United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	**Docket No. 13-2079**
	)	**Issued: February 18, 2014**
U.S. POSTAL SERVICE, NORTH PHILADELPHIA POST OFFICE, 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:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2013 appellant, through counsel, filed a timely appeal from the June 20, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her schedule award claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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's September 15, 1999 employment injury caused any permanent impairment to her right lower extremity, thereby entitling her to a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On the first appeal of this case,[2] the Board set aside OWCP decisions denying appellant's claim of recurrence beginning December 4, 2000 on the grounds that the opinion of the impartial medical specialist required clarification.

On the second appeal,[3] the Board set aside an OWCP decision denying a schedule award on the grounds that a conflict in medical opinion arose between Dr. Nicholas P. Diamond, who was appellant's osteopath, and Dr. Zohar Stark, a Board-certified orthopedic surgeon, acting as a second-opinion physician. In 2008 Dr. Diamond found a 37 percent impairment of the right lower extremity due to the September 15, 1999 employment injury. In 2009 Dr. Zohar found that appellant had completely recovered from the accepted medical conditions and thus had no resulting permanent impairment. The Board remanded the case for an impartial medical specialist to examine appellant.

On the third appeal,[4] the Board issued an order remanding the case for the selection of a second impartial medical specialist. Under procedures applicable at that time, the record was not sufficient to establish that OWCP had properly selected the first impartial medical specialist. The facts of this case, as set forth in the Board's prior decisions, are hereby incorporated by reference.[5]

Upon return of the case record, OWCP first attempted to schedule an examination with Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, but a screenshot showed that OWCP bypassed this physician for the following reason: "After several calls/and left messages, no return call."

OWCP was then able to schedule an impartial medical examination with Dr. William H. Simon, a Board-certified orthopedic surgeon, as evidenced by a Form ME023. It provided Dr. Simon appellant's entire case record and a statement of accepted facts.

In a November 24, 2012 report, Dr. Simon reviewed appellant's history and the specific conflict he was asked to resolve. He noted that the date of injury was 13 years ago, and that the accepted right ankle sprain was a soft-tissue injury and therefore was expected to heal without residual in a matter of several weeks or a few months. Dr. Simon also noted that OWCP accepted a closed fracture of the cuboid bone in the right foot, despite an imaging study and a bone scan that failed to confirm a fracture. Assuming that an undisplaced fracture or crack fracture did occur, he explained that such a condition, again, would heal without residual in a

[2] Docket No. 02-2034 (issued December 17, 2002).

[3] Docket No. 10-1030 (issued December 9, 2010).

[4] Docket No. 12-536 (issued July 12, 2012); *Erratum*, Docket No. 12-536 (issued July 27, 2012) (on the title of one of the judges).

[5] On September 15, 1999 appellant, then a 39-year-old letter carrier, sustained a traumatic injury in the performance of duty when she slipped and fell on the work floor. OWCP accepted her claim for a right ankle sprain and closed fracture of the cuboid bone in the right foot.

matter of weeks to perhaps three to four months. Thus, based on the injury alone, Dr. Simon explained that one would not suspect that appellant would have objective or even functional residuals from the accepted conditions when she was evaluated by Dr. Diamond some 9 years later or by Dr. Stark some 10 years later.

Dr. Simon reviewed the evaluations performed by Dr. Diamond and Dr. Stark. He related appellant's symptoms, including pain in the lateral aspect of her right heel that bothered her when she walked. Dr. Simon described his findings on physical examination. Appellant complained of pain in the instep of her right foot when walking on her toes. There was no obvious atrophy: Measurement of her calf was 15 inches in circumference on both the right and the left.[6] Range of motion was equal bilaterally[7] with no pain elicited by the movements or by palpation of the ankle joint or mid foot. Deep tendon reflexes were normal, and sensation was intact.

Dr. Simon diagnosed a healed sprain of the right ankle and a healed fracture of the right cuboid, by history. He noted that none of appellant's systemic symptoms were corroborated by physical examination to be related to the injuries sustained on September 15, 1999. Referring to Table 16-2 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (Foot and Ankle Regional Grid, page 501), Dr. Simon noted that soft-tissue injury, including strain, with "no significant objective abnormality findings of muscle or tendon injury at maximum medical improvement" -- which was determined in appellant's case to be in 2000 -- represented no impairment of the lower extremity. Referring to the diagnosis of cuboid fracture, on page 503, he noted that a healed fracture with no objective deficits also represented no impairment of the lower extremity. It was therefore Dr. Simon's opinion, to a reasonable level of medical certainty, that appellant had no impairment related to the accepted medical conditions she sustained on September 15, 1999.

An OWCP medical adviser reviewed Dr. Simon's use of the A.M.A., *Guides* and found his calculation of impairment to be correct.

In a December 31, 2012 decision, OWCP denied appellant's claim for a schedule award. It found that Dr. Simon's opinion represented the weight of the medical evidence and established that she had no impairment due to the accepted medical conditions.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 11, 2013. She thereafter submitted an April 19, 2013 report from Dr. Diamond who reviewed his 2008 evaluation and Dr. Simon's evaluation. Dr. Diamond noted that the pain Dr. Simon reported when appellant walked on her toes, together with some findings from 2008, meant that appellant had a three percent impairment of the right lower extremity due to a class 1 cuboid fracture (nondisplaced with minimal findings).

[6] Dr. Simon's report mistakenly notes 15 degrees.

[7] Dr. Simon reported the following measurements: dorsiflexion 20 degrees, plantar flexion 30 degrees, inversion 15 degrees, eversion 10 degrees.

In a decision dated June 20, 2013, OWCP's hearing representative affirmed the denial of a schedule award. He found that Dr. Simon's opinion was sufficiently well reasoned to be entitled to special weight. The hearing representative further found that Dr. Simon based his opinion on a correct interpretation of the A.M.A., *Guides*. He noted that Dr. Diamond did not perform a current evaluation of appellant; therefore, his application of the sixth edition of the A.M.A., *Guides* to his findings from 2008 was of limited probative value.

On appeal, appellant's counsel argues that OWCP did not properly select Dr. Simon because the record contained no screenshot of his selection from the system. He argues that Dr. Simon did not measure for atrophy and incorrectly measured motion compared to the nonaffected ankle, which he states is inappropriate under the sixth edition of the A.M.A., *Guides*. Further, counsel argues that Dr. Simon did not reference any tables or charts in the A.M.A., *Guides* or demonstrate his awareness of the applicable sections.

LEGAL PRECEDENT

The schedule award provision of FECA[8] and the implementing regulations[9] 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[10]

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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[11] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[12]

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.[13] When 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]

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[11] 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

[13] 5 U.S.C. § 8123(a).

[14] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.[15]

The Medical Management Application (MMA), which replaced the Physicians Directory System (PDS), allows users to access a database of Board-certified specialist physicians and is used to schedule referee examinations. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician.[16] The claims examiner is not able to dictate which physician serves as the impartial medical specialist. A medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded. The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare an ME023 appointment notification report for imaging into the case file. Once an appointment with a medical referee is scheduled, the claimant and any authorized representative are to be notified.[17]

If an appointment cannot be scheduled in a timely manner, or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the MMA will select the next physician in the rotation.[18]

ANALYSIS

OWCP selected Dr. Simon, a Board-certified orthopedic surgeon, to resolve a conflict on whether the accepted right ankle sprain or closed fracture of the right cuboid bone in 1999 caused any permanent impairment. It provided him with appellant's entire case file and a statement of accepted facts so that he could base his opinion on a proper history.

On physical examination, appellant showed no objective findings of the accepted medical conditions. She had subjective symptoms and a number of complaints, but none of her systemic

[15] *Raymond J. Brown*, 52 ECAB 192 (2001).

[16] *See generally* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012).

[17] *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.0500.5 (December 2012).

symptoms were corroborated by the physical examination to be related to a right ankle sprain or a nondisplaced right cuboid fracture from September 15, 1999.

Although he concluded that the accepted medical conditions had resolved without residuals, Dr. Simon applied the sixth edition of the A.M.A., *Guides* to his findings. Referencing Table 16-2, on page 501 of the A.M.A., *Guides*, he found no impairment due to soft-tissue injury, including strain, as there were "no significant objective abnormal findings of muscle or tendon injury at maximum medical improvement." As the accepted fracture had healed with no objective deficits, Dr. Simon also found no impairment due to cuboid fracture.

The Board finds that Dr. Simon's opinion is based on a proper history and is sufficiently well reasoned that it must be accorded special weight in resolving the conflict between Dr. Diamond, the attending osteopath, and Dr. Stark, the second-opinion orthopedic surgeon.

Dr. Diamond's April 19, 2013 impairment evaluation relied, at least in part, on his findings from 2008, which are immaterial to appellant's current condition. Dr. Simon did report that appellant complained of pain in the instep of her right foot when walking on her toes, but this is not objective finding. As the A.M.A., *Guides* explains: "A key feature of pain is its subjectivity. Physicians and other observers can make inferences about a patient's pain but cannot directly experience it."[19] The A.M.A., *Guides* strives to base impairment ratings on objective factors insofar as possible.[20] Thus, notwithstanding appellant's pain complaint when walking on her toes, it appears that Dr. Simon correctly placed appellant in class 0 under Table 16-2 ("no significant objective abnormal findings," "no objective deficits"). Dr. Diamond's use of a subjective complaint and stale findings from 2008 to place appellant under class 1 diminishes the probative value of his opinion and does not create a conflict with the impartial medical specialist.

As the special weight of the medical opinion evidence, represented by the opinion of Dr. Simon, establishes that appellant has no impairment resulting from the accepted medical conditions, the Board will affirm OWCP's June 20, 2013 decision denying a schedule award.

Regarding counsel's arguments on appeal, the record contains a Form ME023 confirming Dr. Simon's selection under the MMA, which has replaced the PDS. Accordingly, no screenshot of the selected physician is necessary. Dr. Simon's report shows that he did measure for atrophy. Contrary to the representative's assertion that it is inappropriate to compare motion to the unaffected side, the sixth edition emphasizes: "*Both extremities should be compared*. If the contralateral joint is uninjured it may serve as defining normal for the individual."[21] (Emphasis in the original.) Finally, Dr. Simon specifically referenced Table 16-2, the applicable table for the accepted medical diagnoses. As appellant's findings met the criteria for class 0 severity (no impairment), Dr. Simon had no reason to refer to or apply any of the grade modifier tables. Those tables are relevant only when a default impairment value has been identified under class 1

[19] A.M.A., *Guides* 35.

[20] *Id*.

[21] A.M.A., *Guides* 544 (6th ed. 2009).

and above, and a minor adjustment may be made for functional history, physical examination or clinical studies. That was not the case here.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that the weight of the medical opinion evidence establishes that appellant's September 15, 1999 employment injury caused no permanent impairment to her right lower extremity. Thus, appellant is not entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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