United States Department of Labor
Employees' Compensation Appeals Board

ROBERT E. BARABINO, Appellant	)	
and	)	**Docket No. 04-570**
	)	**Issued: November 15, 2004**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Sacramento, CA, Employer	)	

Appearances:
Sylvia A. Johnson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 30, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 31, 2002, in which an Office hearing representative found that he was not entitled to a schedule award of greater than 44 percent impairment of his left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits in this case.

ISSUE

The issues on appeal are: (1) whether appellant sustained more than a 44 percent permanent impairment of the left lower extremity; and (2) whether the Office abused its discretion in denying appellant's request for a subpoena.

On appeal appellant's representative alleged that the impartial medical examiner's opinion was not sufficient to resolve the conflict, that appellant's request to subpoena the impartial medical examiner was improperly denied and the questions to the impartial medical examiner were unreasonable.

FACTUAL HISTORY

The Office accepted that appellant, born November 15, 1930, was employed as a sheet metal mechanic and sustained two work-related injuries to his left leg, for which the compensation case file records were combined under master file number 130-800462.[1] In the first incident, which occurred on March 13, 1984, appellant twisted his left ankle while running on a wet ramp at work. The Office accepted the condition for fracture of the left ankle medial malleolus and appellant subsequently underwent surgical removal of a left ankle bone spur on June 12, 1996 as a result of the accepted injury. In the second incident, which occurred on June 23, 1986, appellant tripped on an extension cord while carrying a tank cover. The Office accepted the conditions of left knee sprain and left knee internal derangement. The Office also accepted that he incurred a consequential injury on August 22, 1986, including cervical sprain, cervicaligia, a fractured tooth at number 18 and left arm weakness, when his vehicle was rear-ended while returning from a medical appointment. The Office also authorized three left knee surgeries resulting from the accepted injury. Additionally, the Office expanded the claim to include a right foot neuroma of the third web space as a consequential condition of over compensating with the right leg due to the authorized surgeries to the left knee.

The record reflects that appellant received treatment from Dr. Allen Hassan, a Board-certified family practitioner, and Dr. Paul Kisilewicz, a doctor of podiatric medicine.

By decision dated February 15, 2000, appellant received a schedule award for 12 percent permanent impairment of the left lower extremity. He disagreed with the decision and requested a hearing.

In a decision dated May 30, 2000, an Office hearing representative concluded that in a report dated February 22, 1999, appellant's treating physician, Dr. Hassan, presented conflicting descriptions of appellant's left foot/ankle impairment and that he did not provide information regarding permanent impairment of the left knee.[2] The Office hearing representative remanded the case for the Office to obtain a second opinion examination in order to obtain a complete evaluation of the left lower extremity and to issue a *de novo* decision concerning the schedule award.

The Office subsequently referred appellant, the medical record and a statement of accepted facts for a second opinion examination with Dr. Gerald C. Barnes, a Board-certified orthopedic surgeon. He submitted a report dated October 17, 2000, in which he provided findings regarding the left knee and left ankle. Upon receipt of Dr. Barnes' report, the Office referred the file to an Office medical adviser, who concluded in a report dated November 13, 2000, that appellant had a 44 percent permanent impairment of the left lower extremity.

[1] The record reflects several claims for appellant including, 13-800462, 13-732675, 13-797579 and 13-784169. Additionally, he sustained a nonindustrial left shoulder injury on May 28, 1989, a work-related right knee strain on November 4, 1982 (File No. 130728908) and a work-related left shoulder strain and left thumb laceration on October 24, 1985.

[2] It is noted that parts of the record is missing regarding the early years of this claim.

In a November 21, 2000 decision, the Office awarded appellant an additional 32 percent permanent impairment of the left lower extremity, noting that he had received 12 percent previously. By letter dated December 4, 2000, she requested a hearing.

In a June 26, 2001 decision, the Office hearing representative determined that Dr. Barnes had not been provided with a complete statement of accepted facts or medical records regarding the surgeries performed as a result of the employment injuries and that a conflict of medical opinion existed between Dr. Barnes and appellant's treating physicians, Drs. Hassan and Kisilewicz, regarding the findings on physical examination and the extent of permanent impairment. The Office hearing representative vacated the November 21, 2000 decision and remanded the case to the Office with instructions to develop the medical evidence concerning appellant's November 4, 1982 knee injury, to revise the statement of accepted facts and to refer him for an impartial medical examination with a Board-certified orthopedic surgeon.[3]

On November 14, 2001 the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Louis P. Valli, a Board-certified orthopedic surgeon, for an impartial medical examination. In his report dated December 13, 2001, he noted the history of injury and treatment. He provided physical findings which indicated that appellant had minimal pain in the ankle which did not interfere with activities of daily living. The physician noted that pinprick sensation was decreased in the dorsal medial and plantar lateral aspect of the left foot. Dr. Valli noted that there was no loss of function and no ankylosis. Regarding range of motion, he advised that affected versus opposite of dorsiflexion was 10 degrees and 20 degrees; plantar flexion was 28 degrees and 54 degrees; inversion was 32 degrees and 35 degrees and eversion was 10 degrees for both affected versus opposite. He concluded:

> "The loss of function in the left lower extremity is due only to the left knee and that is due to intermittent mild and occasional moderate pain related to being up and around more than an hour or two. The symptoms in the left ankle are slight to occasionally mild and do not preclude or limit activities. [Appellant's] left ankle became permanent and stationary two years ago and the left knee became permanent and stationary five years ago. It is noted that the medical conflict statement of range of motion of the ankle between Dr. Gerald Barnes and Dr. Paul Kisilewicz's [*sic*] findings are noted. As I stated before, there appeared to be guarding against both full knee and full ankle motion, so the degrees of motion I obtained in my opinion, are not completely accurate. In any event, I would state that [appellant] has --7 degrees full extension in his right asymptomatic knee and at the time of measurement today, the left knee lacked 18 degrees full extension with guarding at that point. The right knee flexed 145 degrees; the left knee flexed to 90 degrees and he tightened his muscles and there was not a definite end-point. The right ankle dorsiflexed 20 degrees, the left 10 degrees with some

[3] The Office was unable to obtain the copies of medical records covering the November 4, 1982 injury. The Office also prepared a revised statement of accepted facts dated July 30, 2001, which described in detail appellant's left lower extremity injuries and surgeries, made reference to the November 4, 1982 right knee injury and noted that the records related to such injury had been destroyed.

guarding and the right plantar flexed 54 degrees, the left 28 degrees with some guarding. Subtalar motion was essentially similar on the right and the left."

Dr. Kisilewicz opined that appellant reached maximum medical improvement two years ago.

On January 17, 2002 the Office referred the impartial medical examiner's report to the Office medical adviser. In a report dated January 22, 2002, the Office medical adviser noted that he had previously reviewed the file and on November 13, 2000 appellant was awarded a 44 percent impairment of the left lower extremity. He noted that the fifth edition 2001, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* under Table 17-2, would not combine an award for weakness and atrophy with a value for loss of motion.[4] The Office medical adviser advised that he reviewed the record, including Dr. Valli's report and advised that pursuant to the A.M.A., *Guides*, the subjective complaints regarding the knee between mild and moderate would be graded between a Grade 2 (maximal 80 percent) and a Grade 3 (maximal 50 percent) as per the grading scheme. He referenced page 482, Table 16-10 of the A.M.A. *Guides*[5] and explained that there was a mean of 70 percent grade of a maximal 7 percent (femoral nerve), equivalent to a 4.9 or rounded off, to 5 percent for the pain factors involving the left knee. The Office medical adviser noted that complaints of mild left ankle pain would be assessed at a maximal grade of 3 or a 60 percent grade of a maximal 5 percent for the sural nerve and 5 percent for the peroneal nerve to equal a 6 percent impairment. The medical adviser indicated that the two awards took into consideration the decreased pin prick sensation in the medial left thigh and anterior left leg; and the dorsal medial left foot; and the plantar left lateral foot. The Office medical adviser noted the range of motion of the left knee of 18 degrees of full extension, with further flexion to 90 degrees and assessed a moderate or 20 percent impairment for the loss of extension and a 10 percent impairment for the loss of flexion. He also noted that no mention was made of atrophy in the thighs or calves, other than a mention of atrophy in the lower extremity and a slight weakness in flexion of the left knee, which would equate to a Grade 4/5 weakness which pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*[6] equaled a 12 percent lower extremity impairment. Regarding right ankle motion, the Office medical adviser noted some limitation with 10/20 dorsiflexion and 28/54 plantar flexion, which pursuant to Table 17-11, page 537,[7] would receive a mild or 7 percent lower extremity impairment and a 32 degree left subtalar inversion would receive a 0 percent impairment and inversion of 10 degrees would be assessed at mild or a 2 percent lower extremity impairment. He advised that utilizing the Combined Values Chart, the 2 percent for loss of ankle subtalar motion combined with the 5 percent for knee pain, combined with 6 percent for ankle generated pain, with 7 percent for loss of ankle range of motion, combined with 10 percent for loss of knee flexion, combined with 10 percent for loss of knee extension would be equivalent to a 42 percent impairment, which was less than the 44 percent previously awarded. The Office medical adviser

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[4] A.M.A., *Guides* 527, Table 17-2.

[5] A.M.A., *Guides* 482, Table 16-10.

[6] A.M.A., *Guides* 532, Table 17-8.

[7] A.M.A., *Guides* 537, Table 17-11.

concluded that pursuant to the A.M.A., *Guides*, the medical evidence did not indicate that appellant would be entitled to an award greater than a 44 percent impairment of the left lower extremity.

By decision dated January 29, 2002, the Office denied appellant's claim for an additional schedule award. By letter dated February 11, 2002, he requested a hearing which was held on October 31, 2002.[8]

In a February 6, 2002 report, Dr. Hassan, indicated that appellant was entitled to an additional impairment of 10 percent impairment for his chronic pain. However, he did not refer to a particular section of the A.M.A., *Guides* or arrive at an explanation for his calculation.

In a December 12, 2002 report, Dr. Kisilewicz opined that appellant was 60 percent disabled in the knee and 60 percent disabled in the left ankle. However, he did not refer to any specific tables in the A.M.A., *Guides,* or explain his calculations.

By decision dated December 31, 2002, the Office hearing representative affirmed the January 29, 2002 decision, which found that appellant was not entitled to more than a 44 percent impairment of the left lower extremity. The Office hearing representative also addressed the issue of whether appellant had made a request for a subpoena and noted that there was no specific request and determined that even if it were a request, it did not meet the requirements for issuance of a subpoena. Further, the Office hearing representative determined that appellant was not entitled to have his physician or representative present during an impartial medical examination.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[9] and its implementing regulation[10] 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[11]

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[8] During the hearing, Dr. Kisilewicz testified that appellant's left lower extremity was 70 percent impaired. However, he did not refer to the A.M.A., *Guides,* or explain how he arrived at his conclusion. Further, an inquiry was made regarding whether appellant had made a request for a subpoena for the impartial medical examiner.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404 (2003).

[11] *Id.*

ANALYSIS

In this case, in its June 26, 2001 decision, an Office hearing representative determined that a conflict existed between Dr. Barnes, the second opinion physician, and appellant's treating physicians, Drs. Hassan and Kisilewicz regarding the extent of appellant's permanent impairment of his left lower extremity. The Office hearing representative further found that Dr. Barnes had not been provided with a complete statement of accepted facts or the complete medical records, but nonetheless remanded the case for an impartial medical evaluation. The Board, however, finds that as Dr. Barnes' report, was incomplete and a conflict did not exist at the time of the Office's referral of appellant to Dr. Valli. Thus, he served as an Office referral physician rather than an impartial medical specialist.

The Office based its 44 percent schedule award on the opinions of Dr. Valli, the Office referral physician and the Office medical adviser. Appellant's podiatrist, Dr. Kisilewicz testified at the hearing and alleged that he had a 70 percent impairment to his left lower extremity. However, he did not provide an explanation in accordance with the A.M.A., *Guides,* regarding how he derived at or calculated this amount. In a December 12, 2002 report, Dr. Kisilewicz opined that appellant was 60 percent disabled in the knee and 60 percent disabled in the left ankle. Again, he did not refer to any specific tables, pages or sections of the A.M.A., *Guides.* Dr. Hassan, in a February 6, 2002 report, indicated that appellant was entitled to an additional impairment of 10 percent for his chronic pain. The Board, however, finds that his report is also of limited probative value as he did not refer to any tables or sections of the A.M.A., *Guides* that would support his findings.

The Office subsequently referred the case file, to Dr. Valli and its Office medical adviser for an opinion. Dr. Valli noted that there was no loss of function and no ankylosis and conducted range of motion examinations and advised that loss of function in the left lower extremity was due only to the left knee and was due to intermittent pain. He noted slight symptoms in the left ankle, which were occasionally mild but did not preclude or limit activities. Regarding range of motion, Dr. Valli advised that appellant was guarding and had 7 degrees full extension in his right asymptomatic knee and the left knee lacked 18 degrees full extension with guarding. He noted the right knee flexed 145 degrees; the left knee flexed to 90 degrees. Regarding, the right ankle, Dr. Valli noted that appellant dorsiflexed 20 degrees, as opposed to 10 degrees on the left and the right plantar flexed 54 degrees, as opposed to 28 degrees on the left. He noted that subtalar motion was the same on both the right and the left. Dr. Valli advised that appellant was entitled to no more than a 44 percent impairment of the left lower extremity and explained his findings under the A.M.A., *Guides*.

In his January 22, 2002 report, the Office medical adviser stated that he reviewed Dr. Valli's report and applied the fifth edition of the A.M.A., *Guides.*[12] In accordance with the A.M.A., *Guides*, he advised that the subjective complaints regarding the knee between mild and moderate would be graded between a Grade 2 (maximal 80 percent) and a Grade 3 (maximal 50 percent) as per the grading scheme. Dr. Valli referenced page 482, Table 16-10 of the A.M.A.

[12] The fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001) provides that any initial schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date.

Guides[13] and explained that there was a mean of 70 percent grade of a maximal 7 percent (femoral nerve), equivalent to a 4.9 or rounded off, to 5 percent for the pain factors involving the left knee. He noted that complaints of mild left ankle pain would be assessed at a maximal grade of 3 or a 60 percent grade of a maximal 5 percent for the sural nerve and 5 percent for the peroneal nerve to equal a 6 percent impairment. The Office medical adviser indicated that the two awards took into consideration the decreased pin prick sensation in the medial left thigh and anterior left leg; and the dorsal medial left foot; and the plantar left lateral foot. He noted the range of motion of the left knee, of 18 degrees of full extension, with further flexion to 90 degrees and assessed a moderate or 20 percent impairment for the loss of extension and a 10 percent impairment for the loss of flexion. The Office medical adviser also noted that no mention was made of atrophy in the thighs or calves, other than a mention of atrophy in the lower extremity and a slight weakness in flexion of the left knee, which would equate to a Grade 4/5 weakness which pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*[14] equaled a 12 percent lower extremity impairment. He also explained that a value for loss of strength or atrophy would not be combined with a value for loss of motion or a value for a peripheral nerve injury pursuant to Table 17-2 of the A.M.A., *Guides.*[15] The Office medical adviser also utilized a second method of calculating the award referred to as the diagnosis based estimate. He referred to Table 17-33 of the A.M.A., *Guides* and advised that appellant would be entitled to a 10 percent impairment for partial medial and partial lateral meniscectomies.[16] In addition, the Office medical adviser noted a description of a slight decrease in medial joint space of the left knee and referred to Table 17-31 at page 544 of the A.M.A., *Guides* and noted that this would equate to a seven percent lower extremity impairment and explained that values for loss of function due to pain, atrophy/weakness and limitation of motion, would not be combined with these values. He concluded that using the second method, appellant would only be entitled to a 16 percent lower extremity impairment, much lower than the first method and that at any rate, the current records showed that he was not entitled to more than a 42 percent impairment, which was less than his previous award of 44 percent and that he was not entitled to more than the 44 percent previously awarded.

The Board finds that the Office medical adviser provided a reasoned opinion as to the degree of permanent impairment under the fifth edition of the A.M.A., *Guides* and establishes that appellant has no further permanent impairment resulting from his work-related injury to the left lower extremity. Appellant has not provided any medical reports, based on objective findings which establish that he is entitled to more than a 44 percent permanent impairment of the left lower extremity for which he received a schedule award. Therefore, he has failed to establish his entitlement to an increased schedule award.

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[13] A.M.A., *Guides* 482, Table 16-10.

[14] A.M.A., *Guides* 532, Table 17-8.

[15] A.M.A., *Guides* 526, Table 17-2.

[16] A.M.A., *Guides* 544, Table 17-31.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act states: "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles." This section of the Act gives the Office discretion to grant or reject requests for subpoenas.[17] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could be obtained. The Office hearing representative retains discretion regarding whether to issue a subpoena.[18] The function of the Board on appeal is to determine whether there has been an abuse of discretion. A general contention that the evidence obtained through subpoenas would establish appellant's claim is not sufficient to require that subpoenas should be issued.[19]

ANALYSIS -- ISSUE 2

On appeal appellant's representative indicated that his request for a subpoena, which would have allowed Dr. Valli, the impartial medical examiner, to appear for his hearing was denied. The Office hearing examiner, however, addressed this concern in his December 31, 2002 decision and noted that appellant had not requested a subpoena. He further determined that even if his request had been proper, he did not meet the procedural requirements.[20] The Board finds that the Office hearing representative properly exercised his discretion in denying appellant's subpoena request. The hearing representative noted the requirements under 20 C.F.R. § 10.619(a)(2) and found that appellant failed to demonstrate why the evidence was relevant to the issue at hand and why it would be the best means of obtaining the requested evidence. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts and similar criteria. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[21] The Board finds that the Office hearing representative did not abuse his discretion in finding that a subpoena was not necessary for a full presentation of appellant's case.

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[17] 5 U.S.C. § 8126.

[18] *See* 20 C.F.R. § 10.619; *Janet L. Terry*, 53 ECAB ___ (Docket No. 00- 1673, issued June 5, 2002).

[19] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[20] *Supra* note 11.

[21] *Claudio Vazquez*, 52 ECAB 496 (2001).

CONCLUSION

The Board finds that appellant has not established that he sustained more than a 44 percent permanent impairment of the left lower extremity. The Board further finds that the Office did not abuse its discretion in denying appellant's request for a subpoena.[22]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 31, 2002 is hereby affirmed.

Issued: November 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[22] The Board notes that appellant submitted evidence subsequent to the December 31, 2002 Office decision. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant, however, retains the right to file a claim for an increased schedule award based on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown,* 51 ECAB 115 (1999).