United States Department of Labor
Employees' Compensation Appeals Board

N.R., Appellant	)	
and	)	**Docket No. 09-227**
	)	**Issued: August 24, 2009**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Fort Dix, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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 October 30, 2008 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' January 25, 2008 merit decision and a July 30, 2008 hearing representative's decision granting her a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than three percent permanent impairment of each lower extremity. On appeal, appellant's attorney contends that the impartial medical examiner's opinion was outside the framework of the statement of accepted facts.

FACTUAL HISTORY

On April 1, 2005 appellant, then a 35-year-old legal instruments examiner, filed a claim for an injury occurring on that date when she slipped and fell on ice while walking to her building. The Office accepted her claim for bilateral post-traumatic chondromalacia of the

knees, lumbar and thoracic sprains, lumbar radiculopathy and thoracic or lumbosacral neuritis or radiculitis.

On October 1, 2006 appellant filed a claim for a schedule award. On October 27, 2006 the Office requested that she submit a report from an attending physician evaluating the extent of any permanent impairment of her lower extremities due to her work injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).

Appellant, through her attorney, submitted a report dated June 20, 2006 from Dr. David Weiss, an osteopath, Board-certified in family practice. For the right side, Dr. Weiss determined that appellant had 13 percent impairment due to thigh atrophy[1] and 3 percent impairment due to pain, for a total right lower extremity impairment of 16 percent.[2] For the left side, he found a three percent impairment of the lower extremity due to pain.[3]

On July 7, 2007 the Office medical adviser concluded that appellant had three percent impairment of each lower extremity due to pain. He advised that she reached maximum medical improvement on June 20, 2006.

On August 20, 2007 the Office referred appellant, together with a statement of accepted facts, to Dr. Roy Friedenthal, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Weiss and the Office medical adviser regarding the extent of any permanent impairment. In a report dated September 20, 2007, Dr. Friedenthal found no thigh atrophy and no instability or effusion of the knees. He noted that x-rays were not available for review. On examination, Dr. Friedenthal found intact cruciate ligaments, valgus symmetrical in both knees, no effusion or atrophy and no loss of motion. He diagnosed status post minor knee contusion by history, thoracolumbar strain, by history, degenerative disc disease of the lumbar spine, chondromalacia patellae, possible early patellofemoral arthrosis by history and possible de Quervain's syndrome of the right wrist. Dr. Friedenthal related:

> "Considering the body habitus of [appellant], she is at significant propensity towards chondromalacia and patellofemoral arthrosis even in the absence of any injury. In the absence of external signs of injury, in the absence of objective evidence of patellofemoral damage, it is my considered opinion that no new patellofemoral damage was sustained. [Appellant] may well have felt the symptoms of any underlying and preexisting chondromalacia patella. This does not imply new structural damage. At the time of my evaluation her findings are actually extremely quiescent insofar as there was no pain or crepitus on initial patellofemoral motion. There was no restriction of motion. There was no evidence of instability and there was no muscle atrophy. There was no evidence

[1] A.M.A., *Guides* 530, Table 17-6.

[2] *Id*. at 574, Figure 18-1.

[3] *Id*.

that her underlying condition was in any way altered by superimposed injury reported.

"In summary, it is my considered opinion that [appellant] has fully recovered from minor soft tissue injuries reportedly sustained. I find no indication for ongoing treatment and no permanency is assigned referable to the reported injury. [Appellant] does have underlying and preexisting degenerative processes, which may be sources of symptomatology. These conditions have not been altered. At the time of my evaluation they provide no measurable functional impairment."

On November 26, 2007 an Office medical adviser reviewed Dr. Friedenthal's findings. He found that appellant had no impairment of either knee due to loss of range of motion, instability, arthritis, weakness or atrophy. The Office medical adviser determined that she had three percent impairment due to pain according to Figure 18-1 on page 574 of the A.M.A., *Guides.*

By decision dated January 25, 2008, the Office granted appellant a schedule award for three percent impairment of each lower extremity. The period of the award ran for 17.28 weeks from June 20 to October 18, 2006.

On January 31, 2008 appellant, through her attorney, requested an oral hearing. At the hearing, held on May 13, 2008, counsel argued that the statement of accepted facts provided to the impartial medical examiner erroneously indicated that the claim was accepted for lumbosacral neuritis or radiculitis rather than radiculopathy. He argued that the Office medical adviser should have utilized Dr. Weiss' atrophy finding. Counsel also questioned whether Dr. Friedenthal was appropriately selected using the Physician's Directory System (PDS), noting that some physicians were bypassed because they did not return the Office's telephone call. He noted that the Office medical adviser who created the conflict reviewed the report of the impartial medical examiner.

By decision dated July 30, 2008, the hearing representative affirmed the March 5, 2008 decision. She noted that the Office medical adviser who created the conflict did not review the impartial medical examiner's report. The hearing representative determined that the Office properly selected Dr. Friedenthal as the impartial medical specialist using the PDS.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[4] and its implementing federal regulations,[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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

claimants.[6] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[7]

Section 8123(a) of the Act 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] 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.[9]

The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[10]

ANALYSIS

The Office accepted that appellant sustained post-traumatic chondromalacia of both knees, lumbar and thoracic sprains, lumbar radiculopathy and thoracic or lumbosacral neuritis or radiculitis. On October 1, 2006 appellant filed a claim for a schedule award and submitted a report from her attending physician, Dr. Weiss, who found that she had a 16 percent permanent impairment of the right lower extremity. An Office medical adviser reviewed Dr. Weiss' report and concluded that appellant had three percent right lower extremity impairment. Due to the disagreement between Dr. Weiss and the Office medical adviser, the Office found a conflict in medical evidence regarding the extent of her permanent impairment and referred her to Dr. Friedenthal for resolution of the conflict.

On appeal appellant's attorney contends that Dr. Freidenthal's opinion is outside the statement of accepted facts. When there exists a conflict in medical opinion 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] To assure that the report of a medical specialist is based upon a

[6] *Id.* at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] 5 U.S.C. § 8123(a).

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

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600(3) (October 1990).

[11] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

properly factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.[12] The Office procedure manual provides:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[13]

The Board finds that the opinion of Dr. Freidenthal is not entitled to special weight as his opinion did not follow outside of the statement of accepted facts. He opined that appellant "may have strained a muscle" at the time of her work injury and found that she had preexisting chondromalacia patella due to her weight rather then her employment injury. The Office, however, accepted post-traumatic chondromalacia of both knees due to appellant's April 1, 2005 slip and fall.

Further, while Dr. Friedenthal found that appellant had no impairment resulting from her chondromalacia, he did not apply the appropriate table for determining impairments due to arthritis under the A.M.A., *Guides* in reaching his conclusion. He concluded that she had no impairment based on a full range of motion and lack of crepitation and other clinical findings. However, section 17.2h on page 544 of the A.M.A., *Guides* provides:

> "For most individuals, roentgenographic grading is a more objective and valid method for assigning impairment estimates than physical findings, such as range of motion or joint crepitation. While there are some individuals with arthritis for whom loss of motion is the principal impairment, most people are impaired more by pain and sometimes weakness, but they still can maintain functional ranges of motion, at least in the early stages of the process. Range-of-motion techniques are therefore of limited value for estimating impairment secondary to arthritis in many individuals. Crepitation is an inconstant finding that depends on such factors as forces on joint surfaces and synovial fluid viscosity."

Table 17-31 on page 544 of the A.M.A., *Guides*, entitled "Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals" is the only table provided for determining impairment resulting from an arthritic condition of the lower extremity.

Dr. Freidenthal's opinion is insufficient to resolve the conflict in medical opinion. On remand, the Office should obtain a thorough medical report addressing the impairment of appellant's lower extremities which includes measuring appellant's cartilage level by x-ray.[14]

[12] *See Helen Casillas*, 46 ECAB 1044, 1052 n.15 (1995).

[13] *See supra* note 10.

[14] *See A.C.*, Docket No. 07-199 (issued April 16, 2007).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 30 and January 25, 2008 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 24, 2009
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