

FACTUAL HISTORY

This case has previously been before the Board. On September 18, 2006 the Board set aside a November 3, 2005 decision denying appellant's schedule award claim.¹ The Board found a conflict in medical opinion between Dr. Nicholas Diamond, an attending physician, and Dr. Richard J. Mandel, a Board-certified orthopedic surgeon and referral physician, regarding whether she sustained any permanent impairment of the left lower extremity causally related to her March 3, 1998 employment injury. The Board remanded the case for the Office to refer appellant for an impartial medical examination. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By letter dated September 26, 2006, appellant's attorney requested to participate in the selection of the physician to ensure an impartial evaluation. He also asked that the Office provide him with a decision with appeal rights if it denied his request. On October 4, 2006 the Office advised the attorney that it would schedule the examination using procedures designed to safeguard impartiality.

On October 4, 2006 the Office referred appellant to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. By letter dated October 12, 2006, her attorney requested the Office's referral letter, a statement of accepted facts and a copy of the report from Dr. Lee when it became available. On October 12, 2006 the Office provided him with the requested information and informed him that he could request a copy of Dr. Lee's report 30 days after the examination.

In a report dated October 24, 2006, Dr. Lee discussed appellant's history of a left ankle fracture when she slipped and fell on ice on March 2, 1998. Appellant had a previous history of a crush injury to the left ankle. Before her March 1998 fall, appellant was diagnosed with possible multiple sclerosis. Appellant used a walker for ambulation. Dr. Lee stated:

“The examination of the left ankle shows a well-healed surgical scar in the medial and lateral malleolus. There is an old depigmented scar of the medial malleolus as the result of the crush injury when she was young. There is no significant ankle joint swelling but she does have generalized swelling of both calves. The left ankle joint demonstrates full flexion and extension. There is no instability of the collateral ligament on the stress test. [Appellant] has local tenderness on palpation around the ankle joint. There is no palpable mass or joint effusion.”

¹ Docket No. 06-952 (issued September 18, 2006). The Office accepted that appellant sustained a left ankle fracture on March 3, 1998. On March 5, 1998 she underwent an open reduction and internal fixation of the medial and lateral malleolus of the left ankle. On March 14, 1999 the Office terminated her compensation and authorization for medical treatment, finding that appellant had no further disability or residuals of her employment injury. A hearing representative affirmed the termination by decision dated January 13, 2000. On March 22, 2001 the Board affirmed the termination of compensation and medical benefits by the Office. Docket No. 00-1630 (issued March 22, 2001).

Dr. Lee found that appellant had swelling and limited movement of the right ankle and general weakness of the lower extremities and arm muscles. He interpreted her final x-rays as showing “completely healed fractures of the medial and lateral malleolus and normal ankle mortis.” Dr. Lee stated:

“As far as the injury associated with the incident on March 3, 1998 is concerned, this was limited to a left ankle fracture, which was treated in an excellent manner and has completely recovered with no functional impairment, residuals or disability at this time. Therefore, she has fully recovered.

“However, [appellant] had an unrelated preexisting medical condition of multiple sclerosis, which is a disabling medical condition and has progressed. Her present difficulty with ambulation is solely due to the unrelated preexisting progressive multiple sclerosis and not from any residual of her left ankle injury, in my opinion, within a reasonable degree of medical certainty.”

By decision dated November 2, 2006, the Office denied appellant’s claim for a schedule award. Her attorney requested an oral hearing, which was held on February 22, 2007. At the hearing, counsel argued that it was not evident from the record that the Office selected Dr. Lee using the Physicians Directory System (PDS). He further contended that Dr. Lee should have considered appellant’s impairment due to her preexisting multiple sclerosis and failed to reference the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

In a decision dated June 1, 2007, the Office hearing representative affirmed the November 2, 2006 decision. He found that a medical appointment schedule notification in the record established that Dr. Lee was properly selected as an impartial medical examiner using the PDS.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act² provides compensation for both disability and physical impairment. “Disability” means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.³ In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee’s ability to earn wages.⁴

As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant’s burden to establish that he or she sustained a permanent

² 5 U.S.C. §§ 8101-8193.

³ *Lyle E. Dayberry*, 49 ECAB 369 (1998).

⁴ *Renee M. Straubinger*, 51 ECAB 667 (2000).

impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.⁵ The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury.⁶ The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.⁷

Section 8123(a) 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.⁸ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹ Office procedure provides that the selection of impartial medical specialists is made by a strict rotational system using the PDS whenever possible. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.¹⁰

When there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.¹¹

ANALYSIS

The Office accepted that appellant sustained a left ankle fracture due to a March 3, 1998 work injury. She underwent an open reduction and internal fixation of the medial and lateral malleolus of the left ankle on March 5, 1998. On July 10, 2001 appellant sought a schedule award. On prior appeal, the Board determined that a conflict existed on the issue of whether she

⁵ See *Veronica Williams*, 56 ECAB 367 (2005).

⁶ *Manuel Gill*, 52 ECAB 282 (2001).

⁷ *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(4) (May 2003); see also *M.A.*, 59 ECAB ___ (Docket No. 07-1344, issued February 19, 2008).

¹¹ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

sustained a permanent left lower extremity impairment due to her accepted employment injury and remanded the case for resolution of the conflict.

On remand, the Office referred appellant to Dr. Lee for an impartial medical examination. On October 24, 2006 Dr. Lee examined appellant and noted that she had a preexisting history of a crush injury to her left ankle and a diagnosis of possible multiple sclerosis. He found no significant swelling of the left ankle but calf swelling bilaterally. Dr. Lee opined that she had full extension and flexion of the ankle and no instability of the collateral ligament, tenderness, joint effusion or evidence of a mass. He discussed appellant's generalized weakness of the lower extremities and arms. Dr. Lee found that x-rays revealed healed left ankle fractures. He concluded that appellant had recovered fully from her March 3, 1998 employment injury with no impairment or residuals. Dr. Lee attributed her continued problems with movement to a progression of multiple sclerosis.

Where there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.¹² The Board has carefully reviewed the opinion of Dr. Lee and finds that, as it was based on a proper factual and medical background and is well rationalized, his opinion as the impartial medical specialist is entitled to special weight.¹³ Dr. Lee explained that his findings on examination and by x-ray showed a totally healed ankle fracture. His conclusion that appellant had no impairment due to her accepted employment injury correlates with his findings on examination. Dr. Lee found that her continued difficulties resulted from an unrelated medical condition. Accordingly, appellant has not met her burden of proof to establish that she sustained a permanent impairment of the left lower extremity.

On appeal, appellant's attorney asserted that the case record did not show that Dr. Lee was properly selected using the PDS.¹⁴ The hearing representative noted that the case record contained an appointment schedule form documenting that the Office selected Dr. Lee as the impartial medical specialist in rotation from the PDS. Appellant has provided no evidence that the Office did not follow its procedures in selecting Dr. Lee as the impartial medical specialist from the PDS.

Counsel also argues that Dr. Lee failed to reference the A.M.A., *Guides* in reaching his conclusions, did not provide any specific measurements regarding left ankle range of motion, atrophy or swelling and did not consider appellant's preexisting impairments. A schedule award,

¹² *Sharyn D. Bannick*, 54 ECAB 537 (2003).

¹³ *Phillip H. Conte*, 56 ECAB 213 (2004).

¹⁴ Appellant's attorney initially requested to participate in the selection of the impartial medical specialist and requested a decision with appeal rights if the request was denied. On October 4, 2006 the Office informed appellant's attorney that the selection of the impartial medical examiner would be made according to Office procedure to safeguard against bias. On the same date the Office referred appellant to Dr. Lee on October 24, 2006 for an impartial medical examination. By letter dated October 12, 2006, her attorney requested the Office's referral letter and a copy of the statement of accepted facts. He did not raise any objection to the selection of Dr. Lee as the impartial medical specialist.

however, can be paid only for a condition related to an employment injury.¹⁵ As Dr. Lee found no employment-related impairment, he did not need to apply the A.M.A., *Guides* to his findings or consider preexisting impairments.

CONCLUSION

The Board finds that appellant has not established that she has a permanent impairment of the left lower extremity due to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 1, 2007 and November 2, 2006 are affirmed.

Issued: May 16, 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

¹⁵ See *Veronica Williams, supra* note 5. Permanent impairment is based on direct physiological connection between the employment injury and the part of the body for which a schedule award is claimed. See *Gregory C. Esparza*, 42 ECAB 911, 915 (1991).