U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NICHOLAS A. MAZZONE and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 01-1499; Submitted on the Record;
Issued March 8, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS, MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a two percent permanent impairment of the left lower extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs' Branch of Hearings and Review abused its discretion in denying appellant's request for a second hearing.

On January 12, 1994 appellant, then a 47-year-old pipefitter, slipped on an icy sidewalk and injured his left knee. The Office accepted the claim for a left medial meniscus tear and authorized arthroscopic surgery.

On November 19, 1998 appellant filed a claim for a schedule award for his left knee. In a report dated October 16, 1998, Dr. Jack Haberman, a Board-certified family practitioner, noted the work injury and advised that he reviewed appellant's medical record pertaining to the left knee. Results of an examination of the left knee were provided and diagnoses of status post torn medial meniscus with effusion and synovitis and postoperative left knee arthroscopy, partial medial meniscectomy and partial synovectomy were provided. Dr. Haberman opined that appellant had reached maximum medical improvement on September 4, 1998. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1993), Dr. Haberman opined that appellant had a 21 percent impairment. Appellant's left 3/5 quadriceps motor strength deficit total to a 17 percent impairment under Table 39, page 77 and appellant's left patellofemoral arthritis equated to a 5 percent impairment under Table 62, page 83. The two values were combined to total to a 21 percent left lower extremity impairment.

On January 25, 1999 the Office requested that its Office medical adviser review Dr. Haberman's October 16, 1998 report and the case record to compute appellant's percentage of impairment. In a February 2, 1999 response, the Office medical adviser noted that Dr. Haberman's impairment rating was for muscle atrophy and patellofemoral arthritis which he felt arose from the January 12, 1994 work incident. The Office medical adviser stated that the Office never accepted those conditions. The Office medical adviser stated that appellant had a

torn medial meniscus and partial menisectomy. An August 23, 1994 physical examination found no muscle atrophy. He further noted that the medial meniscus of the knee is between the femur and tibia, not between the patella and femur.

The Office medical adviser took issue with Dr. Haberman's Grade 3/5 muscle weakness. He noted that the A.M.A., *Guides* at Table 12, page 49 described a Grade 3 rating as active movement against gravity only, without resistence. The Office medical adviser opined that this description was not compatible with appellant's job of shipper or moving his weight of 240 pounds.

The Office medical adviser recommended that appellant undergo an orthopedic evaluation to answer: (1) whether the patellofemoral arthritis -- chondromalacia is the result of the work injury or the result of appellant's frame, weight and age; (2) whether any atrophy or muscle weakness is present; and (3) whether the muscle weakness is secondary to the patella-femoral arthritis.

On February 11, 1999 the Office referred appellant to Dr. Steven Valentino, an osteopath, for an evaluation of the extent of any permanent impairment arising from his accepted employment injuries. In a report of March 4, 1999, Dr. Valentino noted the history of injury, reviewed appellant's medical history along with the statement of accepted facts and medical file, and set forth the results of his examination. An impression of a resolved medial meniscal tear left knee, status post surgical arthroscopy left knee was provided. Based on his examination findings, Dr. Valentino opined that appellant was fully recovered from his work injury of January 12, 1994 without residual or any evidence of ongoing impairment or disability. He stated that appellant's objective findings were completely normal. The intraoperative findings of the surgical arthroscopy confirmed a normal examination of the patellefemoral joint. As such, Dr. Valentino reasoned that any diagnosis of patellofemoral arthritis about the left knee could not clearly be the result of his work injury of July 12, 1994 or his history of employment. He further stated that the evaluation revealed no evidence to substantiate any degree of atrophy or weakness. Additionally, Dr. Valentino noted that appellant denied any weakness or use of any ambulatory assistive device or brace. He therefore opined that appellant did not have any residuals of the injury based on his recovery and a negative objective evaluation. Dr. Valentino further stated that there was no permanent functional loss of the left lower extremity. The date of maximum improvement was July 12, 1994, six months after appellant's history of work injury when he returned to work and treatment ceased.

In a decision dated March 31, 1999, the Office denied appellant's schedule award claim. Determinative weight was given to the opinion of Dr. Valentino.

In a letter dated April 5, 1999, appellant, through his attorney, requested a hearing of the Office decision dated March 31, 1999.

By decision dated August 2, 2000 and finalized August 8, 2000, an Office hearing representative modified the March 31, 1999 decision. The Office hearing representative affirmed the finding that appellant had no impairment based on clinical examination; this included no loss of motion, atrophy or muscle weakness. The Office hearing representative, however, found that as appellant had a partial menisectomy performed and part of appellant's

meniscus was removed, the A.M.A., *Guides* allowed for a two percent impairment to provide for loss of meniscal tissue. Accordingly, the Office hearing representative modified the prior decision to reflect entitlement to compensation for a two percent loss due to a diagnosis-based rating for a meniscectomy.

By decision dated September 12, 2000, the Office granted appellant a schedule award for a two percent impairment of the left lower extremity.

In a letter dated October 3, 2000, appellant, through his attorney, requested a hearing of the Office decision dated September 12, 2000.

By decision dated February 5, 2001, the Office denied appellant's request for a hearing. The Office stated that, since the hearing decision of August 2, 2000, there has been no material change in the case and the issue remained the same. The Office further stated that there was no evidence to show that another hearing would serve any useful purpose. The Office further found that the issue in this case could be addressed by requesting reconsideration from the district office.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

Section 8107 of the Federal Employees' Compensation Act specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage of loss of a member, function or organ shall be determined. The method used in making such a determination is a matter, which rests in the sound discretion of the Office.[1] For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*, as the standard for determining the percentage of permanent impairment and the Board has concurred in such adoption.[2]

In his October 16, 1998 report, Dr. Haberman, appellant's treating physician, reported that the examination revealed loss of strength and left patellofemoral arthritis. However, in his March 4, 1999 report, Dr. Valentino, an Office referral physician, stated that appellant's examination revealed full range of motion, without evidence of atrophy or weakness. Section 8123(a) of the Act provides that 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.[3] There exists, therefore, a conflict in the medical evidence as to the nature of appellant's left leg impairment. The case will therefore be remanded for referral of appellant to resolve the conflict in the medical evidence.

[1] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[2] *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961); *Francis John Kilcoyne*, 38 ECAB 168 (1987).

[3] 5 U.S.C. § 8123.

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should describe appellant's physical findings with particular attention to those items that would affect a determination of the permanent impairment caused by the January 12, 1994 employment injury to the left knee. The specialist should then provide an estimate of the extent of appellant's permanent impairment of the left knee in accordance with the A.M.A., *Guides*. After further development as it may find necessary, the Office should issue a *de novo* decision.[4]

The decisions of the Office of Workers' Compensation Programs dated February 5, 2001, September 12 and August 2, 2000 are hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
March 8, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

[4] Given that the case is being remanded, the second issue on appeal is moot.