United States Department of Labor
Employees' Compensation Appeals Board

RICHARD F. WILLIAMS, Appellant	)	
and	)	**Docket No. 03-1176**
	)	**Issued: February 23, 2004**
DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Bethesda, MD, Employer	)	

Appearances:
Nicholas D. Dale, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 14, 2003 appellant filed a timely appeal from the April 15, 2002 decision of the Office of Workers' Compensation Programs, which granted a schedule award for a two percent permanent impairment of his right leg. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

On July 13, 1993 appellant, then a 41-year-old air conditioning equipment mechanic, injured his right knee in the performance of duty when he stepped off the back of a truck. The Office accepted his claim for a torn medial meniscus of the right knee and authorized surgery.

On September 7, 1993 appellant underwent arthroscopic surgery with a partial medial meniscectomy.

On October 1, 1999 appellant filed a claim for a schedule award. In support thereof he submitted a December 6, 1999 medical report, unsigned, on the letterhead of Dr. Montague Blundon, III, a Board-certified orthopedic surgeon.[1] A physical examination showed a decreased range of motion between 0 and 130 degrees with muscle atrophy on the quadriceps and decreased strength of 4 on a scale of 5. Although there was no evidence of severe degenerative arthritis, appellant still had pain and spasms. The report stated that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), appellant sustained a 15 percent permanent impairment to his right leg from his work injury of July 13, 1993.

On February 2, 2000 an Office medical adviser, citing Table 64, page 85, of the fourth edition of the A.M.A., *Guides*, reported that appellant had a two percent permanent impairment of the right leg for a partial meniscectomy.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Walter F. Abendschein, Jr., a Board-certified orthopedic surgeon, for a second opinion on the issue of permanent impairment. In a report dated May 22, 2000, Dr. Abendschein reviewed the date of injury and appellant's partial medial meniscectomy. The tear involved 25 percent of the meniscus primarily at the junction of the middle and posterior thirds. Dr. Abendschein stated that the postoperative course was uncomplicated. Appellant was seen on October 8, 1993 with a full range of motion and good strength and was allowed to progress to full recovery and follow-up as needed. Current findings on physical examination revealed full extension, flexion to 130 degrees, no effusion, no instability, no patellofemoral crepitus and less than a half-inch difference in the measurement of the quadriceps. X-rays revealed a slight spurring of the posterior pole of the patella with no other bony abnormalities. Dr. Abendschein diagnosed status post torn medial meniscus right knee. He discussed the issue of permanent impairment as follows:

> "As there is no loss of motion or motor impairment, it is my opinion that [appellant] has sustained a 10 percent permanent partial impairment function of the lower extremity on the basis of a torn medial meniscus and his partial meniscectomy. He is able to perform his usual activity in an occupation setting. [Appellant] has reached the maximum medical improvement. The impairment noted above is clearly related to his occupational injury."

On April 15, 2002 the Office requested a supplemental report from Dr. Abendschein, noting that he had failed to indicate the specific page and table from the fourth edition of the A.M.A., *Guides* that supported his impairment estimate of 10 percent. The Office informed

[1] The Board has held that medical reports lacking proper identification cannot be considered as probative evidence in support of a claim. *Merton J. Sills*, 39 ECAB 572 (1988) (unsigned notes of medical treatment).

Dr. Abendschein that its medical adviser was reporting a two percent permanent impairment to the right leg according to Table 17-33, page 546, of the fifth edition of the A.M.A., *Guides.*[2]

> "Given the above information and your May 22, 2000 report findings, please advise with rationale whether or not you concur with the DMA [District Medical Adviser] regarding the two percent permanent impairment of the right lower extremity? If not, and you feel your ten percent impairment is more accurate, please provide medical rationale for your opinion and the page and table/chart reference from the 4th Edition of the A[.]M[.]A[.][,] *Guides* to support your findings and opinion.
>
> "Thank you for your anticipated cooperation and assistance in this matter."

On April 15, 2002 the same date that it requested clarification from its referral physician, the Office issued a schedule award for a two percent permanent impairment of appellant's right leg. The Office noted that Dr. Abendschein did not justify his impairment estimate and advised appellant that clarification was being requested.

On December 6, 2002 appellant requested reconsideration. In a decision dated January 17, 2003, the Office denied his request as *prima facie* insufficient to warrant a merit review of his claim. On April 10, 2003 appellant again requested reconsideration. This appeal followed on April 14, 2003. On July 11, 2003 the Office conducted a merit review of appellant's claim and denied modification of its April 15, 2002 schedule award.[3]

LEGAL PRECEDENT

The Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.[4] Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.[5] Once the Office starts to procure medical opinion, it must do a complete job.[6] The Office has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.[7]

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[2] A.M.A., *Guides* (5th ed. 2001). The Office began using the fifth edition effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001).

[3] Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), the Office's July 11, 2003 decision, issued while the Board had jurisdiction over the issue, is null and void.

[4] *Thomas M. Lee*, 10 ECAB 175 (1958).

[5] *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

[6] *William N. Saathoff*, 8 ECAB 769 (1956).

[7] *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983); *Richard W. Kinder*, 32 ECAB 863, 866 (1981) (noting that the report of the Office referral physician did not resolve the issue in the case).

ANALYSIS

The Office referred appellant to Dr. Abendschein for the purpose of evaluating permanent impairment causally related to the July 13, 1993 employment injury and subsequent surgery. Although he reported an impairment of 10 percent, he made no reference to pages or tables in the A.M.A., *Guides* to support the estimate given. The Office properly requested a supplemental report from Dr. Abendschein explaining whether he agreed with the estimate of two percent given by the Office medical adviser, and if not, clarifying how the A.M.A., *Guides* supported his estimate of 10 percent. Having thus undertaken further development of the medical opinion evidence, the Office should not have issued a final decision on the matter before Dr. Abendschein had a reasonable opportunity to respond. The Board notes that the Office medical adviser chose the diagnosis-based estimate of impairment under the A.M.A., *Guides* but that the evaluating physician may use anatomic and functional methods of assessment as an alternative: "It is the responsibility of the evaluating physician to explain in writing why a particular method(s) to assign the impairment rating was chosen. When uncertain about which method to choose, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating."[8] The Office must allow Dr. Abendschein a reasonable opportunity to explain his assessment of impairment under the fifth edition of the A.M.A., *Guides*.

CONCLUSION

The Board finds that this case is not in posture for a decision on whether appellant has more than a two percent permanent impairment of his right leg. Additional development of the medical evidence is warranted. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for a schedule award.[9]

[8] A.M.A., *Guides* at 526 (5th ed. 2001).

[9] In view of the Board's findings as to the merits of the case, the Board will not address the January 17, 2003 nonmerit decision.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2003 and April 15, 2002 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this opinion.

Issued: February 23, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member