United States Department of Labor
Employees' Compensation Appeals Board

C.P., Appellant	)	
and	)	**Docket No. 07-742**
	)	**Issued: August 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan S. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 23, 2007 appellant filed a timely appeal from the December 18, 2006 merit decision of the Office of Workers' Compensation Programs concerning her schedule award. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award issue.

ISSUE

The issue is whether appellant has established entitlement to a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated January 28, 2005, the Board affirmed Office decisions dated February 26 and July 8, 2004 finding that appellant did not meet her burden of proof to establish entitlement to a schedule award due to her accepted condition of displacement of thoracic disc superimposed over preexisting degenerative disc disease.[1] The Board found that there was no evidence that appellant had an impairment of her

[1] Docket No. 04-1998 (issued January 28, 2005).

upper or lower extremities due to her accepted condition and that the Office properly denied her request for reconsideration. The findings of fact and conclusions of law as set forth in the Board's prior decision are hereby incorporated by reference.

In a letter dated December 13, 2005, appellant requested reconsideration of the disallowance of her schedule award claim. In support of her request, she submitted an April 27, 2005 report from Dr. Timothy Morely, an osteopath.

By letter dated February 23, 2006, the Office referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion examination. Under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Kaffen found that appellant had a zero percent impairment of the bilateral upper extremities and the bilateral lower extremities.

The Office determined that a conflict in medical evidence was created between the opinions of Dr. Morley and Dr. Kaffen with respect to whether a permanent impairment existed. It referred appellant to Dr. Loretta Peterson, Board-certified in physical medicine and rehabilitation, for an impartial evaluation.[2] In a July 17, 2006 report, Dr. Peterson reviewed the factual and medical background and noted appellant's complaints. She found that appellant had asymmetric loss of range of motion based on the diagnostic-related estimate (DRE) thoracic Category II. Dr. Peterson subsequently opined, based on Table 15-4, page 389 of the A.M.A., *Guides*, that appellant had a five percent impairment of the whole person. She reported that appellant reached maximum medical improvement, but then noted that "maximum medical improvement would have occurred only upon completion of therapy." Dr. Peterson additionally advised that the accepted condition was still active and disabling and provided a Form OWCP-5 report noting appellant's restrictions.

In an August 23, 2006 report, an Office medical adviser reviewed Dr. Peterson's report and stated that he was unable to provide the requested permanent partial impairment rating "due to inaccurate information." The Office medical adviser noted that Dr. Peterson reported an impairment of the spine using DRE thoracic Category II, which is unacceptable to the Office, and did not provide any of the requested information pertaining to upper extremity impairments or the date of maximum medical improvement.

In a September 13, 2006 letter, the Office requested that Dr. Peterson provide a supplemental report consistent with the A.M.A., *Guides* for the accepted displacement of thoracic disc superimposed over preexisting degenerative disc disease. In a September 19, 2006 report, Dr. Peterson opined that appellant had a five percent whole person impairment. Under Table 15-10, page 411 and Table 15-11, page 414 of the A.M.A., *Guides*, she advised a left rotation of the thoracic spine of 10 degrees equaled a 2 percent impairment of the whole person; a right rotation of the thoracic spine of 10 degrees equaled a 2 percent impairment of the whole person; and flexion of 30 degrees equaled a 1 percent impairment of the whole person.

[2] Dr. Peterson was provided with the medical record, a statement of accepted facts and a set of questions regarding appellant's permanent impairment.

Dr. Peterson stated that maximum medical improvement would not occur until the completion of appellant's physical therapy.

Because Dr. Peterson did not provide medical documentation which corresponded to the information the Office medical adviser requested, an Office claims examiner called the Cleval Evaluation Center where Dr. Peterson works on October 18, 2006 and spoke to "Ellen." In an October 25, 2006 report of the October 18, 2006 telephone conversation, the claims examiner noted that Dr. Peterson's report did not address what the Office had requested in its clarification request and that it were looking for a follow-up to what their Office medical adviser had outlined in his report in order to assess a permanent partial impairment. The claims examiner went over in detail what was needed to assess a permanent partial impairment. Ellen stated that she would see Dr. Peterson that night and would ask whether Dr. Peterson would be able to provide the proper information to make a permanent impairment determination. On October 26, 2006 the claims examiner placed a follow-up call with Ellen at the Cleval Evaluation Center and inquired whether Dr. Peterson was able to provide the necessary information so that the Office could calculate a permanent partial impairment. On November 1, 2006 Ellen from the Cleval Evaluation Center called the Office and advised that Dr. Peterson would be able to provide the figures the Office medical adviser was looking for and a report would be provided soon. No new written requests for information were sent to Dr. Peterson.

In an October 21, 2006 report, Dr. Peterson advised that there was no impairment to range of motion of the upper and lower extremities and cited to various tables within the A.M.A., *Guides*. She additionally advised that there was normal sensation and normal muscle power in the bilateral upper and lower extremities.

In a November 24, 2006 report, the Office medical adviser indicated that the date of maximum medical improvement was unknown and opined that appellant had a zero percent impairment in both her upper and lower extremities based on Dr. Peterson's October 21, 2006 medical report. He indicated that Dr. Peterson reported that appellant had a full range of motion of the joints of both upper extremities and normal sensation and normal muscle power of her bilateral upper extremities, which would result in a zero percent permanent impairment. The medical adviser indicated that Dr. Peterson also reported that appellant has normal range of motion and normal sensation and muscle power in both lower extremities, which results in a zero percent impairment of the lower extremities.

By decision dated December 18, 2006, the Office affirmed its earlier decision that appellant had no permanent partial impairment to either her upper or lower extremities as a result of her accepted work-related condition.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] sets forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. However,

[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.404.

neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulation.[6] 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.[7] The Board notes that section 8109(19) specifically excludes the back from the definition of organ.[8] 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.[9]

Section 8123(a) of the Act[10] provides that, 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.[11] When the case is referred to an 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.[12]

In a situation where the Office secures a report 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.[13] The Office's procedures direct: "If clarification or additional information is needed, the claims examiner will write to the specialist to obtain it. Under no circumstances ... should the [claims examiner] telephone the specialist for elaboration of the report as information obtained ... cannot be considered probative medical evidence and bias may be inferred as a result."[14] These

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[5] *See Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

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

[7] 5 U.S.C. § 8107; *see also Richard R. Lemay, supra* note 6.

[8] *Id.* at § 8109(19).

[9] *See Richard R. Lemay and Thomas J. Engelhart*, *supra* note 6.

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[12] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[13] *Phillip H. Conte*, 56 ECAB ___ (Docket No. 04-1524, issued December 22, 2004); *Guiseppe Aversa*, 55 ECAB 164, 168 (2003).

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examination*, 3.500.5(b)(2) (October 1995).

procedures also require the exclusion of an impartial medical examiner's report where the report "is obtained through telephone contact or submitted as a result of such contact."[15]

Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.[16]

ANALYSIS

The Office accepted appellant's claim for a displacement of thoracic disc, superimposed over preexisting degenerative disc disease. With respect to whether appellant had an impairment due to her accepted work-related condition, the Office found that a conflict in medical opinion arose between Dr. Morley, appellant's physician, and Dr. Kaffer, who provided a second opinion evaluation for the Office. The Office properly referred appellant to Dr. Peterson for an impartial evaluation as to the extent of impairment to either or both of appellant's extremities.

In her July 17, 2006 report, Dr. Peterson reviewed the history of injury, appellant's complaints and the medical record and conducted a thorough physical examination and provided detailed findings. Dr. Peterson, however, in her July 17, 2006 report and clarification report of September 19, 2006, did not properly rate appellant's impairment under the A.M.A., *Guides*.[17] As Dr. Peterson's impairment ratings were not appropriate for a schedule award determination under the Act, the Office attempted to secure a supplemental report from Dr. Peterson to correct the defects in her reports.[18] However, the Board finds that the October 21, 2006 report of Dr. Peterson was improperly obtained and must be excluded from the record.

Dr. Peterson's October 21, 2006 report was apparently submitted in response to an October 18, 2006 telephone conversation between the Office claims examiner and Dr. Peterson's office. In the October 25, 2006 report of the October 18, 2006 telephone conversation, the claims examiner noted that Dr. Peterson's earlier report did not address the information the Office had requested in its clarification request. The claims examiner explained what information it needed to assess a permanent partial impairment and requested that Dr. Peterson provide such information. In the October 26, 2006 report of the telephone conversation, the claims examiner inquired whether Dr. Peterson would be able to provide the requested information.

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[15] *Id.* at 3.500.6(c).

[16] *See Thomas J. Fragale*, 55 ECAB 619 (2004). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002).

[17] In her July 17 and September 19, 2006 reports, Dr. Peterson provided an impairment rating based on findings of the thoracic spine. To be entitled to a schedule award, there must be a permanent impairment to a scheduled member of the body. Neither the Act nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. The back is specifically excluded from the definition of organ under the Act. *See Richard R. Lemay, supra* note 6. Dr. Peterson's reference to the thoracic spine in her July 17 and September 19, 2006 reports, rather than the extremities, is not appropriate for a schedule award determination under the Act.

[18] *Phillip H. Conte*, *supra* note 13.

In *Carlton Owens*,[19] the Board held that oral communications or conversations between the Office and the impartial medical examiner on disputed issues should not occur, as it undermines the appearance of impartiality that is crucial to a referee opinion. In *Edward E. Wright*,[20] the Board applied the principles in *Owens* to a situation where the communication was with the physician's office personnel. Similarly, in *George A. Johnson*,[21] the Board found that a telephone conversation between an Office claims examiner and an impartial medical examiner's office regarding the disputed issue raised an appearance of impropriety such that this report was considered to be improperly obtained. The Board directed that the report in question in *Johnson* be excluded from the record.

The Board finds that the Office's October 18, 2006 telephone conversation with Dr. Peterson's office raises an appearance of impropriety as a prohibited communication regarding the disputed issue of whether appellant has established entitlement to a schedule award. Specifically, the Office's discussion of what information Dr. Peterson's report should contain undermines the appearance of impartiality on the disputed issue.[22]

Consequently, the supplemental medical report dated October 21, 2006 was improperly obtained and must be excluded from the case record.[23] Because the conflict in medical opinion remains, the Office should refer appellant to an appropriate impartial medical examiner not previously associated with this case for resolution of the conflict of the issue of whether appellant has impairment of her extremities due to her accepted work-related condition. After such further development as is necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The case is not in posture for decision due to an unresolved conflict in the medical opinion.

[19] 36 ECAB 608, 616 (1985).

[20] 41 ECAB 1017 (1990).

[21] 43 ECAB 712 (1992).

[22] *Carol E. Swiggins*, 47 ECAB 667 (1996).

[23] *George A. Johnson*, *supra* note 21.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 18, 2006 is set aside and the case remanded for further action consistent with this opinion.

Issued: August 9, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board