

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD POMPIZZI and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-1992; Submitted on the Record;
Issued April 7, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained any permanent impairment entitling him to a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for contusion of the right knee for a November 22, 1993 employment injury. Prior to the work injury, appellant underwent arthroscopy on the right knee on February 26, 1992. On June 28, 1994 appellant filed a claim for a schedule award.

In his report dated February 17, 1994, Dr. Curt D. Miller, a Board-certified orthopedic surgeon, noted that a magnetic resonance imaging (MRI) scan performed on January 22, 1992 showed an oblique tear of the posterior horn of the medial meniscus and a popliteal cyst and that appellant's x-rays were normal. He noted that the February 26, 1992 surgery on appellant showed a complex tear of the posterior horn of the medial meniscus and grade I fibrillations of the medial femoral condyle and patellofemoral joint. Dr. Miller stated that x-rays taken after appellant's fall at work showed mild narrowing of the patellofemoral joint consistent with post-traumatic arthritis. He opined that the fall worsened appellant's right knee condition and appellant required permanent restrictions. In a report dated August 2, 1994, appellant's treating physician, Dr. Bong S. Lee, a Board-certified orthopedic surgeon, opined that appellant had a 40 percent loss of function to the right knee based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. In a report dated November 14, 1994, Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination, reviewed x-rays and diagnosed patellafemoral arthritis or chondromalacia patella. He noted appellant had full range of motion and several well-healed scars from arthroscopy procedures. He found symptoms from the fall had resolved and appellant sustained no permanent impairment. An MRI scan performed on appellant on January 17, 1995 showed early diffuse chondromalacia patella, small knee joint effusion, a small oblique tear affecting the posterior horn and body of the medial meniscus and

slight loss of cartilage in the medial compartment affecting the tibial more than the femoral. Dr. Horowitz did not attribute these findings to the employment injury.

To resolve the conflict between Dr. Lee's opinion that appellant had permanent impairment due to his November 22, 1993 injury and Dr. Horowitz's opinion that appellant did not, the Office referred appellant to an impartial medical specialist, Dr. William H. Simon, a Board-certified orthopedic surgeon. In his report dated March 7, 1995, he considered appellant's history of injury, performed a physical examination, reviewed x-rays of the knee which were normal and the January 17, 1995 MRI scan. He diagnosed mild chondromalacia of the patella which was not a major functional impairment. Dr. Simon stated that appellant's major problem appeared to be an element of lumbar nerve root irritation from his underlying degenerative disc disease and spondylolisthesis which was causing positive straight leg raising sign and weakness of the extensor hallucis longus pain in the lumbar spine. He also stated that appellant's lumbar condition was capable of causing pain in the thigh or knee area in and of itself. Dr. Simon stated that appellant had no permanent injury to his right knee due to the accepted employment injury. He stated that absent knee arthroscopy, he could not determine whether there were any cartilagenous areas directly injured by the fall. Dr. Simon opined that appellant could perform light-duty work.

By decision dated April 14, 1995, the Office denied appellant's claim for a schedule award, finding that the evidence of record failed to establish that there were any residuals from the November 22, 1993 employment injury and therefore appellant had no permanent impairment.

On April 26, 1993 appellant requested an oral hearing before an Office hearing representative which was held on October 31, 1995. At the hearing, appellant described how he injured himself on November 22, 1993 and that a month after the injury, he performed light duty and retired on disability compensation on June 4, 1994. Appellant testified that his knee continued to bother him in that he felt pain and had swelling.

On January 5, 1996 appellant submitted a medical report from Dr. David Weiss, an osteopath and physiatrist. In his report dated December 11, 1995, Dr. Weiss considered appellant's history of injury, performed a physical examination, reviewed the two MRI scans of record and diagnosed, *inter alia*, post-traumatic internal derangement of the right knee, a posterior horn medial meniscus of the right knee, post-traumatic chondromalacia patellar of the right knee due to the November 22, 1993 employment injury and preexisting right knee pathology from the 1991 motor vehicle accident. He opined that the November 22, 1993 and April 1, 1994 work-related injuries were the "competent producing factor" of appellant's subjective and objective findings. Using the A.M.A., *Guides* (fourth edition), Dr. Weiss opined that appellant had a 17 percent permanent impairment and reached maximum medical improvement on December 4, 1995.

By decision dated January 30, 1996, the Office hearing representative found that Dr. Simon's March 7, 1995 report was insufficient to resolve the conflict and remanded the case for clarification of his opinion. Specifically, the hearing representative stated that Dr. Simon should state whether appellant had any residuals from the accepted work injury and specifically

address the findings of the MRI scan, stating whether those were related to the accepted work injury.

In a report dated February 27, 1996, Dr. Simon noted that appellant had difficulty with his knee since an auto accident on October 5, 1991 and that a January 22, 1992 MRI scan showed an oblique tear of the posterior horn of the medial meniscus. He considered Dr. Miller's findings that appellant had a complex tear of the posterior horn medial meniscus, grade I fibrillations of the medial femoral condyle and tibial plateau right knee and chondromalacia patella grade III. Dr. Simon stated that evidence of record showed that restrictions were placed on appellant prior to his 1993 fall and the problems were progressive in that they were degenerative in nature and would be expected to worsen on their own. He stated that the January 17, 1995 MRI scan, which showed early diffused chondromalacia patella, small knee joint effusion, a small oblique tear affecting the posterior horn and bone of the medial meniscus, and a slight loss of cartilage in the medial compartment was "essentially similar" to the 1992 MRI scan. Dr. Simon concluded that while appellant had progressive physical impairment from degenerative changes in his knee, there was no evidence that the employment injury caused any further permanent physical impairment. He stated that Dr. Lee's assessment of a 40 percent loss of function of the right knee was not related to the 1993 employment injury.

In a report dated May 10, 1996, Dr. Lee noted that appellant stated that his knee condition had progressively worsened, that a scheduled arthroscopy was canceled pending the outcome of appellant's workers' compensation claim and that appellant required surgery. He diagnosed chondromalacia of the right patella and medial meniscus tear of the right knee.

By decision dated May 29, 1996, the Office denied appellant's schedule award claim, finding that the weight of the medical evidence demonstrated that appellant had no impairment causally related to the November 22, 1993 employment injury.

On June 3, 1996 appellant requested an oral hearing before an Office hearing representative which was held on January 14, 1997. At the hearing, appellant's attorney requested 30 days to obtain additional medical evidence from Dr. Lee to establish a causal connection between appellant's need for surgery and the November 22, 1993 employment injury.

By decision dated February 25, 1997, the Office hearing representative affirmed the Office's May 29, 1996 decision.

The Board finds that appellant has not established that he is entitled to a schedule award for his accepted knee condition.

In the present case, appellant sustained an injury to his right knee on November 22, 1993, accepted for a right knee contusion. On June 28, 1994 he filed a claim for a schedule award. In developing his claim, a conflict in medical opinion was created between Dr. Lee and Dr. Horowitz as to the nature and extent of physical impairment due to the accepted injury.

In situations where there are 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 on a proper

factual background, must be given special weight.¹ In the present case, the Board referred appellant to an impartial medical specialist, Dr. Simon, to resolve the conflict in medical opinions. He reported findings on March 7, 1995, concluding that appellant's right knee symptoms were not due to the accepted injury. In the January 30, 1996 decision, the Office hearing representative found that Dr. Simon's March 7, 1995 report was defective, in that he did not address the results of the 1995 MRI scan and did not indicate whether appellant had any residuals from the November 22, 1993 employment injury. The hearing representative remanded the case for clarification of Dr. Simon's opinion. In his report dated February 27, 1996, Dr. Simon addressed the results of the 1992 and 1995 MRI scans and found that because they were "essentially" the same, appellant did not sustain any impairment to his right knee due to the November 22, 1993 employment injury. He also stated that x-rays of the right knee were normal. Dr. Simon concluded that appellant had progressive physical impairment from degenerative changes in his right knee but these were not related to the November 22, 1993 employment injury. His opinion which is based on a review of the objective evidence of record, *i.e.*, the x-rays and the two MRI scans, is sufficiently rationalized to establish that appellant did not sustain a permanent impairment due to the November 22, 1993 employment injury. Contrary to appellant's contentions on appeal, because Dr. Simon found no work-related impairment, he was not obligated to set forth the A.M.A., *Guides*. Further, Dr. Simon's discrepancy as to the dates of appellant's injury at work does not undermine his overall opinion as to causation. Dr. Weiss' January 5, 1996 opinion in which he concluded that appellant had a 17 percent permanent impairment due, in part, to the November 22, 1993 employment injury based on the A.M.A., *Guides* does not outweigh Dr. Simon's opinion, as Dr. Weiss did not address the significance of the two MRI scan results being "essentially" the same before and after the November 22, 1993 employment injury. The Board finds that as the impartial medical specialist, Dr. Simon's February 27, 1996 opinion constitutes the weight of the evidence and justifies the Office's determination that appellant is not entitled to a schedule award.

¹ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

The decisions of the Office of Workers' Compensation Programs dated February 25, 1997 and May 29, 1996 are hereby affirmed.

Dated, Washington, D.C.
April 7, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member