United States Department of Labor
Employees' Compensation Appeals Board

G.C., Appellant	)	
and	)	**Docket No. 08-1803**
	)	**Issued: February 12, 2009**
DEPARTMENT OF DEFENSE, NATIONAL SECURITY AGENCY, Fort Meade, MD, Employer	)	

Appearances:
Appellant, pro se
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 June 10, 2008 appellant filed a timely appeal from an April 21, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for an increased 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 a 10 percent permanent impairment of the left upper extremity and a 5 percent permanent impairment of the left lower extremity.

FACTUAL HISTORY

On April 4, 1999 appellant, then a 52-year-old security protective officer, filed a traumatic injury claim alleging that on April 3, 1999 he injured his left shoulder, arm and lower back opening a broken vehicle gate. The Office accepted the claim for a left elbow and shoulder

strain, lumbar strain and a herniated disc at L5-S1.[1] On May 3, 2002 appellant underwent a laminectomy at L5, extensive bilateral foraminotomies at L5 and S1 and a left L5-S1 discectomy. He resumed full-time light-duty employment on July 29, 2002.[2] Appellant subsequently stopped work and the Office placed him on the periodic rolls beginning September 13, 2003.

By decision dated June 6, 2003, the Office granted appellant a schedule award for a 10 percent impairment of the left upper extremity and a 5 percent permanent impairment of the left lower extremity. In a decision dated June 15, 2004, the Office denied appellant's request for further merit review of its June 6, 2003 decision.

On January 20, 2005 appellant filed a claim for an additional schedule award. In a report dated November 30, 2005, Dr. William J. Launder, a Board-certified orthopedic surgeon, found that appellant had a 30 percent impairment of the left shoulder and a 30 percent impairment of each lower extremity. On February 16, 2006 an Office medical adviser stated that Dr. Launder failed to explain the basis for his impairment ratings. The Office medical adviser determined that appellant had a five percent impairment of the left lower extremity due to a sensory deficit of the left S1 nerve root.

On March 21, 2006 the Office referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated April 4, 2006, Dr. Hanley applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) and found that appellant had a five percent impairment of the left upper extremity and a one percent impairment of the left lower extremity.

The Office determined that a conflict existed between Dr. Launder and Dr. Hanley regarding the extent of appellant's permanent impairment. On January 31, 2007 it referred appellant to Dr. Stephen R. Matz, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In a report dated February 20, 2007, Dr. Matz discussed appellant's complaints of decreased strength and intermittent left shoulder pain and constant low back pain with numbness into the lower extremities. He measured calf circumference on the left as one-quarter inch less than the right. Dr. Matz stated:

> "There is no shoulder tenderness. Left shoulder active range of motion revealed 165 degrees abduction and forward flexion. [Appellant] has full internal rotation, full external rotation, full backward flexion and full adduction. He has some degree of left shoulder pain at the extremes of all ranges of motion. [Appellant] has strong internal and external rotation against resistance with the elbow at 90 degrees and the forearm in neutral position and the arm adducted to his side. He has no scapula winging or shoulder girdle atrophy. Gentle abduction is strong.

[1] By decision dated December 3, 1999, the Office found that appellant failed to establish that he sustained a back condition due to his April 3, 1999 work injury. On March 21, 2000 an Office hearing representative reversed the December 3, 1999 and accepted that appellant sustained lumbar strain. On May 8, 2001 the Office accepted appellant's claim for a herniated disc at L5-S1 due to the April 3, 1999 employment incident.

[2] In a decision dated June 9, 2003, the Office reduced appellant's compensation based on his actual earnings as a training instructor effective October 14, 2002.

[Appellant] has symmetric strength when compared to the right shoulder. There is no shoulder hike during elevation."

Dr. Matz found no loss of range of motion of the fingers, wrists or elbow and good strength and range of motion of the lower extremities. He determined that appellant had one percent impairment due to loss of abduction and one percent impairment due to loss of forward flexion according to page 476 and 477 of the A.M.A., *Guides*, which yielded a two percent impairment of the left upper extremity. Dr. Matz noted that the remaining ranges of motion yielded no impairment. Citing Chapter 15 of the A.M.A., *Guides*, which is relevant to impairments of the spine, he opined that appellant had a 10 percent whole person impairment of the lumbosacral spine. Dr. Matz further found an additional seven percent whole person impairment for loss of range of motion of the lumbar spine. He stated, "On the basis of some mild residual sensory deficit left lateral calf, page 424, [T]able 15-15, Grade 4, [T]able 15-18 equals an additional one [percent] of the whole person. There was no motor weakness." Dr. Matz concluded that appellant had a 17 percent whole person impairment of the lower back due to his work injury.

On June 4, 2007 an Office medical adviser reviewed the medical evidence and noted that Dr. Hanley, the second opinion physician, performed a "very detailed evaluation." He concurred with Dr. Hanley's findings of a five percent impairment of the upper extremity and a one percent impairment of the lower extremity. The Office medical adviser opined that appellant reached maximum medical improvement in May 2003.

By decision dated July 2, 2007, the Office granted appellant a schedule award for a five percent impairment of the left upper extremity and a one percent impairment of the left lower extremity. The period of the award ran from July 8 to November 14, 2007. The Office noted that appellant had previously received a schedule award for a 10 percent impairment of the left upper extremity and a five percent impairment of the left lower extremity.

On July 24, 2007 appellant requested a review of the written record. By decision dated November 28, 2007, the hearing representative set aside the July 2, 2007 schedule award decision. She noted that the Office medical adviser applied the A.M.A., *Guides* to the findings of the second opinion examiner, Dr. Hanley, rather than obtaining clarification of the degrees of impairment from Dr. Matz, the impartial medical examiner. The hearing representative noted that Dr. Matz improperly provided a whole person impairment to the lumbosacral spine. She instructed the Office to request that the impartial medical examiner determine whether appellant had lower extremity impairment and provide references to the tables and pages of the A.M.A., *Guides* in support of his findings. The hearing representative further indicated that, as appellant had previously received a schedule award for a 10 percent impairment of the left upper extremity and a five percent impairment of the left lower extremity, appellant "was not entitled to an additional schedule award at the time the July 2007 decision was issued." She found that the Office should determine whether he was entitled to an additional schedule award and, if not, address whether an overpayment existed.

On December 19, 2007 the Office requested that Dr. Matz address whether appellant had a permanent impairment of the lower extremities according to the A.M.A., *Guides*. In a supplemental report dated February 26, 2008, Dr. Matz indicated that he was "unable to relate

any specific or significant permanent partial physical impairment to the lower extremities. This is a low back injury and low back surgery."

On March 21, 2008 the Office medical adviser applied the A.M.A., *Guides* to the findings by Dr. Matz in his February 20, 2007 report. He concurred with Dr. Matz finding that appellant had a two percent impairment of the left upper extremity. The Office medical adviser found that 165 degrees abduction constituted a 0.5 or one percent, impairment according to Figure 16-43 on page 477 of the A.M.A., *Guides* and that 165 degrees forward flexion constituted one percent impairment according to Figure 16-40 on page 476. He noted that Dr. Matz found full internal and external rotation, extension and adduction. The Office medical adviser stated:

> "[Dr. Matz] states that there is mild residual sensory deficit [of the] left lateral calf and he used [p]age 424, Table 15-15 to place the claimant in a Grade 4 classification which gives up to a 24 [percent] sensory deficit which would be multiplied times Table 15-18 for nerve root impairment of a maximum loss of 5 [percent]. This will give a 1.25 [percent] (rounded off to one [percent]) lower extremity impairment. This is essentially what Dr. Matz did. On [p]age 7 of his report, he used Tables 15-15 and 15-18 on [p]age 424 of the [A.M.A., *Guides*] but he stated that the one [percent] was for whole person whereas Table 15-18 gives this impairment of the lower extremity."

The Office medical adviser found no impairment for ¼ inch of calf atrophy. He concluded that appellant had a one percent impairment of the left lower extremity and a two percent impairment of the left upper extremity.

By decision dated April 21, 2008, the Office denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing federal regulations,[4] 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 claimants.[5] 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.[6]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id.* at § 10.404(a).

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

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.[7] The implementing regulation 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.[8] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner 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] If the opinion of the impartial medical examiner 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. If the impartial medical examiner is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[10]

In order to properly resolve a conflict in medical evidence with respect to a schedule award, it is the referee examiner who should provide a reasoned medical opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An Office medical adviser may review the opinion, but resolution of the conflict is the responsibility of the referee examiner.[11]

ANALYSIS

The Office accepted that appellant sustained a left elbow and shoulder strain, lumbar strain and a herniated disc at L5-S1 due to an April 3, 1999 employment injury. On June 6, 2003 it granted him a schedule award for a 10 percent permanent impairment of the left upper extremity and a 5 percent permanent impairment of the left lower extremity.

In a report dated November 30, 2005, Dr. Launder, appellant's attending physician, opined that he had a 30 percent permanent impairment of the left shoulder and a 30 percent impairment of each lower extremity. On April 4, 2006 Dr. Hanley, who provided a second opinion examination, found that appellant had a five percent left upper extremity impairment and a one percent left lower extremity impairment. The Office determined that a conflict existed in the medical evidence and referred appellant to Dr. Matz for an impartial medical examination.[12] In a report dated February 20, 2007, Dr. Matz measured left shoulder range of motion of 165

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

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

[10] *See Guiseppe Aversa*, 55 ECAB 164 (2003).

[11] *See V.G.*, 59 ECAB ___ (Docket No. 07-2179, issued July 14, 2008); *Thomas J. Fraale*, 55 ECAB 619 (2004).

[12] The Office initially referred appellant to Dr. Launder for an impartial medical examination; however, this was improper as he had previously examined appellant as he was on one side of the conflict in the evidence.

degrees abduction and forward flexion. He found full range of motion in internal and external rotation, extension and adduction. Dr. Matz further determined that appellant had a 10 percent whole person impairment of the lumbar spine and 7 percent impairment due to loss of range of motion of the lumbar spine. Citing Tables 15-15 and 15-18 on page 424 of the A.M.A., *Guides*, he asserted that appellant had an additional one percent whole person impairment for sensory deficit in the left lateral calf. The Act, however, does not provide for impairment of the whole person.[13] Additionally, the Act specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.[14]

On November 28, 2007 an Office hearing representative instructed the Office to obtain clarification from Dr. Matz regarding whether appellant had lower extremity impairment.[15] In a report dated February 26, 2008, Dr. Matz asserted that he could not "relate any specific or significant permanent partial physical impairment to the lower extremities" as the injury was to the lower back. On March 21, 2008 an Office medical adviser applied the A.M.A., *Guides* to the findings by Dr. Matz in his February 20, 2007 report. He determined that 165 degrees abduction constituted 0.5 or 1 percent, impairment according to Figure 16-43 on page 477 of the A.M.A., *Guides* and that 165 degrees forward flexion constituted 1 percent impairment according to Figure 16-490 on page 476. The Office medical adviser noted that Dr. Matz found full internal and external rotation, extension and adduction. Dr. Matz, however, did not provide any measurements for internal and external rotation, extension and adduction in his report. Consequently, his report is not entitled to special weight on the issue of the extent of appellant's upper extremity impairment as it contains insufficient clinical findings regarding appellant's range of motion.[16]

The Office medical adviser further reviewed Dr. Matz' finding in his February 20, 2007 report that appellant had a one percent whole person impairment by finding a Grade 4 impairment which he multiplied by a sensory deficit of an unidentified nerve. The Office medical adviser applied the A.M.A., *Guides* to his findings and concluded that appellant had a one percent impairment of the lower extremity. The Office's procedures, however, provide that when the Office directs an employee to undergo a referee examination, it is to rely on the opinion of the medical referee in determining the issue.[17] An Office medical adviser may review the opinion but the resolution of the conflict is the responsibility of the impartial medical specialist.[18] Dr. Matz initially found that appellant had a one percent whole person impairment of the lower extremity. In his supplemental report dated February 26, 2008, he found no lower extremity

[13] *See D.J.*, 59 ECAB ___ (Docket No. 08-725, issued July 9, 2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[14] *See* 5 U.S.C. § 8107; *Patricia J. Horney*, 56 ECAB 256 (2005); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[15] The hearing representative noted that the Office medical adviser applied the A.M.A., *Guides* to the findings of Dr. Hanley rather than the impartial medical examiner.

[16] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.7(g) (April 1993) (while a district medical adviser may create a conflict in medical opinion, he or she may not generally resolve it).

[18] *See V.G.*, *supra* note 11; *Richard R. LeMay*, 56 ECAB 341 (2005).

impairment. Dr. Matz did not explain the discrepancies between his reports and thus his opinion is insufficiently rationalized to be accorded special weight as the impartial medical examiner.[19]

The case will be remanded so that appellant may be referred to another impartial medical examiner to resolve the conflict regarding the extent of permanent impairment of his left upper and lower extremity. Following such further development as deemed necessary, the Office shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 21, 2008 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 12, 2009
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

[19] *See Elaine Sneed*, 56 ECAB 373 (2005).