

On July 19, 2005 appellant filed a claim for a schedule award. In an April 7, 2005 report, Dr. Nicholas Diamond, an osteopath, opined that appellant had a 30 percent right lower extremity impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).¹

In a September 25, 2006 report, an Office medical adviser reviewed the medical evidence of record and opined that appellant had 14 percent total impairment of the right lower extremity. He stated that Dr. Diamond's impairment for motor strength deficit of the right quadriceps and gastroc should be reduced from 12 percent impairment each to 6 percent impairment each as Dr. Diamond had graded muscle strength at 4+/5 and not 4/5. The Office medical adviser additionally stated that there was two percent impairment for the partial medial meniscectomy.

The Office determined there was a conflict in medical opinion between Dr. Diamond and the Office medical adviser and referred appellant to Dr. Thomas Osteen, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office advised Dr. Osteen that the purpose for the examination was to determine whether appellant sustained permanent impairment, as a result of the work injury, pursuant to the A.M.A., *Guides*.

In a March 20, 2007 report, Dr. Osteen reviewed appellant's history and described his findings on examination. He noted that the right knee showed full range of motion with normal alignment and no laxity to valgus stress, medial joint line was tender, minimal effusion, no redness or induration, and normal strength to flexion and extension. Dr. Osteen assessed right knee pain. He stated that appellant would use medication and follow-up in three months. He stated that, if appellant's symptoms were not controlled, injection therapy would be used. Dr. Osteen further noted that surgical versus conservative approach to treatment was discussed.

In a June 14, 2007 report, the Office medical adviser recommended that a supplemental report from Dr. Osteen be obtained. He recommended that Dr. Osteen be asked what he discussed with appellant regarding ongoing treatment for the right knee and whether appellant was at maximum medical improvement. The Office medical adviser further noted that Dr. Osteen did not perform an impairment rating. He stated that, while Dr. Osteen advised appellant had normal range of motion, no goniometric measurements were provided so a determination whether appellant had a ratable deficit could be made. The Office medical adviser indicated that Dr. Osteen should be asked to provide the measured values for appellant's right range of motion. He further noted that, while Dr. Osteen found normal strength to flexion and extension, he should grade the knee strength under Table 17-7 on page 531 of the A.M.A., *Guides*.

The Office requested that Dr. Osteen clarify his March 20, 2007 report in conjunction with the Office medical adviser's comments. In a June 19, 2007 report, Dr. Osteen indicated that appellant was treated with a cortisone injection. Appellant was to follow-up in three to six weeks. In a July 2, 2007 report, Dr. Osteen responded to the Office's June 28, 2007 request for clarification. He provided an assessment of Grade 2 medial compartment osteoarthritis right knee. Dr. Osteen indicated that appellant's range of motion was from full extension to 140 degrees of flexion and strength was normal or 5/5 to flexion and extension. He indicated that

¹ A.M.A., *Guides* (5th ed. 2001).

there were Grade 2 medial compartment degenerative changes on weight bearing x-rays with less than 50 percent of joint space loss (4.5 millimeters versus 5.5 millimeter lateral). Dr. Osteen opined that appellant had seven percent permanent impairment for the one millimeter loss of medial joint space. He stated that there was no impairment for range of motion or strength.

In a July 23, 2007 report, the Office medical adviser opined that appellant reached maximum medical improvement on March 20, 2007. He noted that Dr. Osteen found no ratable knee deficits on examination and there was no loss of range of motion or strength. While Dr. Osteen had assigned seven percent leg impairment for a one millimeter loss of joint space, he advised this was an incorrect way to rate arthritic changes in the knee. He indicated that, under Table 17-31, page 544 of the A.M.A., *Guides*, a rating for arthritis was not allowed until the amount of joint space left in the knee was three millimeters or less. As Dr. Osteen indicated appellant had 4.5 millimeter of joint space left in the lateral compartment of the right knee, no rating could be made for arthritic change in the knee. He opined, however, under Table 17-33, page 546 of the A.M.A., *Guides*, appellant was eligible for two percent right leg impairment secondary to his partial medial meniscectomy. Dr. Osteen further noted that, while the medical record indicated appellant had ongoing pain in his knee, the pain was secondary to having a medical meniscus tear and undergoing medial meniscectomy. Thus, he opined the pain was appropriately addressed by the impairment rating for medial meniscectomy.

By decision dated November 15, 2007, the Office granted appellant a schedule award for two percent right lower extremity impairment. The award covered the period March 20, 2007 to April 29, 2007 for a total of 5.76 weeks of compensation.

On November 26, 2007 appellant's attorney requested a hearing. By decision dated February 5, 2008, an Office hearing representative set aside the November 15, 2007 decision and remanded the case for further development. The hearing representative noted that while, an Office medical adviser may review the opinion of an impartial medical specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility. The hearing representative found that since Dr. Osteen's impairment rating for arthritis did not properly conform to the A.M.A., *Guides*, it was insufficient to resolve the conflict in medical opinion and further clarification was needed prior to issuance of a final decision.

Pursuant to the hearing representative's instructions on remand, the Office requested, in a February 15, 2008 letter, that Dr. Osteen review the Office medical adviser's July 23, 2007 report and clarify whether appellant had ratable impairment under the A.M.A., *Guides*. In a March 27, 2008 report, Dr. Osteen stated that a further review of the A.M.A., *Guides* revealed that a one millimeter of joint space narrowing was not ratable. He opined that an impairment rating of two percent of the right leg for the partial arthroscopic meniscectomy was the correct rating.

In an April 4, 2008 decision, the Office denied any additional schedule award beyond the two percent permanent impairment to the right lower extremity already paid.

On April 7, 2008 appellant's attorney requested a hearing, which was held telephonically on August 28, 2008. At the hearing, appellant's attorney questioned whether Dr. Osteen was properly selected to serve as an impartial physician.

In an April 17, 2009 decision, an Office hearing representative affirmed the April 4, 2008 decision. The hearing representative found there was no impropriety in the Office's selection of Dr. Osteen, that Dr. Osteen's report could be afforded the special weight granted to an impartial medical specialist even though he assumed care of appellant following the impartial examination, and Dr. Osteen's report was sufficiently rationalized to support appellant's entitlement to two percent permanent impairment of the right lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ 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. The Act, however, 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.⁴

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, the Secretary shall appoint a third physician who shall make an examination.⁵ 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.⁶ 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.⁷

Office procedures provide that selection of impartial medical specialists is made by a rotational system using the Physician's Directory System (PDS), whenever possible, to ensure consistent rotation among physicians.⁸ Physicians who may not be used as referees include those

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.404.

⁴ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁵ 5 U.S.C. § 8123(a).

⁶ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

⁷ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4, 7 (March 1994, May 2003); FECA Bulletin No. 00-01 (issued November 5, 1999).

previously connected with the claim or the claimant, or physicians in partnership with those already so connected.⁹

The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.¹⁰ These procedures contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and the Office.¹¹ Moreover, the reasons for the selection made must be documented in the case record.¹²

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹³

ANALYSIS

Appellant received a schedule award for two percent impairment of his right lower extremity. The Office found a conflict in medical opinion arose between Dr. Diamond and the Office medical adviser regarding the extent of impairment to appellant's right lower extremity. Dr. Diamond opined that appellant had 30 percent impairment of the right lower extremity while the Office medical adviser took issue with some of Dr. Diamond's impairment values and further opined that there was two percent impairment for arthroscopic partial meniscectomy. The Board finds that the Office properly concluded that there was a conflict of medical opinion evidence requiring an impartial medical evaluation.

The Office selected Dr. Osteen, a Board-certified orthopedic surgeon, to serve as the impartial medical examiner. On appeal, appellant's attorney objected to Dr. Osteen's selection on the grounds there is insufficient evidence of record to establish that he was selected on a proper rotational basis using the PDS. Counsel argued that the file does not reveal whether Dr. Osteen was selected from the PDS and there is no image of his selection from the PDS. While the record contains a brief notation on its "RME REFERRAL FORM" that Dr. Osteen was selected from the PDS, this evidence does not reflect whether Dr. Osteen was the first physician so contacted on that date, that he was next on any list maintained by the Office or provide any

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(3)(b) (March 1994, October 1995, May 2003), citing *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

¹⁰ See *Raymond J. Brown*, 52 ECAB 192 (2001).

¹¹ *Id.* See also *Miguel A. Muniz*, 54 ECAB 217 (2002).

¹² See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). A claimant may ask to participate in the selection of the impartial medical specialist under certain conditions; however, no request was made in this case.

¹³ See *Phillip H. Conte*, 56 ECAB 213 (2004).

reference to the rotational procedures for selecting the impartial medical specialist. This evidence is not adequate to establish that Dr. Osteen was properly selected in compliance with the rotational system using the PDS.¹⁴ Therefore, the Board finds that the Office abused its discretion in this regard.

As Dr. Osteen was not properly selected as the impartial medical specialist, the Office's schedule award decision will be set aside due to an unresolved conflict in medical opinion regarding the extent of appellant's permanent impairment. On remand, the Office should refer appellant, together with an updated statement of accepted facts, to an impartial medical specialist.

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: September 20, 2010
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁴ A.R., 61 ECAB ____ (Docket No. 09-1566, issued June 2, 2010).