United States Department of Labor
Employees' Compensation Appeals Board

V.G., Appellant	)	
and	)	**Docket No. 09-1558**
	)	**Issued: May 10, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 3, 2009 appellant, through counsel, filed a timely appeal of the July 29, 2008 and February 25, 2009 merit decisions of the Office of Workers' Compensation Programs denying her claim for a schedule award. 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 is entitled to a schedule award for her left lower extremity resulting from her August 25, 1996 and March 26, 1997 employment injuries.

On appeal, appellant's attorney contends that a conflict arose in the medical opinion evidence between Dr. Nicholas Diamond, an attending osteopath and an Office medical adviser regarding the extent of permanent impairment to appellant's left lower extremity and, thus, the case should be remanded to the Office for referral of appellant to an impartial medical specialist. Counsel further contends that the medical opinion of Dr. Menachem M. Meller, a Board-certified orthopedic surgeon and impartial medical specialist, was not entitled to special weight in denying

appellant's schedule award claim as his physical examination was not conducted for schedule award purposes.

FACTUAL HISTORY

This case has previously been before the Board.[1] In the most recent appeal the Board, by a May 22, 2006 decision, found that the Office met its burden of proof in terminating appellant's wage-loss compensation effective November 27, 2002 and her medical benefits effective June 28, 2004 based on Dr. Meller's impartial medical opinion that she had no impairment of the left lower extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) and no continuing residuals or need for further medical treatment causally related to her August 25, 1996 and March 26, 1997 employment injuries.[2]

Appellant filed a claim for a schedule award and submitted a March 15, 2007 report of Dr. Diamond. In this report, Dr. Diamond reviewed a history of appellant's "work related" March 26, 1997 and September 17, 2001 injuries, medical treatment and family and social background. He noted her complaints of intermittent pain, stiffness, swelling, instability and locking, thermal changes and coldness of the left lower extremity and intermittent left low back pain. Appellant also experienced difficulty with performing her daily activities. Dr. Diamond listed his findings on physical examination of the left lower extremity. His range of motion measurements for the left hip included 100/120 degrees of forward flexion, 15/30 degrees of extension, 30/40 degrees of abduction, 40/40 degrees of adduction, 20/45 degrees of internal rotation and 20/45 degrees of external rotation with pain. Regarding the left knee, Dr. Diamond reported essentially normal findings with difficulty kneeling and squatting, pain on Varus stress testing and 0-125/140 degrees of flexion/extension with pain. Manual muscle strength testing revealed Grades of 4-4+/5 each for the hip flexors, abductors and adductors, Grade 5/5 on the

[1] On August 25, 1996 appellant, then a 36-year-old mail processor, filed a traumatic injury claim (Form CA-1) assigned Office File No. xxxxxx639 alleging that she pulled a muscle in her left knee while pulling or picking up a tray of mail from a cart on that date. By letter dated October 17, 1996, the Office accepted her claim for left knee sprain. In a decision dated March 19, 1997, it found that appellant failed to establish that she sustained a recurrence of disability on November 18, 1996 causally related to the August 25, 1996 employment injury. By decision dated June 10, 1997, the Office found that she failed to establish that she sustained a recurrence of disability on February 18, 1997 causally related to the August 25, 1996 employment injury. On March 26, 1997 appellant filed a CA-1 form assigned Office File No. xxxxxx565 alleging that she sprained her left knee while picking up mail that had fallen onto the floor on that date. The Office accepted her claim for left knee strain and authorized arthroscopic surgery which was performed on June 10, 1997. Subsequently, it accepted appellant's claim for reflex sympathetic dystrophy. The Office combined the File Nos. xxxxxx639 and xxxxxx565 into a master claim assigned File No. xxxxxx565. On September 17, 2001 appellant filed a CA-1 form assigned Office File No. xxxxxx525 alleging that she sustained a left knee injury while getting off a work stool to retrieve mail on that date. By decision dated June 19, 2003, the Board affirmed the Office's November 27, 2002 decision finding that she did not sustain a left knee injury while in the performance of duty on September 17, 2001. Docket No. 03-953 (issued June 19, 2003). By order dated May 16, 2005, the Board remanded the case for reconstruction and proper assemblage of the case records to be followed by an appropriate decision because evidence was missing relative to the proposed notice of termination. Docket No. 05-558 (issued May 16, 2005).

[2] Docket No. 06-111 (issued May 22, 2006).

right and 4/5 on the left for the quadriceps muscles and Grade 5/5 on the right and 4/5 on the left for the gastrocnemius muscles.

On sensory examination, Dr. Diamond found a perceived deficit over the L4 and L5 dermatomes. The circumference of the quadriceps muscles taken at 10 centimeters above the patella was 45 centimeters on the right versus 46 centimeters on the left. The gastrocnemius circumference was 41 centimeters bilaterally. The deep tendon reflexes were +2 and symmetrical. Regarding the March 26, 1997 employment injury, Dr. Diamond diagnosed post-traumatic exacerbation of Grade 2 degenerative joint disease with acute synovitis anterior compartment and intra-articular loose bodies of the left knee. He advised that appellant was status post left knee diagnostic arthroscopy noting synovitis and interventional pain management.

Regarding the September 17, 2001 injury, Dr. Diamond diagnosed post-traumatic aggravation of preexisting Grade 2 degenerative joint disease and chronic regional pain syndrome of the left lower extremity. He advised that appellant was status post-interventional pain management of the lumbar spine, spinal cord stimulator implant with complication at the stimulator site, thoracic laminectomy and foraminotomy with chest pain complication and interventional pain management.

Dr. Diamond opined that the March 26, 1997 and September 17, 2001 "work related" injuries were the competent producing factor for his subjective and objective findings. He determined that 4/5 motor strength deficit of the left quadriceps (knee extension) constituted l2 percent impairment (A.M.A., *Guides* 532, Table 17-8). Dr. Diamond further determined that 4/5 motor strength deficit of the left hip abduction represented a 25 percent impairment (A.M.A., *Guides* 532, Table 17-8). He found that 4/5 motor strength deficit of the left extensor hallucis longus constituted a two percent impairment (A.M.A., *Guides* 532, Table 17-8). Dr. Diamond found that a Grade 2 sensory deficit of the left L4 and L5 nerve roots each represented a four percent impairment (A.M.A., *Guides* 424, Tables 15-15, 15-18). He combined the motor and sensory deficit impairment ratings to calculate a 41 percent impairment of the left lower extremity. Dr. Diamond concluded that appellant reached maximum medical improvement on March 15, 2007.

By decision dated July 29, 2008, the Office denied appellant's schedule award claim. It found that the evidence submitted was insufficient to support such a claim as the effects of her March 26, 1997 employment injury had been established to have resolved based on Dr. Meller's impartial medical opinion. The Office further found that the September 17, 2001 left knee injury had not been accepted. In a July 31, 2008 letter, appellant, through her attorney, requested an oral hearing before an Office hearing representative.

By decision dated February 25, 2009, an Office hearing representative affirmed the July 29, 2008 decision. The hearing representative found that Dr. Diamond's report was insufficient to outweigh the special weight accorded to Dr. Meller's impartial medical opinion.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[5] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[6]

A claimant seeking a schedule award, therefore, has the burden of establishing that her accepted employment injury caused permanent impairment of a scheduled member, organ or function of the body.[7]

ANALYSIS

The Office accepted appellant's claim for left knee sprain and strain resulting from employment injuries of August 26, 1996 and March 26, 1997, respectively. Appellant contends that she is entitled to a schedule award for permanent impairment to her left lower extremity. The Board finds, however, that she has not established that she has sustained any permanent impairment to her left lower extremity due to her employment-related left knee conditions.

As this Board found on prior appeal, Dr. Meller, selected as the impartial medical specialist, provided a rationalized medical opinion finding that appellant had no permanent impairment of the left lower extremity based on the A.M.A., *Guides.*

Dr. Diamond examined appellant on March 15, 2007, nearly five years after the effective date of termination of wage-loss compensation and three years after the effective date of termination of medical benefits. Although he determined that she had 41 percent impairment of the left lower extremity, he did not provide any explanation as to why the impairments he found were caused by the August 25, 1996 and March 26, 1997 employment injuries. Dr. Diamond's comments regarding the cause of the impairment were limited to the conclusory statement that the "work[-]related" injuries of March 26, 1997 and September 17, 2001 were the competent producing factor for his subjective and objective findings. The Board notes that the September 17, 2001 left knee injury was not previously accepted by the Office as employment related as appellant's claim for this injury was denied by the Office on November 27, 2002 and affirmed by the Board on June 19, 2003. The burden of proof is thus on appellant to establish an

[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.404.

[5] *Supra* note 3 at § 8107(c)(19).

[6] *Supra* note 4.

[7] *See Annette M. Dent*, 44 ECAB 403 (1993).

employment relationship.[8] Further, Dr. Diamond did not explain the disparity in his findings for pain with those of Dr. Meller who provided a well-rationalized opinion that appellant had no impairment to the left lower extremity and no continuing employment-related residuals. His report lacks probative value in that it fails to provide a rationalized medical opinion regarding the relationship between the resolved August 25, 1996 and March 26, 1997 employment injuries and appellant's permanent impairment.[9] The Board finds, therefore, that Dr. Diamond's report is of limited probative value and insufficient to outweigh the special weight accorded to Dr. Meller's impartial medical opinion that appellant does not have any employment-related impairment based on the A.M.A., *Guides* or to create a new conflict.

Regarding appellant's contention on appeal that there is an unresolved conflict between Dr. Diamond and an Office medical adviser, the Board notes that the case record does not contain a medical opinion from an Office medical adviser stating that she does not have any impairment of the left lower extremity due to her employment injuries.

Appellant's contention that Dr. Meller's impartial medical opinion should not be accorded special weight since he did not evaluate her for schedule award purposes lacks merit. The Board notes that the Office, in its August 11, 1999 and June 11, 2002 referral letters, requested that Dr. Meller resolve the conflict in medical opinion not only as to the cause and extent of appellant's continuing employment-related residuals but also, as to the extent and degree of any employment-related impairment.

CONCLUSION

The Board finds that appellant is not entitled to a schedule award for her left lower extremity resulting from her August 25, 1996 and March 26, 1997 employment injuries.

[8] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[9] The medical opinion to establish a claim must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2009 and July 29, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 10, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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