United States Department of Labor
Employees' Compensation Appeals Board

T.F., Appellant	)	
and	)	**Docket No. 07-846**
	)	**Issued: August 10, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Plymouth Meeting, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 6, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 9, 2006 with respect to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a four percent permanent impairment to each lower extremity, for which he received schedule awards.

FACTUAL HISTORY

The case has been before the Board on two prior appeals. In a decision dated February 1, 2002, the Board found a conflict of medical opinion existed as to whether appellant had an employment-related permanent impairment to a scheduled member of the body under the Federal Employees' Compensation Act.[1] The Office referred appellant to Dr. William Schaaf, a Board-

[1] Docket No. 01-1260 (issued February 1, 2002).

certified orthopedic surgeon selected as a referee examiner. In a decision dated November 8, 2002, the Office issued a schedule award for a four percent permanent impairment to each lower extremity. By decision dated July 8, 2004, the Board found that the referee physician selected did not resolve the conflict.[2] The case was remanded to secure a report from an appropriate referee examiner. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

The Office selected Dr. Richard Whittaker, a Board-certified orthopedic surgeon, as a referee examiner. Dr. Whittaker was provided with a statement of accepted facts and medical records. In a report dated November 15, 2005, he provided a history and results on examination. Dr. Whittaker reviewed medical records and noted that the record showed that appellant had back problems and neurologic symptoms as a result of degenerative spine disease predating his 1994 employment injury. He also noted that the accepted conditions in this case were thoracic sprain and lumbosacral strain with radiculopathy. Dr. Whittaker further stated, "In my opinion, and within a reasonable degree of medical certainty, symptoms related to his 1994 injury have resolved. Appellant has no disability in reference to his 1994 injury. His diagnosis has resolved from his injury and now his symptoms are related to his degenerative disc disease, which he had prior to his injury, his obesity, deconditioning and his diabetes. These are all unrelated to his injury." Dr. Whittaker noted that he was familiar with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, but this did not apply as symptoms referable to his employment injury had resolved.

By decision dated December 13, 2004, the Office determined that appellant did not have more than a four percent permanent impairment to each lower extremity. Appellant requested a hearing before an Office hearing representative. In a decision dated September 9, 2005, the hearing representative set aside the December 13, 2004 decision and remanded the case for further development. He found that the opinion of Dr. Whittaker was not fully rationalized.

The Office requested that Dr. Whittaker submit a supplemental report. In a report dated November 8, 2005, Dr. Whittaker reviewed the evidence and again opined that the employment injury had resolved. He noted that orthopedic texts indicate sprain and strains will resolve within one or two months and therefore scientific evidence showed that symptoms had resolved in reference to appellant's work injury. Dr. Whittaker again noted that medical records showed that appellant had prior back problems and the degenerative disc disease, obesity, diabetes and deconditioning were not related to the employment injury. He also indicated that diabetes can cause a peripheral neuropathy. In a report dated January 6, 2006, Dr. Whittaker reiterated his opinion that residuals of the employment injury had resolved.

By decision dated February 1, 2006, the Office determined that appellant did not have more than a four percent permanent impairment to each leg.

Appellant requested a hearing, which was held on May 26, 2006. By decision dated August 9, 2006, the hearing representative affirmed the February 1, 2006 decision.

[2] Docket No. 04-835 (issued July 8, 2004).

LEGAL PRECEDENT

Section 8107 of the Act 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] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice under the law for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4] Any permanent impairment must be causally related to an accepted employment injury.[5]

It is well established that, when a case is referred to a referee examiner for the purpose of resolving a conflict under 5 U.S.C. § 8123(a), the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[6]

ANALYSIS

In the present case, Dr. Whittaker was selected as a referee examiner to resolve the conflict regarding an employment-related permanent impairment. He provided reports dated November 15, 2004, November 8, 2005 and January 6, 2006, which provided a detailed factual and medical history. In addition, Dr. Whittaker offered an unequivocal opinion that the employment injury had resolved with no permanent impairment. He explained that appellant had preexisting degenerative disc disease that was not causally related to the employment injury, and that appellant suffered from diabetes, obesity and deconditioning. Dr. Whittaker noted that the accepted conditions in this case were thoracic sprain and lumbar strain with radiculopathy, and that sprains and strains typically resolved in a short period of time.[7] He found that appellant's current conditions were degenerative disc disease and diabetes, which were not employment related. Dr. Whittaker indicated that he was familiar with the A.M.A., *Guides* but they were not applicable in this case because the employment injury had resolved.

The Board finds that Dr. Whittaker provided a rationalized medical opinion based on a complete factual and medical background. As noted above, a rationalized opinion from a referee examiner is entitled to special weight. Dr. Whittaker represents the weight of the evidence in this case and the Office properly concluded that appellant was not entitled to an additional schedule award.

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[3] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[4] *A. George Lampo*, 45 ECAB 441 (1994).

[5] *Rosa Whitfield Swain*, 38 ECAB 368 (1987).

[6] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[7] Appellant noted that Dr. Whittaker quoted from an orthopedic textbook. While medical literature itself is not probative medical evidence, a physician may properly refer to medical literature to support a medical opinion. *See Elizabeth N. Kramm,* 57 ECAB ___ (Docket No, 05-715, issued October 6, 2005).

CONCLUSION

The evidence does not establish more than a four percent permanent impairment to each leg.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2006 is affirmed.

Issued: August 10, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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