United States Department of Labor
Employees' Compensation Appeals Board

E.Y., Appellant	)	
and	)	**Docket No. 08-219**
	)	**Issued: August 15, 2008**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY SYSTEMS COMMAND, Philadelphia, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 30, 2007 appellant, through his attorney, filed a timely appeal of an Office of Workers' Compensation Programs' hearing representative's May 31, 2007 schedule award decision. 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 24 percent impairment of his right lower extremity for which he has received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. On May 25, 1989 appellant, then a 43-year-old automobile mechanic, sustained injury to his right knee. The Office authorized surgery and appellant underwent arthroscopy of his right knee with partial medial meniscectomy and excision of a mass of the patellar tendon. On June 25, 1998 the Office granted appellant a

schedule award for 24 percent impairment of the right lower extremity. An Office hearing representative affirmed this decision on April 1, 1999. In a decision dated December 6, 2000, the Board found a conflict of medical opinion evidence regarding the extent of permanent impairment and remanded the case for referral to an impartial medical examiner.[1] The Office referred appellant for an impartial medical examination with Dr. Stanley Askin, a Board-certified orthopedic surgeon. By decision dated February 28, 2001, the Office denied appellant's claim for an additional schedule award based on Dr. Askin's report. In a decision dated December 16, 2002, the Office hearing representative set aside the February 28, 2001 decision and remanded the case to obtain a supplemental report from Dr. Askin. Thereafter, the Office denied appellant's claim for an additional schedule award on August 6, 2003. An Office hearing representative affirmed the August 6, 2003 decision on June 14, 2004. In a decision dated May 4, 2005, the Board noted that appellant underwent two additional surgeries to his right lower extremity in April 1999 and November 2000. The Board reviewed Dr. Askin's reports and determined that he had not properly applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* in arriving at his impairment rating. Dr. Askin found that appellant reached maximum medical improvement on November 30, 2001 and had 15 percent impairment of the right lower extremity due to both loss of range of motion and diagnosis-based impairments. This combination is prohibited by the A.M.A., *Guides*. The Board further found that Dr. Askin did not properly calculate appellant's impairment in accordance with the diagnosis-based estimates as he found mild impairments for both the cruciate and collateral ligaments. The Board remanded the claim for the Office to obtain a supplemental report from Dr. Askin regarding the degree of appellant's impairment. The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

In a letter dated June 3, 2005, the Office requested that Dr. Askin further address the degree of impairment to appellant's right lower extremity. Dr. Askin responded on June 4, 2005 and noted that appellant had injury to his meniscus which entailed a loss of the "spacing" function resulting in laxity of the knee ligaments. He stated that his previous finding regarding mild laxity of the collateral and cruciate ligaments was based on the partial loss of the menisci and should not have been accorded a separate impairment estimate. Dr. Askin concluded, "Given that [appellant's] condition is fully contained within the diagnosis-based estimate for 'meniscectomy, medial and lateral, partial' his impairment rating is 10 percent of the lower extremity per [T]able 17-33 of page 546 of the [A.M.A., *Guides*] [fifth] [e]dition based on the information provided and the examination findings of July 9, 2003."

By decision dated June 13, 2005, the Office denied appellant's claim for an additional schedule award. The Office found that Dr. Askin's reports were entitled to the weight of the medical evidence and established that appellant had 10 percent impairment of his right lower extremity.

Appellant, through his attorney requested an oral hearing on June 16, 2005. The Office hearing representative set aside the June 13, 2005 decision on February 22, 2006 and remanded the claim for referral to a new impartial medical specialist to resolve the conflict of medical

[1] Docket No. 99-2389 (issued December 6, 2000).

opinion evidence regarding the extent of appellant's permanent impairment for schedule award purposes.

The Office referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated September 20, 2006, Dr. Didizian noted examining appellant on September 16, 2006 and listed appellant's history of injury and medical treatment. On physical examination he noted that appellant was congenitally bow-legged with five to seven degrees of varus. Dr. Didizian found appellant had minimal crepitation at the patellofemoral joint, intact cruciate ligament, negative Drawer's test and negative Lachman's test. He examined appellant's standing x-rays and found medial joint line narrowing bilaterally to one millimeter. Dr. Didizian found appellant's right knee range of motion was from 0 to 85 degrees. He stated that appellant had 10 percent impairment due to loss of flexion and, based on the diagnosis-based estimates, appellant had 10 percent impairment due to partial medial and lateral meniscectomies. Dr. Didizian stated, "I am aware that the basic principle in utilizing [the A.M.A., *Guides*] is to either use a diagnosis-based impairment or range of motion impairment. In this patient's case, the impairment for both is the same at 10 percent of the lower extremities." He concluded that appellant had 10 percent impairment of his right lower extremity.

By decision dated October 6, 2006, the Office denied appellant's claim for an additional schedule award finding that the weight of the medical opinion evidence rested with Dr. Didizian.

Appellant, through his attorney, requested an oral hearing. Counsel appeared at the oral hearing on February 21, 2007 and contended that Dr. Didizian's report was not sufficient to constitute the weight of the medical opinion evidence as he did not provide a rating based on loss of strength,[2] did not address the laxity of the knee ligaments and as he did not provide a rating for medial joint line narrowing or for pain. He also contended that the reports of Dr. Askin should have been excluded from the record.

By decision dated April 18, 2007, the Office denied appellant's request to change treating physicians.[3]

The hearing representative affirmed the Office's October 6, 2006 decision on May 31, 2007. He found that Dr. Didizian's report was sufficient to constitute the weight of the medical opinion evidence as it was based on a proper factual background and provided medical reasoning in support of his conclusions. The hearing representative found that Dr. Askin's report was not required to be excluded from the record.

[2] The A.M.A., *Guides* provide that it is improper to combine impairments for decreased strength and decreased range of motion as well as to combine decreased strength with diagnosis-based estimates. A.M.A., *Guides* 526, Table 17.2; *Patricia J. Horney*, 56 ECAB 256, 258 (2005).

[3] As appellant did not request review of this decision on his application for review, the Board will not address this issue on appeal.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] set 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 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.

If a claimant's various impairment ratings cannot be combined, he is entitled to only the greater of the two evaluation methods.[6] It is the responsibility of the evaluating physician to explain in writing why a particular method to assign the impairment rating was chosen.[7] 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 rationalized and based on proper factual and medical background must be given special weight.[8]

ANALYSIS

The Board remanded the case for the Office to obtain a supplemental report from Dr. Askin, a Board-certified orthopedic surgeon and impartial medical examiner. The Office obtained a supplemental report from Dr. Askin on June 5, 2005. Dr. Askin acknowledged that he incorrectly included ligament laxity as a separate diagnosis-based estimate when this function of the meniscus would be included under the diagnosis-based estimate for partial meniscectomies of the lateral and medial meniscus. He concluded that appellant's right lower extremity impairment was 10 percent based on the partial meniscectomies.[9]

An Office hearing representative found that Dr. Askin's supplemental report was not sufficiently rationalized to constitute the weight of the medical opinion evidence and remanded the case to the Office for a second impartial medical examination.[10] The Office referred

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Juantia L. Spencer*, 56 ECAB 611 (2005).

[7] *Tara L. Hein*, 56 ECAB 431 (2005).

[8] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[9] A.M.A., *Guides*, 546, Table 17-33.

[10] On appeal, appellant's attorney alleged that Dr. Askin's reports should be excluded from the record. This allegation is not supported by the Office procedure manual or Board precedent which requires exclusion of a second impartial medical examiner's report only when the Office fails to request a supplemental report from the initial impartial medical examiner. *Nancy Keenan*, 56 ECAB 687, 692 (2005); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.0500.6.b (March 2005).

appellant to Dr. Didizian, a Board-certified orthopedic surgeon, to conduct the second impartial medical examination. In his September 20, 2006 report, Dr. Didizian examined appellant and provided a detailed history of injury and medical history. He found a permanent impairment based on the loss of range of motion of the right lower extremity. The A.M.A., *Guides* provide that flexion of less than 110 degrees is 10 percent impairment of the lower extremity.[11] Dr. Didizian also provided a diagnosis-based estimate due to the partial medial and lateral meniscectomies also 10 percent impairment of the lower extremity under the A.M.A., *Guides.*[12] *Dr.* Didizian also noted that appellant had medial joint line narrowing to one millimeter in the medial joint space based on standing x-rays.[13]

The A.M.A., *Guides* provide that a loss of range of motion impairment may not be combined with an impairment rating for arthritis.[14] However, the A.M.A., *Guides* do allow the combination of diagnosis-based estimates and arthritic impairments.[15] The A.M.A., *Guides* provide that one millimeter cartilage interval of the patellofemoral joint[16] is 15 percent impairment of the lower extremity.[17] When the 10 percent diagnoses-based impairment for the partial meniscectomy and 15 percent impairment for arthritis are combined, this results in 24 percent impairment of the lower extremity.[18]

Appellant has already received a schedule award for 24 percent impairment of the right lower extremity. Therefore based on the weight of the medical opinion evidence as represented by Dr. Didizian, the impartial medical examiner, appellant has 24 percent impairment of his right lower extremity for which he has received a schedule award.[19] He has not established greater impairment.

[11] A.M.A., *Guides* 537, Table 17-10.

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

[13] *Id*. at 544, 17.2h Arthritis.

[14] *Id*. at 526, Table 17-2.

[15] *Id.*

[16] Dr. Didizian did not specifically indicate whether appellant's loss of cartilage interval involved the patellofemoral joint or the knee joint. A.M.A., *Guides*, 544, Table 17-31. Assuming that the loss of cartilage interval involves the patellofemoral joint and not the knee joint, with a maximum cartilage interval of one millimeter, then appellant has additional 15 percent impairment rating. If the loss of cartilage interval is established to involve the knee joint, the impairment rating for 1 millimeter is 25 percent of the right lower extremity. *Id.*

[17] A.M.A., *Guides*, 544, Table 17-31.

[18] *Id.* at 604

[19] Appellant's attorney argued that appellant was entitled to an additional evaluation due to his diagnosed vagus or bow-legged stature. The A.M.A., *Guides* provided for impairment rating for vagus deformity only due to knee ankylosis. Dr. Didizian did not opine that appellant's right lower extremity was ankylosed in vagus and he is not therefore entitled to an additional impairment rating for this condition. A.M.A., *Guides* 540, Table 17-20.

CONCLUSION

The Board finds that the medical evidence supports an impairment rating of 24 percent for which appellant has already received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2007 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: August 15, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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