

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLYDE D. PHEASANT and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 01-1198; Submitted on the Record;
Issued May 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has greater than a 25 percent permanent loss of use of his right leg.

On October 6, 1989 appellant, then a 37-year-old rigger helper, filed a claim for an injury to his right knee sustained that day in a fall. The Office of Workers' Compensation Programs accepted that appellant sustained a right knee strain and authorized arthroscopic surgery for a medial meniscus tear.

On July 12, 1990 Dr. Jeffrey D. Patterson, a Board-certified orthopedic surgeon, performed a lateral retinacular release and noted that appellant's medial meniscus was intact. In an October 1, 1990 report, he estimated that appellant had a five percent permanent impairment of his right leg.

On November 9, 1990 the Office issued appellant a schedule award for a five percent permanent loss of use of his right leg.

On May 2, 1994 appellant, then working as a fabric worker helper, filed a claim for a traumatic injury to his right knee sustained on April 28, 1994 when he fell on and twisted his knee while exiting a void tank. On July 27, 1994 Dr. Patterson performed further surgery on appellant's right knee, described as debridement of loose bodies and patellar realignment. On May 31, 1995 he performed a debridement of arthrofibrosis and removal of an inferior patellar spur.

On July 26, 1996 appellant filed a claim for a traumatic injury to his right knee sustained on July 25, 1996 when he twisted his knee exiting a shipyard bus. On September 27, 1996 Dr. Patterson performed an arthroscopic debridement of the unstable lateral rim of appellant's lateral meniscus. These three knee surgeries were authorized by the Office.

In a report dated August 22, 1997, Dr. William S.T. Mayhall, a Board-certified orthopedic surgeon, evaluated the permanent impairment of appellant's right leg and assigned a seven percent permanent impairment for patellar subluxation or dislocation with residual instability, seven percent for lateral meniscectomy and seven percent for mild collateral ligament laxity. In an addendum dated October 9, 1997, Dr. Mayhall stated that x-rays did not show a narrowing of the articulation of the knee and that no permanent impairment was appropriate for narrowing of the joint spaces of the knee.

On January 13, 1998 the Office issued appellant a schedule award for a 20 percent permanent loss of use of the right leg.

On March 26, 1999 appellant filed a claim for a traumatic injury sustained on February 3, 1999, when he experienced right and left knee pain after standing for seven hours. On September 16, 1999 appellant filed a claim for a schedule award.

In a report dated January 13, 2000, Dr. Michael S. McManus, who is Board-certified in preventive medicine, evaluated the permanent impairment of appellant's right leg and assigned 10 percent for flexion to 110 degrees, 20 percent for extension limited to 6 to 8 degrees, 7 percent for mild anterior cruciate laxity or deficiency and 2 percent for a partial lateral meniscectomy, for a combined total of 34 percent permanent impairment of the right leg.

On May 11, 2000 an Office medical adviser reviewed the medical evidence and stated:

"On December 27, 1999 his surgeon, Dr. Patterson, noted [appellant] had a full range of motion of his knee. It was Dr. McManus' report seventeen days later where he noted the restricted motion of flexion to 110 degrees and extension of -- 6 to 8 degrees. This represents a major inconsistency.

"Dr. Patterson on January 24, 2000 stated that [appellant] had a full range of motion of the knee, so Dr. McManus' report of January 13, 2000 is sandwiched between two reports by the surgeon, Dr. Patterson, on December 27, 1999 and January 24, 2000 where the range of motion of the knee was normal.

"Therefore, Dr. McManus' motion findings are not cogent and are suspect to be inaccurate. Based on this assessment I believe it is appropriate to have an independent medical examination. There is no reason to suspect [appellant] would have limited motion anyway based on the conditions that he has."

On June 12, 2000 the Office referred appellant, the case record and a statement of accepted facts to Dr. Lance Brigham, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion regarding the permanent impairment of appellant's right leg. In a report dated June 27, 2000, Dr. Brigham stated that appellant's gait pattern was normal, that he walked without a limp, that there was full motion from 0 to 140 degrees, that there was "1+ lateral instability, 1+ anterior instability and 1+ anterolateral rotary instability." Dr. Brigham concluded that appellant's right leg impairment was not greater than 25 percent, with no percentage given for loss of motion.

By decision dated July 6, 2000, the Office found that the findings of the impartial medical specialist, Dr. Brigham, established that appellant did not have greater than a 25 percent permanent impairment of his right leg.

By letter dated July 26, 2000, appellant requested reconsideration. He submitted a July 18, 2000 report from Dr. Patterson, who stated that an examination that day revealed that appellant's right knee had a range of motion from 10 to 120 degrees. Dr. Patterson noted that he had reviewed the medical reports evaluating appellant's permanent impairment and stated:

“I do concur with Dr. McManus' evaluation which rated [appellant] at 34 percent. This is based on multiple visits in which I have seen [appellant], having followed him over a number of years. I know the inside of his knee and how significant the arthritic changes are; I know that his range of motion can fluctuate but probably lays within the range of what Dr. McManus has pointed out, on a more usual basis, which is [appellant's] activity level will bear.”

By decision dated October 10, 2000, the Office found that appellant had not submitted any new and relevant evidence and that his request for reconsideration was not sufficient to warrant a review of its prior decision.

The Board finds that there is an unresolved conflict of medical opinion on the degree of permanent impairment of appellant's right leg.

Section 8123(a) of the Federal Employees' Compensation Act¹ states in pertinent part: “[i]f 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.” The medical disagreement in the present case was between two of appellant's physicians, Drs. McManus and Patterson, regarding the range of motion of appellant's right knee. An Office medical adviser's May 11, 2000 review did not create a conflict of medical opinion, but rather pointed out the discrepancy between the range of motion found by appellant's physicians.

As there was no conflict of medical opinion at the time of the referral to Dr. Brigham, that doctor's report is not that of an impartial medical specialist and is not entitled to special weight. Dr. Brigham's report created a conflict of medical opinion with the report of Dr. McManus. The case will be remanded to the Office for resolution of this conflict of medical opinion.²

¹ 5 U.S.C. § 8123(a).

² In light of this disposition of the merits of appellant's claim, the Office's October 10, 2000 decision denying a review of the merits of appellant's claim is moot.

The July 6, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
May 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member