United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 07-1533**
	)	**Issued: December 17, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Eatontown, NJ, Employer	)	

Appearances:
Thomas Uliase, 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 16, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 11, 2006. 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 a permanent impairment to a scheduled member of the body entitling her to a schedule award pursuant to 5 U.S.C. § 8107.

FACTUAL HISTORY

On February 22, 2001 appellant, then a 27-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained back and neck injuries while pulling tubs of mail. On June 4, 2001 the Office accepted the claim for cervical, thoracic and lumbosacral strains.

Appellant was referred for a second opinion examination by Dr. David Rubinfeld, an orthopedic surgeon. In a report dated March 17, 2003, Dr. Rubinfeld diagnosed lumbar radiculopathy and indicated that appellant could work eight hours with restrictions. He opined that the lumbar radiculopathy was employment related in an April 16, 2003 report. By decision dated November 19, 2003, the Office determined that appellant's actual earnings in a light-duty job since October 2002 fairly and reasonably represented her wage-earning capacity.

In a report dated March 17, 2005, Dr. Nicholas Diamond, an osteopath, provided a history and results on examination. With respect to the degree of permanent impairment to the legs under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, he opined that appellant had a 12 percent right leg impairment. Dr. Diamond found that appellant had a motor deficit in the right deltoid and an additional impairment for pain.[1] For the left leg, he found a 31 percent impairment, based on motor deficit in the knee, ankle and great toe, as well as an impairment for pain.[2]

An Office medical adviser reviewed the medical evidence and indicated that in a November 9, 2005 report that it was not clear whether lumbar radiculopathy was an accepted condition. The Office advised the medical adviser that lumbar radiculopathy was an accepted condition. By report dated December 21, 2005, the medical adviser opined that appellant had a four percent impairment to the left leg and a three percent impairment of the right leg. The medical adviser indicated that he reviewed both Dr. Rubinfeld and Dr. Diamond's reports. For the right leg, the medical adviser identified Table 17-6 and found a three percent impairment for a one centimeter atrophy in the right calf. For the left leg, the medical adviser opined that there was a two percent impairment for sensory deficit of the S1 nerve root,[3] and two percent for muscle weakness in great toe extension.[4]

The Office determined that a conflict in the medical evidence existed with respect to the degree of lower extremity permanent impairment. Appellant was referred to Dr. Ian Fries, a Board-certified orthopedic surgeon selected as a referee examiner. In a report dated April 14, 2006, Dr. Fries provided a history and results on examination. With respect to permanent impairment, he indicated that he disagreed with Dr. Diamond and the Office medical adviser. Dr. Fries stated, "While [appellant] may have had neurologic findings in the past, she now has no objective neurological abnormalities. In particular, she does not have weakness in her lower extremities. Thigh and calf circumferences are equal bilaterally, appellant's gait is normal bilaterally and reflexes clearly are symmetrical. Her global left lower extremity sensory claim does not conform to a dermatomal pattern." Dr. Fries stated that, while appellant contended that she had severe back pain, she had no affective or physical evidence of such remarkable pain and she did not qualify for an impairment based on pain. He stated that it was inappropriate to determine her impairment based on neurological findings in the lower extremities, as did Dr. Diamond and the Office medical adviser. Dr. Fries concluded that appellant's presentation

[1] Dr. Diamond cited Tables 16-15 and 16-11 of the A.M.A, *Guides*, which are tables for the upper extremities.

[2] Table 17-8 was cited, along with Figure 18-1 for pain.

[3] A.M.A., *Guides* 424, Table 15-18.

[4] *Id.* at 532, Table 17-8.

met the criteria for Category II of the lumbar spine diagnosis-related estimates provided under Table 15-3, for a six percent whole person impairment.[5]

In a report dated May 4, 2006, an Office medical adviser opined that appellant had no permanent impairment to the lower extremities. The medical adviser noted that Dr. Fries had found no objective neurological findings.

By decision dated May 15, 2006, the Office determined that appellant was not entitled to a schedule award pursuant to 5 U.S.C. § 8107. Appellant requested an oral hearing before an Office hearing representative, which was held on October 17, 2006. In a decision dated December 11, 2006, the hearing representative affirmed the May 15, 2006 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[6] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[7]

It is well established that when a case is referred to a referee 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.[8]

ANALYSIS

In the present case, there was a conflict in the medical evidence with respect to a permanent impairment to the lower extremities between Dr. Diamond and an Office medical adviser. Pursuant to 5 U.S.C. § 8123 the case was referred to Dr. Fries as a referee examiner.[9] Dr. Fries provided a rationalized medical opinion that resolved the conflict. He clearly found

[5] *Id.* at 384, Table 15-3.

[6] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[7] *A. George Lampo*, 45 ECAB 441 (1994).

[8] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[9] 5 U.S.C. § 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

that appellant had no objective evidence of any neurological abnormalities. Accordingly, Dr. Fries indicated that he did not find any peripheral nerve impairments to the lower extremities, unlike Dr. Diamond and the Office medical adviser. In addition, he did not find any impairment for calf atrophy, as his physical findings did not show calf atrophy. As to pain, Dr. Fries found no evidence to warrant an additional impairment for pain.

The only impairment found by Dr. Fries was a lumbar spine impairment under Table 15-3. It is well established that this table does not support a schedule award under the Act, as it represents an impairment to the spine, which is not a scheduled member of the body, and is expressed as a whole person impairment, which is not applicable under the Act.[10] An Office medical adviser confirmed that the report of Dr. Fries did not establish a permanent impairment to a scheduled member of the body.

The Board finds that Dr. Fries provided a report with a rationalized medical opinion, based on a complete background, that appellant did not have a permanent impairment to the lower extremities under the A.M.A., *Guides.* His report is entitled to special weight and represents the weight of the evidence in this case.

CONCLUSION

The weight of the medical evidence did not establish an employment-related permanent impairment to a scheduled member of the body.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 11, 2006 is affirmed.

Issued: December 17, 2007
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

[10] *See Tania R. Keka,* 55 ECAB 354 (2004); *Guiseppe Aversa,* 55 ECAB 164 (2003).