

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LEONARD M. BURGER and DEPARTMENT OF THE ARMY,  
COMBAT READINESS DIVISION, Fort Dix, NJ

*Docket No. 02-1548; Submitted on the Record;  
Issued February 19, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant has any permanent impairment of his left lower extremity, causally related to his February 13, 1995 employment injuries, entitling him to a schedule award.

This is the second appeal in this case.<sup>1</sup> On the first appeal, the Board reviewed the Office of Workers' Compensation Programs' January 29, 1998 decision, which affirmed the Office's decision terminating appellant's compensation benefits effective February 18, 1997. The Office found that appellant had no disability due to his February 13, 1995 employment injury after that date, and that appellant's employment injury did not aggravate his underlying condition to the extent that surgery was warranted. The Office determined that the weight of the medical evidence rested with the opinion of Dr. Alexander Sapega, the impartial medical examiner. The Board, however, found that Dr. Sapega's opinion was based on an inaccurate factual history and was insufficient to resolve the conflict in medical opinion in this case.<sup>2</sup> Accordingly, the Board reversed the Office's January 29, 1998 decision. The complete facts of this case are set forth in the Board's March 15, 2000 decision and are herein incorporated by reference.

By letter dated May 25, 2000, the Office referred appellant together with the case record, a list of questions to be resolved and a statement of accepted facts to Dr. Howard Zeidman, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion regarding the nature and extent of appellant's injury-related disability.

In his June 20, 2000 medical report, Dr. Zeidman provided a history of appellant's left knee injury, noting that appellant struck his left knee against the end of a table on February 13, 1995, and that, at the time of his injury, appellant had a preexisting 10 percent service-connected permanent disability because of his knees. In reviewing appellant's medical treatment and the medical evidence of record, Dr. Zeidman noted the opinion of Dr. Krasnick, appellant's treating

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<sup>1</sup> Docket No. 98-1532 (issued March 15, 2000).

<sup>2</sup> See *Donald G. Aitken*, 42 ECAB 237 (1990).

physician, that appellant's February 1995 employment-related severe contusion to his already arthritic knee significantly aggravated his condition, resulting in interarticular loose material and tearing of both menisci, necessitating surgery in June 1995 and April 1996. Dr. Zeidman also provided his own findings on physical examination, which included a lack of 5 degrees of extension and 10 degrees of flexion, but with no effusion. He also noted that appellant's left knee joint had palpable osteophytes, but was not unstable. Based on his findings and his review of the record, Dr. Zeidman stated:

“Based upon the operative description, it is evident that the patient had severe degenerative arthritis prior to the injury of February 1995.

“The injury described and reported by the patient and the records is deemed insufficient to produce such damage in that short a period of time and this problem, therefore, in all medical probability, is a preexisting problem. Any aggravation of this underlying problem by the injury of 1995, was at most, a temporary aggravation and certainly could not in just a few months time produce a multiple degenerative and hypertrophic changes noted, as well as the multiple loose bodies, as described by Dr. Krasnick. Therefore, I feel that the problem is one of the preexisting degenerative condition and not directly related to the injury of February of 1995.”

On July 3, 2000 appellant filed a claim for a schedule award. In support of his claim, appellant submitted a May 10, 2000 report from Dr. David Weiss, an osteopath, who examined appellant and evaluated his left knee condition pursuant to standards set forth in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Weiss diagnosed post-traumatic internal derangement of the left knee with tears of the medial and lateral menisci, and aggravation of preexisting degenerative joint disease of the left knee involving the medial and lateral joint compartments, and concluded that appellant had a total left lower extremity impairment of 31 percent. With respect to the cause of appellant's left knee conditions, Dr. Weiss stated that the “work-related injury of February 13, 1995 was the competent producing factor for the patient's subjective and objective findings....” Dr. Weiss stated that he had based his conclusion on appellant's history, the physical examination, the duties of appellant's occupation, and a review of the medical records.

On April 12, 2001 an Office medical adviser reviewed the medical evidence of record and concluded that, based on Dr. Zeidman's finding that appellant's accepted contusion produced only a temporary aggravation of his underlying condition, appellant had no employment-related permanent residuals of his accepted condition upon which a schedule award could be based.

By decision dated June 21, 2001, the Office found that the weight of the medical evidence rested with Dr. Zeidman's opinion. Accordingly, the Office denied appellant's claim for a schedule award for his left lower extremity.

Following an oral hearing in a decision dated February 7, 2002, an Office hearing representative found that the weight of the medical evidence properly rested with Dr. Zeidman, the impartial medical specialist. Therefore, the hearing representative affirmed the Office's prior

finding that appellant does not suffer from any permanent residuals of his accepted condition, and, therefore, is not entitled to a schedule award. In a separate memorandum of the same date, the Office noted that the issue on which the Board remanded the case had not yet been decided.

The Board has duly reviewed the case record in this appeal and finds that this case is not in posture for a decision.

The schedule award provisions of the Act<sup>3</sup> and its implementing regulation<sup>4</sup> 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. However, the permanent impairment for which an appellant seeks compensation must be causally related to an employment injury, and not solely to a preexisting condition, as determined by the weight of the medical evidence of record.<sup>5</sup> In this case, Dr. Zeidman was selected to act as an impartial medical specialist on the issues previously before the Board, upon which the Office has yet to issue a decision. At the time of Dr. Zeidman's report, appellant's schedule award claim had not yet been filed. There was, therefore, no conflict in the medical opinion evidence on the issue of employment-related permanent impairment. Dr. Zeidman cannot be considered an impartial medical specialist with respect to this issue.<sup>6</sup> Rather, with respect to the issue of whether appellant has established that he has any permanent impairment of his left lower extremity causally related to his February 13, 1995 employment injuries, Dr. Zeidman's opinion is one of an Office referral physician.

Section 8123(a) of the Federal Employees' Compensation Act provides: "If there is a 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."<sup>7</sup>

In the present case, appellant's treating physician, Dr. Weiss, opined that appellant had a total combined left lower extremity impairment of 31 percent causally related to the work-related injury of February 13, 1995. However, the Office referral physician, Dr. Zeidman, offered a rationalized second opinion that appellant's current left knee condition was due to his preexisting degenerative condition and not related to the accepted employment injury of February 1995.

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404 (1999).

<sup>5</sup> See *Carolyn F. Allen*, 47 ECAB 240 (1995).

<sup>6</sup> Consequently, the weight of Dr. Zeidman's opinion would not be enhanced by the extra weight accorded an impartial medical specialist's opinion due to its extensive foundation, including access to a statement of accepted facts and completeness, and comprehensive consideration of the entire case record, see *Melvina Jackson*, 38 ECAB 443 (1987) but would have to stand on its thoroughness, responsiveness and rationale independent of Office direction.

<sup>7</sup> 5 U.S.C. § 8123(a); see also *Brady L. Fowler*, 44 ECAB 343 (1992); *George A. Johnson*, 43 ECAB 712 (1992); *Melvina Jackson*, *supra* note 6.

The Board finds that the reports of Drs. Weiss and Zeidman are of approximately equal value, and are in conflict on the issue of whether appellant has any permanent impairment of his left knee due to his February 13, 1995 employment injury. This requires resolution by referral to a Board-certified impartial medical specialist, accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing this issue.

The February 7, 2002 and June 21, 2001 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, DC  
February 19, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member