United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 06-704**
	)	**Issued: August 7, 2006**
DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL INSTITUTE, Fort Dix, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 30, 2006 appellant filed an appeal of the Office of Workers' Compensation Programs' merit decision dated October 6, 2005, denying his request for an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision.

ISSUE

The issue is whether appellant has established that he has more than an eight percent impairment of his right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On June 28, 1998 appellant, a 39-year-old correctional officer, filed a traumatic injury claim for injuries sustained when he slipped on a soapy floor. His claim was accepted for right ankle strain, hip strain and lumbosacral sprain.

Appellant filed a claim for a schedule award on July 30, 2001. In support of his request, he submitted a report dated May 30, 2001 from Dr. David Weiss, a treating physician, who

diagnosed chronic post-traumatic lumbosacral strain and sprain; multi-level bulging lumbar disc; lumbar radiculopathy; chronic post-traumatic right ankle strain and sprain, with involvement of the anterior talofibular ligament; aggravation of preexisting left and right knee pathology; and chronic post-traumatic trochanteric bursitis to the right hip. Based upon the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[1] Dr. Weiss opined that appellant had a 62 percent permanent impairment of the right lower extremity and a 10 percent permanent impairment of the left lower extremity due to his accepted work injury.

In a second opinion report dated August 13, 2002, Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, opined that, according to Table 17-6 of the A.M.A., *Guides,* appellant had an eight percent impairment of his right lower extremity due to atrophy. He found no evidence of lumbar radiculopathy or that the right hip, ankle or knee suffered permanent disability as a result of the 1998 accepted injury. Referring to Dr. Weiss' May 30, 2001 report, Dr. Maslow stated that he found no impairment due to sensory or strength deficits, or range of motion deficits at the hip and knee.

The Office referred the file to the medical adviser, who concluded on October 8, 2002 that appellant had an eight percent impairment of the right lower extremity, based on Dr. Maslow's August 13, 2002 report.

On October 15, 2002 appellant was granted a schedule award for an eight percent impairment of his right lower extremity for a period of 23.04 weeks.

On October 24, 2002 appellant requested an oral hearing, which was held on March 18, 2004. By decision dated July 28, 2004, an Office hearing representative found a conflict between the opinions of Drs. Maslow and Weiss. Accordingly, the hearing representative remanded the case, instructing the Office to refer appellant and the entire case record to an orthopedic surgeon for an impartial medical examination.

On August 12, 2004 appellant's representative requested that he be allowed to participate in the selection of the impartial medical examiner.

The record contains a document entitled "ESAFEC Report: PDS [Physicians Directory System] Appointment Schedule," identifying Dr. Stanley Askin, a Board-certified orthopedic surgeon, as the impartial medical examiner. The record also contains an "RME REFERRAL FORM," completed by the claims examiner and the medical scheduler on September 1 and 2, 2004, respectively. The form indicates that the case was remanded to the Office and referred to Dr. Askin for a schedule award determination. "PDS" was identified as the referral source. By letter dated September 9, 2004, the Office notified appellant and his representative of a September 24, 2004 appointment scheduled on behalf of appellant with Dr. Askin. By letter dated September 15, 2004, appellant's representative acknowledged receipt of notice of appellant's scheduled appointment with Dr. Askin, statement of accepted facts and requested a copy of Dr. Askin's report.

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[1] A.M.A., *Guides* (5th ed. 2001). Dr. Weiss referred to Tables 15-15 and 15-18, p. 424, and Tables 17-8, 9, and 10, pp. 532 and 537.

In a report dated September 24, 2004, Dr. Askin opined that appellant had no impairment, permanent or otherwise, due to the June 28, 1998 event, and that his right leg changes were due to edema, rather than to atrophy. He indicated that he had reviewed the entire file, including the history and statement of accepted facts. During his physical examination of appellant, Dr. Askin found subjective tenderness at the left sacroiliac joint; unrestricted motion of the knees and ankles; preserved sensation to light touch in both legs; and symmetrically hypoactive deep tendon reflexes at the knees and ankles. He found no obvious paravertebral spasm. Measurements of the left and right calves were 58 and 55 centimeters (cm) respectively, with gross, pitting edema, right more than left. Appellant was able to exert with his hip flexors, extensors, hamstrings, quadriceps, and ankle and toe motors for each leg with normal facility. Passive straight leg raising was negative bilaterally. Patrick's test on the right caused report of pain from the right knee to the back, and he declined to perform the test on the left due to anticipated pain. While bending, appellant offered 50 percent forward flexion and "nil" side bending. Dr. Askin found no clinical evidence of radiculopathy and no sensory or motor abnormalities. Stating that appellant's predominant problem was his obesity, Dr. Askin opined that appellant's back pain resulted from arthritic joints in his lower back due to middle age. He stated, in conclusion, that Dr. Maslow's opinion was more accurate than that of Dr. Weiss.

In a supplemental report dated October 6, 2004, Dr. Askin stated that appellant's 1998 soft tissue injury had resolved. He noted that, although appellant still had significant problems, they were due to his obesity. Accordingly, Dr. Askin opined that appellant had a zero percent permanent impairment attributable to the accepted work injury. He stated that Dr. Maslow's figure was more accurate than Dr. Weiss because it was closer to zero.

By decision dated October 15, 2004, the Office denied appellant's request for an increased schedule award. Finding that Dr. Askin's report represented the weight of the medical evidence, the Office determined that appellant had failed to establish that he had a permanent impairment of the right lower extremity in excess of eight percent.

On October 21, 2004 appellant requested an oral hearing, which was held on July 12, 2005. At the hearing, his representative argued that Dr. Askin had performed "no physical examination whatsoever." Appellant also objected to the selection of Dr. Askin, stating that "it's hard to imagine how the same doctor can be selected on three different cases to examine a claimant on the same day if the PDS is being used properly." He further contended that Dr. Askin's reports were insufficient to carry the weight of the medical evidence, in that he gave no rating regarding appellant's preexisting knee condition and did not provide measurements of strength or range of motion. Appellant also argued that Dr. Askin failed to refer to tables and charts in the A.M.A., *Guides* for loss of motion, motor strength deficit and atrophy.

By decision dated October 6, 2005, an Office hearing representative affirmed the Office's October 15, 2004 decision, finding that the weight of the medical evidence rested with Dr. Askin. The hearing representative further found that the Office followed proper procedures in scheduling the impartial medical examination.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[3] The schedule award provisions of the Act[4] and its implementing federal regulation[5] sets 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 Act 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[7] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[8] The Board notes that section 8109(19) specifically excludes the back from the definition of "organ."[9] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[10]

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[11] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[12] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well

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[2] 5 U.S.C. § 8107(a).

[3] *Id.*

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

[7] *See Richard R. LeMay*, 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[8] 5 U.S.C. § 8107. *See Richard R. LeMay, supra* note 7; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[9] 5 U.S.C. § 8109(c).

[10] *Thomas J. Engelhart, supra* note 7.

[11] 5 U.S.C. § 8123(a). *See Raymond A. Fondots*, 53 ECAB 637 (2002).

[12] *William C. Bush*, 40 ECAB 1064 (1989).

rationalized and based on proper factual and medical background, must be given special weight.[13]

The weight of medical opinion evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the opinion.[14] The opinion of a physician supporting causal relation must be one of reasonable medical certainty, supported with affirmative evidence, explained by medical rationale and based on a complete and accurate factual and medical background.[15]

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for selecting impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.[16]

The Office procedures further provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the PDS should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Directory of Medical Specialists.[17]

In addition, under the Office procedures, a claimant who asks to participate in the selection of an impartial medical examiner or who objects to the selected physician must provide a valid reason.[18] Upon the claimant's request, the claimant will be afforded a list of three specialists acceptable to the Office, from which the claimant may choose.[19] The procedural

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[13] *See Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005). *See also Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[14] *See James R. Taylor,* 56 ECAB ___ (Docket No. 05-135, issued May 13, 2005). *See also Anna C. Leanza*, 48 ECAB 115 (1996).

[15] *See Manuel Gill*, 52 ECAB 282 (2001).

[16] *Charles M. David*, 48 ECAB 543 (1997).

[17] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Miguel A. Muniz*, 54 ECAB 217 (2002); *Albert Cremato*, 50 ECAB 550 (1999).

[18] Federal (FECA) Procedure Manual Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).

[19] *Id.*

opportunity for participation in the selection of an impartial medical examiner has been recognized by the Board.[20] However, this procedural opportunity is not an unqualified right under the Act. The Office has imposed limitations requiring that the employee provide a valid reason for any objection proffered against the designated impartial specialist. It is within the discretion of the Office to determine whether a claimant has provided a valid objection to a selected physician.

ANALYSIS

Appellant filed a claim for a schedule award on July 30, 2001. Dr. Weiss opined that appellant had a 62 percent impairment of the right lower extremity and a 10 percent impairment of the left lower extremity due to his accepted work injury. In a second opinion report, Dr. Maslow concluded that appellant had only an eight percent impairment of his right lower extremity due to atrophy. The Office medical adviser agreed with Dr. Maslow's assessment, and on October 15, 2002 the Office granted appellant a schedule award for an eight percent impairment of his left lower extremity. In a July 28, 2004 decision, the Office hearing representative found a conflict between the opinions of Drs. Maslow and Weiss and remanded the case to the Office for an impartial medical examination. The Office properly referred appellant to Dr. Askin to resolve the conflict.

Initially, appellant argues that the Office did not follow proper procedures in scheduling the impartial medical examination. However, the record supports, by virtue of a September 1, 2004 referral form, that the PDS was used by the Office for the selection of the impartial medical examiner, and that, by letter dated September 9, 2004, notice was properly given to appellant and his representative of the September 24, 2004 appointment scheduled on behalf of appellant with Dr. Askin. By letter dated September 15, 2004, appellant's representative acknowledged receipt of notice of appellant's scheduled appointment with Dr. Askin and statement of accepted facts. Appellant and his representative had an opportunity to object to the selection of Dr. Askin, but chose not to do so. The Board notes that appellant's representative requested that he be allowed to participate in the selection of the impartial medical specialist. However, he did not provide a reason for his request. Without a valid reason, the Office is not obligated to allow participation in the selection of an impartial medical examiner.[21] Therefore, the Office was not required to issue a formal denial of the request. The Board finds that the Office did not abuse its discretion in not allowing appellant to participate in the selection of the impartial specialist.

The Board finds that Dr. Askin provided a proper factual and medical background; described in detail his findings on examination; and rendered diagnoses based on the results of his examination and review of the entire record. In his September 24, 2004 report, Dr. Askin opined that appellant had no impairment, permanent or otherwise, due to the June 28, 1998 event and that his right leg changes were due to edema, rather than to atrophy. During his physical

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[20] *Roger S. Wilcox*, 45 ECAB 265, 273-74 (1993).

[21] Federal (FECA) Procedure Manual Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).

examination of appellant, Dr. Askin found subjective tenderness at the left sacroiliac joint; unrestricted motion of the knees and ankles; preserved sensation to light touch in both legs; and symmetrically hypoactive deep tendon reflexes at the knees and ankles. He found no obvious paravertebral spasm. Measurement of the left and right calves were 58 and 55 cm., respectively, with gross, pitting edema, right more than left. Appellant was able to exert with his hip flexors, extensors, hamstrings, quadriceps, and ankle and toe motors for each leg with normal facility. Passive straight leg raising was negative bilaterally. Patrick's test on the right caused report of pain from the right knee to the back, and he declined to perform the test on the left due to anticipated pain. While bending, appellant offered 50 percent forward flexion and "nil" side bending. Dr. Askin found no clinical evidence of radiculopathy and no sensory or motor abnormalities. Stating that appellant's predominant problem was his obesity, Dr. Askin opined that appellant's back pain resulted from arthritic joints in his lower back due to middle age. In his October 6, 2004 supplemental report, Dr. Askin stated that appellant's accepted injury had resolved. He noted that, although appellant still had significant problems, they were due to his obesity. Accordingly, Dr. Askin opined that appellant had a zero percent permanent impairment attributable to the accepted work injury.

The Board finds that Dr. Askin's impartial medical opinion is sufficiently probative, rationalized, and based upon a proper background. For this reason, his opinion represents the weight of the medical evidence and establishes that appellant's accepted conditions have resolved to the point where appellant no longer has a permanent impairment ratable under the A.M.A., *Guides*. His representative argues that appellant's preexisting knee condition should be considered in the determination of a schedule award. However, the evidence of record does not establish that his accepted injury caused or aggravated a preexisting knee condition. As appellant no longer has a ratable permanent impairment pursuant to the A.M.A., *Guides*, appellant's knee condition is not relevant to this schedule award claim. The Board will affirm the Office hearing representative's October 6, 2005 finding that appellant failed to establish that he has more than an eight percent impairment of his right lower extremity.

CONCLUSION

The Board finds that appellant failed to establish that he has more than an eight percent impairment of his right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 6, 2005 is affirmed.

Issued: August 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board