United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM STARR, Appellant	)	
	)	**Docket No. 06-347**
and	)	**Issued: May 4, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Chester, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 November 28, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated October 20, 2005, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's claim for a schedule award.

FACTUAL HISTORY

On January 26, 1993 appellant, then a 42-year-old dispatch clerk, filed a traumatic injury claim alleging that on the same day he was opening a lock on a vehicle and injured his back. The Office accepted appellant's claim for dorsal strain and aggravation of lumbar strain.[1]

[1] Appellant filed another claim for a back injury sustained on September 16, 1985, which the Office accepted for myofascitis lumbar spine, herniated disc at L4-5 and lumbar discectomy at L4-5, file number A13-78459. This claim was consolidated with the current claim before the Board.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and impartial medical examiners regarding the extent of his work-related condition and disability.

On November 29, 2001 appellant filed a claim for a schedule award. He came under the treatment of Dr. Neil M. Cohen, an osteopath, who noted on October 19, 2001 that appellant had reached maximum medical improvement. Appellant was referred to Dr. George L. Rodriguez, a Board-certified physiatrist, for a determination of permanent impairment. In a report dated March 6, 2002, Dr. Rodriguez noted a history of appellant's work injuries. He diagnosed herniated disc at L4-5, status post laminectomy and decompression, lumbar radiculopathy, bladder disorder, penile disease, chronic pain and gait abnormality. He opined that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*) appellant sustained a 38 percent impairment of the right lower extremity,[3] a 48 percent impairment of the left lower extremity,[4] a 20 percent whole person impairment for penile disease[5] and an 8 percent whole person impairment for bladder disorder.[6]

The Office referred the case record to an Office medical adviser for review. In a report dated August 5, 2002, the medical adviser indicated that there was no previous diagnosis establishing nerve damage to the genitalia and no causal relationship between the bladder and penile conditions and the accepted work injury. He recommended referring appellant for a second opinion examination.

On September 18, 2002 the Office referred appellant for an examination by Dr. Richard Bennett, a Board-certified neurologist. The Office provided Dr. Bennett with appellant's medical records, a statement of accepted facts as well as a detailed description of his employment duties. In a medical report dated October 7, 2002, Dr. Bennett reviewed the records provided to him and performed a physical examination of appellant. He addressed the history of appellant's work-related back injury and diagnosed chronic lower back pain consistent with spinal stenosis secondary to ongoing degenerative disc disease combined with the effects of two spine operations. He advised that an electromyogram (EMG) and nerve conduction study was performed, which revealed no signs of acute denervation, no motor impairment, chronic denervation or evidence of ongoing radiculopathic process. Dr. Bennett found no evidence of motor or sensory impairment and advised that physical examination revealed no objective signs of neurological or motor impairment. He further noted that there was no evidence of sexual or urologic disturbance resulting from a neurologic injury sustained at work. He concluded that appellant did not sustain any permanent impairment.

[2] A.M.A., *Guides* (5th ed. 2001).

[3] A.M.A., *Guides* at 552, Table 15-15, 15-16, 15-18 and 17-37.

[4] *Id.*

[5] A.M.A., *Guides* at 156, Table 7-5.

[6] A.M.A., *Guides* at 151, Table 7-3.

In a decision dated November 19, 2002, the Office denied appellant's claim for a schedule award.

In a letter dated March 7, 2003, appellant requested a review of the written record. He submitted a report from Dr. Rodriguez dated February 27, 2003, who stated his disagreement with the opinion of Dr. Bennett. Dr. Rodriguez advised that appellant had ongoing radiculopathy due to his work injury. He advised that Dr. Bennett's EMG was incomplete as he failed to test the F-wave measurement, which revealed motor impairment. Dr. Rodriguez further advised that an EMG was performed on December 26, 2002, which revealed a reduced right and left peroneal motor response with electrophysiologic evidence of right L5 radiculopathy.

In a decision dated October 21, 2003, an Office hearing representative determined that a conflict of medical opinion was created between Dr. Rodriguez, appellant's treating physician, and Dr. Bennett, the Office referral physician, regarding whether appellant sustained any permanent impairment due to his accepted injury. On November 20, 2003 the Office referred appellant to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, selected as the impairment medical specialist. The Office sent a copy of the statement of accepted facts which was prepared on August 31, 1993.

In a letter dated November 30, 2003, appellant through his attorney advised that the August 31, 1993 statement of accepted facts was incorrect and predated appellant's surgery for bilateral L2 through 5 laminectomy with nerve root decompressions that was performed on June 28, 1996. By letter dated December 8, 2003, the Office advised appellant that it would review the statement of accepted facts for errors and, if necessary, update and send it back to the physician for a supplemental report.

In a report dated December 4, 2003, Dr. Askin reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury and indicated that appellant advised him that he underwent a second surgery in 1996, which was not mentioned in the statement of accepted facts. Dr. Askin noted that appellant did not mention sexual dysfunction during the examination. He diagnosed degenerative changes in appellant's lumbosacral facet joints and attributed appellant's back pain to this condition. Dr. Askin noted findings upon physical examination of full range of motion of the neck, shoulders, elbows, forearms, wrists, fingers and thumbs, Spurling test was negative, muscle function of the trapezii, latissimus dorsi, pectoralis, deltoids, triceps, biceps, wrist flexors and extensors bilaterally were intact, thenar function was intact, Phalen's, Tinel's and Finkelstein's tests were negative bilaterally, there was no tenderness of the paravertebral muscles, trochanters or sciatic notches and sensation was preserved with no anesthesia about either foot or leg. He indicated that there was no objective clinical evidence of neurological impairment. Dr. Askin advised that, although he could not reconcile the EMG reports prepared for Drs. Rodriguez and Bennett, neither reported denervation changes on needle study of the muscles. Upon physical examination, appellant did not present with symptoms indicative of radiculopathy including muscle weakness, atrophy, asymmetry of the deep tendon reflexes or positive straight leg raising.

He advised that based on the fifth edition of the (A.M.A., *Guides*)[7] appellant sustained an eight percent impairment of the whole person for the accepted L4-5 disc herniation.[8]

By letters dated December 23, 2003 and January 3, 2004, appellant again requested a revised statement of accepted facts be prepared and referred to the impartial medical examiner for consideration.

On February 6, 2004 the Office referred the matter to the medical adviser for an opinion as to whether it was necessary to amend the statement of accepted facts to include surgery performed on June 28, 1996, in order for Dr. Askin to calculate a percentage of permanent impairment and, if not, whether appellant had ratable permanent impairment. In a report dated February 10, 2004, the medical adviser indicated that it was not necessary to amend the statement of accepted facts because there was no provision for a schedule award for the back or spine, only for radiculopathy of the extremities. In this case, the medical adviser noted that Dr. Askin found no objective clinical evidence of neuropathy, which included radiculopathy, of the lower extremities. He further advised that the surgery for nerve root decompression relieved the pressure on the roots so that there would be no permanent impairment.

In a decision dated February 12, 2004, the Office denied appellant's claim for a schedule award, finding that the weight of the medical evidence rested with Dr. Askin, which established that appellant had no permanent impairment to a scheduled member due to his accepted work-related injury.

In a letter dated March 5, 2004, appellant requested an oral hearing before an Office hearing representative. The hearing was held on June 28, 2005. Appellant asserted in letters dated April 20 and May 31, 2005, that both Drs. Bennett and Askin's reports were flawed as they were based on an inaccurate statement of accepted facts. He further alleged that Dr. Askin was biased against injured workers. Appellant submitted the surgery report of June 28, 1996.

In a decision dated October 20, 2005, the hearing representative affirmed the February 12, 2004 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[9] and its implementing regulation[10] 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, good administrative practice necessitates the use of a single set of tables so that there may be

[7] *Supra* note 2.

[8] A.M.A., *Guides* at 384, Table 15-3.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404 (1999).

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]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[12] Neither the Act nor its implementing regulation provides for the payment of a schedule award for the permanent loss of use of the back or the body as a whole and no claimant is entitled to such a schedule award.[13] The Board notes that section 8101(20) specifically excludes the back from the definition of "organ."[14] 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.[15]

ANALYSIS

Appellant alleges that he is entitled to a schedule award for permanent partial impairment of the lower extremities and back. The Office accepted his claim for dorsal strain and aggravation of lumbar strain. However, as noted, the Act does not permit a schedule award based on impairment to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper or lower extremities due to his accepted back condition.

In this case, the Office determined that a conflict existed in the medical evidence between appellant's attending physician, Dr. Rodriguez, who disagreed with the Office referral physician, Dr. Bennett, concerning whether appellant had any permanent impairment of the lower extremities. The Office properly referred appellant to Dr. Askin to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[16] The Board finds that the opinion of Dr. Askin is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant is not entitled to a schedule award.

Dr. Askin noted a history of appellant's work-related injury and subsequent surgeries. Appellant informed the physician that he underwent a second back surgery in 1996, which produced favorable results but was not mentioned in the statement of accepted facts. Dr. Askin diagnosed degenerative changes in his lumbosacral facet joints and opined that appellant's back pain was attributable to this condition. He noted that neither of the EMG and nerve conduction studies dated October 7 and December 26, 2002 reported denervation changes on needle study of

[11] *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[12] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[13] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[14] 5 U.S.C. § 8101(20).

[15] *Thomas J. Engelhart*, *supra* note 12.

[16] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

the muscles. Upon physical examination, appellant did not present symptoms consistent with radiculopathy, such as muscle weakness, atrophy, asymmetry of the deep tendon reflexes or positive straight leg raising and sensation was preserved with no anesthesia about either foot or leg. Dr. Askin emphasized that there was no objective clinical evidence of neurological impairment. He advised that based on the fifth edition of the A.M.A., *Guides*[17] appellant sustained an eight percent impairment of the whole person for the accepted L4-5 disc herniation.[18] However, an estimate of impairment to the whole person[19] or back[20] is not compensable under the Act. Dr. Askin found no other basis on which to attribute impairment under the A.M.A., *Guides*.

The medical adviser properly reviewed the medical evidence and in a report dated February 10, 2004, found no basis for an impairment rating, based on the findings presented by Dr. Askin. While the medical adviser noted that appellant had spinal impairment, he noted that the spine is not a schedule member of the body. The medical adviser further noted that there was no medical reason for seeking a supplemental report from Dr. Askin based on the omission of appellant's 1996 surgery from the statement of accepted facts.[21] The Board finds that it was not necessary for the Office to seek a supplemental report from Dr. Askin under the circumstances presented as the physician acknowledged this surgery and factored this into his opinion regarding appellant's impairment.

Appellant also contends that he is entitled to a rating for impairment to his penis. However, the Office did not accept any condition relative to the penis.[22] Dr. Askin, the impartial medical specialist, did not attribute any impairment to the penis due to appellant's accepted employment conditions.

Appellant asserted that the reports of Dr. Bennett and Dr. Askin are flawed as they were based on an inaccurate history and an inaccurate statement of accepted facts. As noted, the report from the impartial specialist acknowledged the 1996 surgery. Although there may be omissions in the statement of accepted facts, the impartial medical adviser addresses both of appellant's accepted injuries of 1985 and 1993 and each of the accepted conditions of myofascitis lumbar spine, herniated disc at L4-5 and lumbar discectomy at L4-5, dorsal strain and aggravation of lumbar strain. He provides findings on examination of each of these areas

[17] *Supra* note 2.

[18] *Supra* note 8.

[19] *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

[20] *Supra* note 14.

[21] *See Guiseppe Aversa*, 55 ECAB ___ (Docket No. 03-2042, issued December 12, 2003) (in a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion).

[22] Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004).

and a review of the diagnostic testing. Therefore, the Board finds this argument to be without merit.

Additionally, appellant alleged that Dr. Askin was biased toward injured workers. However, he submitted no evidence to support this assertion. The Board has held that 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.[23]

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award.[24]

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 4, 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

[23] *See William Fidurski*, 54 ECAB 146 (2002).

[24] With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).