United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
	)	
and	)	**Docket No. 10-1496**
	)	**Issued: February 2, 2011**
DEPARTMENT OF THE ARMY, U.S. ARMY MATERIAL COMMAND, Richmond, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 11, 2010 appellant filed a timely appeal from the April 21, 2010 merit decision of the Office of Workers' Compensation Programs denying 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.[1]

ISSUE

The issue is whether appellant met his burden of proof to establish that he had permanent impairment of his legs due to his March 13, 2002 employment injury, which would entitle him to schedule award compensation.

[1] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3(e).

FACTUAL HISTORY

This case has previously been before the Board. The Board issued a decision on November 19, 2009, in which it affirmed the February 12, 2009 decision of the Office on the grounds that appellant did not meet his burden of proof to establish that he had permanent leg impairment due to his March 13, 2002 employment injury which would entitle him to schedule award compensation.[2] The Board determined that a March 20, 2007 report of Dr. Terry L. Troutt, an attending Board-certified physical medicine and rehabilitation physician, was of limited probative value in establishing that appellant was entitled to schedule award compensation. Dr. Troutt indicated that appellant had 5/5 strength and normal sensation in his legs and determined, under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) that appellant fell under diagnosis-related estimate lumbar Category II (Table 15-3 on page 384), which constituted a six percent whole person impairment rating. The Board found that this report was of limited probative value because Dr. Troutt did not provide any explanation of why the observed deficits were related to the March 13, 2002 employment injury and because the Federal Employees' Compensation Act does not provide for a schedule award for impairment to the back or to the body as a whole. The Board also found that an August 2, 2008 report of Dr. Martin Fritzhand, an attending Board-certified preventive medicine physician, was of limited probative value on the relevant issue of the present case. Dr. Fritzhand posited that, under the standards of the fifth edition of the A.M.A., *Guides*, appellant had a 31 percent left leg impairment based on sensory and strength deficits. The Board determined, however, that he did not provide a rationalized opinion that the observed impairment associated with the sciatic nerve was related to residuals of the March 13, 2002 employment injury.

The Board also found that the record contained evidence that appellant did not have permanent leg impairment due to his March 13, 2002 employment injury. In a January 6, 2009 report, Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, who served as an Office referral physician, reported that appellant had an essentially normal examination of his back and legs. He pointed out that November 15, 2006 magnetic resonance imaging (MRI) scan testing showed some degeneration at L4-5 and L5-S1 but no focal disc herniation or nerve root swelling. Dr. Sheridan concluded that there was no evidence of radiculopathy affecting the lower extremities and therefore appellant had no impairment of his lower extremities related to his March 13, 2002 employment injury.[3] The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.

[2] Docket No. 09-999 (issued November 19, 2009). The Office accepted that on March 13, 2002 appellant, then a 57-year-old explosives operator/materials handler, sustained displacement of his L4-5 disc without myelopathy due to a fall at work. Appellant received compensation from the Office for periods of disability. In May 2005, the Office adjusted his compensation based on its determination that his actual wages as a facility management clerk fairly and reasonably represented his wage-earning capacity. On August 17, 2006 appellant filed a claim alleging that he was entitled to a schedule award due to his March 13, 2002 employment injury. In June 26 and November 20, 2007 and February 12, 2009 decisions, the Office denied his schedule award claim.

[3] On February 6, 2009 Dr. James W. Dyer, a Board-certified orthopedic surgeon, who served as an Office medical adviser, indicated that he agreed with this assessment.

In a December 7, 2009 report, Dr. Fritzhand provided an extensive discussion of his opinion that appellant had permanent impairment of his legs related to his March 13, 2002 employment injury. He stated that MRI scan testing of appellant's lumbar spine from the period shortly after the occurrence of the March 13, 2002 employment injury documented disc herniation at the L4-5 level which obviously caused ongoing pain and discomfort in his low back and left leg. Dr. Fritzhand indicated that MRI scan testing obtained about five years later apparently revealed degenerative disc disease at the L4-5 level but did not document disc herniation. He stated that these results "in no way should mitigate the cause of [appellant's] ongoing symptoms." Dr. Fritzhand noted that the nerve damage caused by the work-related disc herniation and impingement to the L5 nerve root was permanent and indicated that physical examination results from August 2008 documented muscle weakness, sensory loss and atrophy involving the left leg. He indicated that he disagreed with Dr. Sheridan's findings, as diminished muscle strength and sensory loss were obviously present on his examination. Dr. Fritzhand then determined that, under the standards of the fifth edition of the A.M.A., *Guides*, appellant had a 12 percent impairment of his left leg due to sensory and motor loss associated with the L5 nerve.

The Office determined that there was a conflict in the medical opinion between the December 7, 2009 report of Dr. Fritzhand and the January 6, 2009 report of Dr. Sheridan regarding whether appellant had permanent impairment related to his March 13, 2002 employment injury. In order to resolve the conflict, it referred appellant to Dr. Daniel D. Primm, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding this matter.

In a March 26, 2010 report, Dr. Primm provided an extensive discussion of appellant's factual and medical history, including the circumstances of his March 13, 1992 employment injury and findings on examination and diagnostic testing. He reported the findings of his own examination of appellant noting that there was no clinical deformity of the thoracolumbar spine and no tenderness to palpation over the thoracolumbar spine, sacroiliac joint or buttocks. On range of motion testing of the back, appellant's overall motion was very good and supple. There was no palpable muscle spasm or muscle tightness in his back and straight-leg raising was negative for back or leg pain at 90 degrees in the sitting position. Dr. Primm noted that motor strength was 5/5 in the lower extremities, including in the ankles and toes. He diagnosed chronic degenerative disc disease and degenerative arthritis of the lumbar spine with history of superimposed sprains and a current examination showing no objective motor, sensory or reflex deficits in either lower extremity. Dr. Primm stated:

> "Based on everything I saw and reviewed, as well as based on [appellant's] objective exam[ination] today, I can find no evidence of a specific impairment to either lower extremity. That is, today, he displayed 5/5 motor power in all muscle groups of both legs. I found no measurable muscle atrophy in either leg. Straight-leg raising was negative for any radicular or other pain complaints, indicating no lumbar nerve root tension or ongoing radiculopathy. Therefore, if asked to assess an impairment rating based on objective findings in either lower extremity, I have to say that [appellant's] impairment rating to either lower extremity is [zero] percent."

In an April 21, 2010 decision, the Office denied appellant's schedule award claim on the grounds that he did not submit sufficient medical evidence to establish that he had a permanent impairment entitling him to a schedule award. It found that the well rationalized March 26, 2010 report of Dr. Primm represented the weight of the medical opinion with respect to this matter.

LEGAL PRECEDENT

An employee seeking compensation under the Act[4] has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[5]

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.[6]

The schedule award provision of the Act[7] and its implementing regulations[8] 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. When a work related cause is established for a given impairment, the A.M.A., *Guides* provides the appropriate standard for evaluating schedule losses.[9] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[10] Neither the Act nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.[11]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee,

---

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and therefore it denied her claim for entitlement to a schedule award for the left ear.

[6] *Victor J. Woodhams,* 41 ECAB 345, 351-52 (1989).

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *Id*.

[10] FECA Bulletin No. 09-03 (issued March 15, 2009).

[11] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

the Secretary shall appoint a third physician who shall make an examination."[12] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The Office accepted that on March 13, 2002 appellant sustained displacement of his L4-5 disc without myelopathy due to a fall at work. Appellant received compensation from the Office for periods of disability. On August 17, 2006 he filed a claim alleging that he was entitled to a schedule award due to his March 13, 2002 employment injury. In June 26 and November 20, 2007 and February 12, 2009 decisions, the Office denied appellant's schedule award claim.

The Board finds that the Office properly determined that there was a conflict in the medical opinion between the January 6, 2009 report of Dr. Sheridan, a Board-certified orthopedic surgeon who served as an Office referral physician, and the December 7, 2009 report of Dr. Fritzhand, an attending Board-certified preventive medicine physician, regarding whether appellant had permanent impairment related to his March 13, 2002 employment injury.[15] In order to resolve the conflict, the Office properly referred appellant to Dr. Primm, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding this matter.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Primm, the impartial medical specialist selected to resolve the conflict in the medical opinion.[16] The report of Dr. Primm establishes that appellant had no permanent impairment due to his March 12, 2002 employment injury.

[12] 5 U.S.C. § 8123(a).

[13] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[15] *See supra* notes 13 and 14. In his January 6, 2009 report, Dr. Sheridan concluded that there was no evidence of radiculopathy affecting appellant's lower extremities and therefore he had no impairment of his lower extremities related to his March 13, 2002 employment injury. In contrast, Dr. Fritzhand indicated in his December 7, 2009 report that appellant had permanent impairment of his legs related to his March 13, 2002 employment injury. He also found that, under the fifth edition of the A.M.A., *Guides*, appellant had a 12 percent impairment of his left leg due to sensory and motor loss associated with the L5 nerve. The Board notes that the sixth edition of the A.M.A., *Guides* was in effect when Dr. Fritzhand produced his report. *See supra* note 11. However, even if the sixth edition would provide a different impairment rating, there still would be a conflict in the medical opinion regarding whether appellant has any degree of impairment in that Dr. Sheridan found no impairment and Dr. Fritzhand found some level of impairment.

[16] *See supra* note 15.

The Board has carefully reviewed the opinion of Dr. Primm and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Primm provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[17] He provided medical rationale for his opinion by explaining that there were no objective findings on physical examination or diagnostic testing to show that appellant had permanent impairment of his legs. Dr. Primm indicated that appellant had 5/5 strength in his legs and that there were no objective sensory abnormalities in his legs. He also explained that appellant had no measurable muscle atrophy in either leg and that straight-leg raising was negative for any radicular or other pain complaints, a result which indicated no lumbar nerve root tension or ongoing radiculopathy.

For these reasons, the weight of the medical evidence rests with Dr. Primm's opinion that appellant had no work-related permanent impairment and the Office properly denied appellant's schedule award claim.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he had permanent leg impairment due to his March 13, 2002 employment injury which would entitle him to schedule award compensation.

[17] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

ORDER

IT IS HEREBY ORDERED THAT April 21, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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