United States Department of Labor
Employees' Compensation Appeals Board

V.T., Appellant	)	
and	)	**Docket No. 09-1021**
	)	**Issued: November 25, 2009**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, 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 March 9, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 17, 2008. 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 an eight percent permanent impairment to his right leg.

FACTUAL HISTORY

The Office accepted that appellant sustained a right knee contusion and right knee synovitis/chondromalacia in the performance of duty on September 22, 1983. He stopped working at the employing establishment in 1995. With respect to a right leg permanent impairment, appellant submitted a September 8, 2003 report from Dr. David Weiss, an osteopath,

who opined that appellant had a 20 percent permanent right leg impairment, based on a 17 percent motor deficit impairment,[1] and an additional 3 percent for pain.

The Office referred the case to Dr. Steven Valentino, an osteopath, for a second opinion examination.[2] In a report dated December 9, 2004, Dr. Valentino opined that appellant had recovered from his employment injury with no employment-related permanent impairment. The Office determined that a conflict in the medical evidence was created,[3] and appellant was referred to Dr. David Steinberg, a Board-certified orthopedic surgeon, for an independent medical examination.

In a report dated November 9, 2006, Dr. Steinberg provided a history and results on examination. He opined that based on the A.M.A., *Guides* appellant had a 24 percent permanent impairment under Table 17-8 for 4/5 motor strength deficit of the right hamstrings and quadriceps. No decision was issued by the Office.

By report dated April 11, 2007, an Office medical adviser stated that under the A.M.A., *Guides* "decreased strength cannot be rated in the presence of painful conditions." He opined that appellant had an eight percent permanent impairment, based on five percent from Table 17-31 and an additional three percent for pain.

The Office then referred appellant to Dr. Scott Rushton, a Board-certified orthopedic surgeon, for a referee examination. In a report dated November 16, 2007, Dr. Rushton opined that appellant had eight percent right leg impairment, using the same tables as the Office medical adviser who submitted an April 17, 2008 report finding that appellant had eight percent permanent impairment, with a date of maximum medical improvement of November 9, 2006, the date of examination by Dr. Steinberg.

By decision dated May 22, 2008, the Office issued a schedule award for eight percent permanent impairment to the right leg. The period of the award was 23.04 weeks from November 9, 2006.

Appellant requested an oral hearing before an Office hearing representative. A hearing was held on October 27, 2008. In a decision dated December 17, 2008, the hearing representative affirmed the May 22, 2008 schedule award. The hearing representative found the weight of the evidence was represented by Dr. Rushton.

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[1] Dr. Weiss cited Table 17-8 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.).

[2] 5 U.S.C. § 8123(a) provides: "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at times and places as may be reasonably required."

[3] According to 5 U.S.C. § 8123(a), "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 an examination."

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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 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.[6]

ANALYSIS

The Office found a conflict existed under 5 U.S.C. § 8123(a) and referred appellant to Dr. Steinberg as a referee physician, who opined that appellant had a 24 percent impairment under Table 17-8.[7] An Office medical adviser asserted that the A.M.A., *Guides* does not allow decreased strength impairments in the presence of "painful conditions." The A.M.A., *Guides* states, in discussing upper extremity impairment based on strength measurements, that decreased strength cannot be rated in the presence of decreased motion or painful conditions that prevent effective application of maximal force in the region being evaluated. Dr. Steinberg attempted to apply Table 17-8 for leg impairments due to muscle weakness based on manual muscle testing. The A.M.A., *Guides* does not prohibit use of this table simply because there may be a painful condition. Dr. Steinberg did not discuss whether appellant's condition prevented application of maximal force.

There are additional guidelines to the use of Table 17-8. Weakness caused by a motor deficit of a specific peripheral nerve should be assessed according to the section under peripheral nerve impairments.[8] Moreover, measurements made by one examiner should be consistent on different occasions.[9] Dr. Steinberg did not clarify whether the use of Table 17-18 was appropriate in this case or whether strength measurements were properly performed in accordance with the A.M.A., *Guides*.

The Office should have requested that Dr. Steinberg provide clarification on these issues. According to its procedures regarding referee reports, "If clarification or additional information

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] A.M.A., *Guides* 532, Table 17-8 provides impairments due to lower extremity muscle weakness based on manual muscle testing.

[8] *Id.* at 531.

[9] *Id.*

is needed, the [claims examiner] will write to the specialist to obtain it."[10] There is no evidence of record that the Office sought clarification. In this case, the Office referred appellant to a second referee examination. Office procedures clearly state, "Only if the selected physician fails to provide an adequate and clear response after a specific request for clarification may the Office seek a second referee specialist's opinion."[11]

The Board accordingly finds that the Office failed to follow its procedures in this case. The Office should have made a specific request for clarification from Dr. Steinberg regarding the use of Table 17-8 and the validity of strength measurements. When it improperly refers a claimant for a second referee examination before attempting clarification of the initial referee report, the second physician's report is excluded from the record.[12] As the Board explained in *Alsing*,[13] the Office should not consider evidence that is improperly obtained. The report from Dr. Rushton therefore should be excluded from the record in this case.

The case will be remanded to the Office to seek clarification from Dr. Steinberg in accord with Office procedures. If Dr. Steinberg is unable to provide adequate clarification, appellant should be referred for another referee examination. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the Office did not properly follow its procedures and did not resolve the conflict in the medical evidence.

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 2.500.5(b)(2) (October 1995).

[11] *Id.* at 3.500.6(b) (September 1995).

[12] *Nancy Keenan*, 56 ECAB 687 (2005); *Joseph R. Alsing*, 39 ECAB 1012 (1988); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 2.500.6(b) (September 1995).

[13] *Joseph R. Alsing, supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 17 and May 22, 2008 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 25, 2009
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