United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL V. BANDOCH, Appellant	)	
and	)	**Docket No. 06-112**
U.S. POSTAL SERVICE, POST OFFICE, South Jersey, NJ, Employer	)	**Issued: July 25, 2006**

Appearances:
Thomas 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated June 3, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a 50 percent permanent impairment of his right lower extremity.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[1] In an October 14, 1988 decision, the Board found that the case was not in posture regarding the degree of impairment of appellant's right lower extremity. The case was remanded for further development. The facts of

[1] Docket No. 88-1392 (issued October 14, 1988).

the case, as set forth in the prior decision, are incorporated by reference. The relevant facts are reiterated.

The Office accepted appellant's claim for laceration of the right knee and internal derangement-chondromalacia. He underwent arthroscopy/arthrotomy on October 10, 1988 and another on May 4, 1992.[2] The Office expanded appellant's claim to include a left knee condition. He received appropriate compensation benefits.[3] In 1988 appellant received a schedule award for 10 percent permanent impairment to the right leg.

On November 30, 1994 appellant received a schedule award of an additional 5 percent to the right knee for a total award of 15 percent to the right leg. The period of the award was for 14.40 weeks from October 4, 1994 to January 12, 1995.

Appellant filed a Form CA-7 claim for a schedule award on October 23, 2001.[4]

In support of his claim for an additional schedule award, appellant submitted a July 24, 2001 report, in which Dr. David Weiss, a Board-certified osteopath, referred to Table 17-33 and Table 17-35.[5] He opined that appellant had a 75 percent permanent impairment of the right, lower extremity as a result of his accepted employment injury due to a "poor" result from the right total knee replacement. Dr. Weiss determined that appellant reached maximum medical improvement on May 1, 2001.

In a November 20, 2001 report, the Office medical adviser determined that appellant was entitled to a 43 percent impairment of the right lower extremity.

The Office continued to develop the claim, and by letter dated January 3, 2002, referred appellant for a second opinion evaluation, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon. In a January 22, 2002 report, he noted appellant's history of injury and treatment and conducted a physical examination. Regarding the right knee, Dr. Maslow noted that appellant had degenerative changes at the joint, multiple surgical procedures, and eventually a total knee arthroplasty without a "fully satisfactory result." However, he explained that he did not believe the result was poor, but rather noted that appellant had a "fair" result. Dr. Maslow referred to

[2] On June 16, 1999 the Office authorized extraction of broken teeth and placement of osseointegrated fixtures and fixed maxillary prosthesis.

[3] Appellant also filed several claims for recurrences on September 20 and October 15, 1986, November 23, 1993, March 4, 1994, and March 19 and September 25, 2001, which were accepted as being causally related to the accepted employment injury. Furthermore, appellant had a nonwork-related automobile accident in November 1991.

[4] By letter dated July 24, 2001, appellant's representative requested a schedule award.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment,* 547, 549, Table 17-33, Table 17-35.

Table 17-33[6] and determined that appellant was entitled to an impairment of 50 percent to the right lower extremity due to a "fair" outcome from the total knee replacement.

On May 2, 2003 the Office referred appellant, together with a statement of accepted facts, and the medical record, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Weiss and Dr. Maslow, regarding the extent of appellant's permanent impairment.

In a May 25, 2003 report, Dr. Askin noted appellant's history of injury and treatment. He determined that appellant's knees were "active" because "a state of clinical repose or quiescence has not been achieved." Dr. Askin explained that appellant's left knee had "an effusion and the right knee has synovitis." He noted that appellant had disabling conditions, which included arthritic changes in the left knee and advised that "the right knee has been surgically altered by the knee replacement." Dr. Askin indicated that appellant's "knees hurt," and referred to Table 17-33.[7] He determined that appellant's right knee function was "fair," and explained that appellant could walk on it without a cane, in relative comfort. Dr. Askin opined that appellant had 50 percent lower extremity impairment. He noted that appellant reached maximum medical improvement on May 23, 2003.

On July 9, 2003 the Office forwarded the file to the Office medical adviser for review of appellant's impairment based upon the A.M.A., *Guides.* In a July 12, 2003 report, the Office medical adviser opined that he concurred with Dr. Maslow. He noted that Dr. Maslow determined that appellant had a "fair" outcome from the total knee replacement. The Office medical adviser referred to Table 17-33[8] and opined that appellant had an impairment of 50 percent of the right lower extremity.

In an August 12, 2003 report, Dr. Ronald M. Krasnick, a Board-certified orthopedic surgeon, noted that appellant could work in a sedentary capacity and had permanent limitations in terms of kneeling, squatting, crawling and climbing. He opined that appellant had a 50 percent permanent impairment.

On May 5, 2004 the Office granted appellant a schedule award for an additional 25 percent permanent impairment of the right leg.[9] The award covered a period of 60.7 weeks from August 10, 2003 to April 17, 2004.

On June 3, 2004 appellant requested a hearing, which was held on March 28, 2005.

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[6] *Id.* at 546, Table 17-33.

[7] *Id.*

[8] *Id.*

[9] The Board notes that appellant previously received an award on March 21, 1988 for 10 percent loss of use of the right leg. Additionally, on November 30, 1994, appellant received an award for an additional five percent for the right knee. Therefore, prior to the May 5, 2004 award, appellant only received 15 percent for his right lower extremity.

By decision dated June 3, 2005, the Office hearing representative affirmed the Office's May 5, 2004 decision. The hearing representative found that the report of Dr. Askin, as supported by Dr. Maslow, was entitled to special weight.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[10] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[11] The Act, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[12] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[13]

ANALYSIS

The Board finds that this case is not in posture for a decision. The case requires further development of the medical evidence.

The Office determined that a conflict in medical opinion was created between appellant's physician, Dr. Weiss, a Board-certified family practitioner, who found that appellant had an impairment of 75 percent to the right lower extremity, and Dr. Maslow, a Board-certified orthopedic surgeon and second opinion physician, who determined that appellant had no more than 50 percent of the right lower extremity. The Office referred appellant to Dr. Askin, a Board-certified orthopedic surgeon, and impartial medical examiner, to resolve the conflict.[14]

Section 8123(a) of the Act[15] provides, 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.[16] In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an

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[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8107.

[12] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[13] 20 C.F.R. § 10.404.

[14] On appeal, appellant asserts that Dr. Askin was improperly selected as an impartial specialist. However, appellant has not submitted any evidence establishing that Dr. Askin was improperly selected or that he was biased. *See William Fidurski*, 54 ECAB 146 (2002) (an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias); *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB 386 (2003) (a claimant who objects to the selection of a physician as a medical referee has the burden to document bias or unprofessional conduct on the part of the selected physician).

[15] 5 U.S.C. §§ 8101-8193.

[16] 5 U.S.C. § 8123(a).

impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[17]

In his May 25, 2003 report, Dr. Askin referred to Table 17-33 of the A.M.A., *Guides*[18] and determined that appellant's right knee function was "fair." His rationale was that "appellant could walk on it without a cane, in relative comfort." As a result, he determined that appellant was entitled to 50 percent lower extremity impairment. However, he did not reference Table 17-35 of the A.M.A., *Guides.*[19] This table would need to be utilized first, as appellant had a knee replacement, to determine the specific points obtained during the physician's evaluation of appellant.[20] The points obtained from the physician's assessment would then be applied to Table 17-33 for the diagnosis of the impairment rating.[21] The Board notes that Dr. Askin's report is unclear in this area and requires clarification. For example, although he noted that appellant's right knee function was fair, because he could walk without a cane in relative comfort, he did not explain or note why other factors such as pain, range of motion, stability, which were listed in Table 17-35 would or would not relate to his assessment. Board precedent provides that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[22]

Therefore, further development of the medical record is needed to establish the degree of appellant's right lower extremity impairment. On remand, the Office should request Dr. Askin for clarification of his opinion regarding the extent of appellant's permanent impairment based on a proper application of the fifth edition of the A.M.A., *Guides*. Following such further development as the Office deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision and must be remanded for further development of the medical evidence.

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[17] *Barbara J. Warren*, 51 ECAB 413 (2000).

[18] A.M.A., *Guides* 546.

[19] *Id.* at 549.

[20] *Id.* at 545.

[21] *Id.*

[22] *April Ann Erickson*, 28 ECAB 336, 341-42 (1977). To the extent that the Office relied on Dr. Maslow's report to bolster the report of Dr. Askin, the Board notes that the impartial specialist must resolve the conflict. *See id.*; *James P. Roberts*, 31 ECAB 1010 (1980).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2005 is set aside. The case is remanded for further action consistent with this decision.

Issued: July 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board