United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
	)	**Docket No. 09-1420**
and	)	**Issued: February 2, 2010**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2009 appellant filed a timely appeal from an April 30, 2009 decision of the Office of Workers' Compensation Programs adjudicating his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than 13 percent impairment to his left lower extremity, 10 percent to his right lower extremity and 3 percent to his right upper extremity.

FACTUAL HISTORY

This case was previously before the Board.[1] By order dated September 23, 2008, the Board set aside a December 14, 2007 Office decision and remanded the case for further development of the medical evidence. The Board found that the Office failed to follow the instructions in its August 20, 2007 decision to refer appellant to an impartial medical specialist for a resolution of the conflict in the medical evidence. Instead, the Office referred him for second opinion examination. By decision dated August 20, 2007, the Board set aside a January 25, 2007 Office decision and remanded the case for further development of the medical evidence. The Board found a conflict in the medical evidence between the attending physician, Dr. Richard I. Zamarin, and an Office medical adviser, Dr. Arnold T. Berman, necessitating referral to an impartial medical specialist. The facts and the law of the case in the Board's prior order and decision are incorporated herein by reference.

In its December 14, 2007 schedule award decision, the Office noted that the correct impairment rating for appellant's left lower extremity was 13 percent, rather than the 19 percent previously awarded, and he had 10 percent impairment to his right lower extremity. It made the correction based on an October 27, 2007 report from Dr. Berman. In his first report dated December 28, 2006, Dr. Berman found seven percent impairment due to a patellar fracture but inadvertently indicated that the fracture was to the left lower extremity rather than the right lower extremity. The Office accepted three percent impairment to each lower extremity for pain, as determined by Dr. Berman on October 27, 2007. Dr. Berman provided medical rationale including additional impairment to the lower extremities due to pain. In its December 14, 2007 decision, the Office granted an award for three percent impairment to appellant's right upper extremity based on Dr. Berman's determination of three percent impairment due to pain that was not caused by nerve injury. It granted appellant an additional schedule award for 20.88 weeks based on seven percent additional impairment. The weeks of compensation awarded for an upper extremity are based on a maximum 312 weeks for 100 percent upper extremity impairment. For a lower extremity, the maximum number of weeks is 288 for 100 percent impairment.[2] Multiplying 312 weeks by four percent additional impairment for appellant's lower extremities equals 11.52 weeks of compensation. Multiplying 288 weeks by three percent for the lower extremity equals 8.64 weeks of compensation, for a total of 20.88 weeks.

On November 12, 2008 the Office referred appellant to Dr. William C. Hamilton, a Board-certified orthopedic surgeon, for an examination and evaluation to resolve the conflict in the medical opinion evidence.

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[1] *See* Docket No. 08-608 (issued September 23, 2008); Docket No. 07-829 (issued August 20, 2007). On February 18, 2005 appellant, then a 53-year-old letter carrier, filed a claim for a traumatic injury on February 17, 2005 when he was struck by a motor vehicle while walking his delivery route. The Office accepted his claim for a contusion and fracture of the left ankle, a fracture of the right patella, a sprain and strain of the right rotator cuff, a contusion of the right chest wall, a collapsed right lung and pneumonia. On September 22, 2005 it expanded the claim to accept a cervical strain and aggravation of a torn left medial meniscus. On March 30, 2006 appellant filed a claim for a schedule award. On April 14, 2006 he underwent arthroscopic surgery, including a partial medial and lateral meniscectomy, chondral shaving of the medial compartment and patella femoral joint and ablation. On November 10, 2008 the Office accepted a recurrence of disability on September 27, 2008.

[2] *See* 5 U.S.C. § 8107 (c)(1) and (c)(2).

In a January 13, 2009 report, Dr. Hamilton reviewed the medical records and conducted a physical examination of appellant. However, he provided no findings on physical examination. Dr. Hamilton summarized the impairment ratings of Dr. Zamarin and Dr. Berman, noting that they both found 10 percent impairment to the left lower extremity for a partial medial and lateral meniscectomy, 7 percent impairment to the right lower extremity for a patellar fracture and 3 percent impairment to the right upper extremity for pain. He stated that there was significant disagreement between the physicians, however, as to whether appellant had additional left lower extremity impairment due to gait derangement. Dr. Hamilton determined that appellant was not entitled to impairment based on gait derangement according to section 17.2c of the A.M.A., *Guides.* He determined that appellant had 20 percent impairment which he stated was in agreement with Dr. Berman's impairment rating, "allowing for slight mathematical error." Dr. Hamilton did not explain his rating with reference to each of the three body parts involved.

By letter dated February 19, 2009, the Office asked Dr. Hamilton to specify the impairment to each of appellant's body parts. On February 24, 2009 Dr. Hamilton responded that he agreed with Dr. Berman's rating of 13 percent impairment to the left lower extremity, 10 percent to the right lower extremity and 3 percent to the right upper extremity for a 26 percent total impairment. He stated that he miscalculated in stating that appellant had 20 percent impairment but did not explain. The record shows that Dr. Hamilton's reports were not reviewed by an Office medical adviser.[3]

On April 30, 2009 the Office affirmed the December 14, 2007 decision, finding that appellant had no more than 13 percent impairment to his left lower extremity, 10 percent to his right lower extremity and 3 percent to his right upper extremity.[4]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulations[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

[3] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

[4] Subsequent to the April 30, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7]

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."[8] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[9]

ANALYSIS

The Board finds that this case is not in posture for a decision. The impairment rating of Dr. Hamilton is not sufficient to resolve the conflict in the medical opinion evidence.

Dr. Hamilton reviewed the medical records and conducted a physical examination of appellant. However, he provided no description of his findings on physical examination. Dr. Hamilton summarized the impairment ratings of Dr. Zamarin and Dr. Berman, noting that they both found 10 percent impairment to the left lower extremity for a partial medial and lateral meniscectomy, 7 percent impairment to the right lower extremity for a patellar fracture and 3 percent impairment to the right upper extremity for pain. He failed to note that both Dr. Zamarin and Dr. Berman found an additional 3 percent impairment to each lower extremity due to pain. Dr. Hamilton stated that there was significant disagreement between the physicians as to whether appellant had additional left lower extremity impairment due to gait derangement. He determined that appellant was not entitled to impairment based on gait derangement according to section 17.2c of the A.M.A., *Guides.* Dr. Hamilton determined that appellant had 20 percent impairment which he noted was in agreement with Dr. Berman's impairment rating, allowing for slight mathematical error. He did not explain his rating with reference to the three body parts involved. The Office asked Dr. Hamilton to provide a supplemental report addressing the impairment to each of appellant's body parts. Dr. Hamilton responded, without explanation, that he agreed with Dr. Berman's rating of 13 percent impairment to the left lower extremity, 10 percent to the right lower extremity and 3 percent to the right upper extremity, for a 26 percent total impairment. He stated that he miscalculated in stating that appellant had 20 percent impairment in his previous report but did not explain. The Board finds that Dr. Hamilton's impairment rating is not sufficient to resolve the conflict in the medical opinion evidence for several reasons. Dr. Hamilton failed to provide specific physical findings. He did not explain how he determined appellant's impairment with reference to applicable sections of the A.M.A., *Guides* (with the exception of his reason for excluding impairment for gait derangement). Dr. Hamilton did not address impairment to each body part but merely provided a 20 percent total impairment without further explanation. He later changed the total impairment to the 26

[7] *Id.*

[8] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[9] *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

percent determined by Dr. Berman, without explanation, except to say that he miscalculated. In sum, Dr. Hamilton merely indicated his agreement with Dr. Berman's impairment rating without providing his own independent assessment of appellant's impairment based on specific physical findings on examination and reference to specific sections and tables in the A.M.A., *Guides*. Due to these deficiencies, his impairment rating is not sufficient to resolve the conflict in medical opinion.

The Board notes also that the Office failed to follow its procedures requiring referral of the medical evidence to an Office medical adviser in cases where an impartial medical specialist examination was arranged to resolve a conflict in a schedule award case.[10] The Office did not refer the impairment rating of Dr. Hamilton to an Office medical adviser as required.

On remand the Office should refer appellant to a new Board-certified medical specialist for an independent evaluation of his left and right lower extremity and right upper extremity impairment based on correct application of the A.M.A., *Guides*. The physician should provide specific findings on physical examination and any measurements necessary for application of appropriate sections of the A.M.A., *Guides.* He or she should refer to specific sections and tables in the A.M.A, *Guides* that are appropriate to a determination of appellant's impairment. The physician should provide medical rationale explaining why a particular rating method was selected. If more than one impairment rating method can be used in evaluating appellant's impairment, the method that provides the higher rating should be adopted.[11]

On appeal, appellant asked the Board to review, in addition to the schedule award, the pay rate used in the schedule award. However, he did not identify any specific error by the Office in its pay rate determination for the Board to consider.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should refer appellant to a new Board-certified impartial medical specialist for an evaluation of the impairment to his lower extremities and his right upper extremity.

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5 (March 2005).

[11] A.M.A., *Guides* 527.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2009 is set aside and the case is remanded for further development consistent with this decision.

Issued: February 2, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board