United States Department of Labor
Employees' Compensation Appeals Board

T.P., Appellant	)	
and	)	**Docket No. 09-1562**
	)	**Issued: April 7, 2010**
DEPARTMENT OF THE ARMY, FORT MONMOUTH, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated August 26, 2008, regarding a schedule award. The Office also issued a decision dated May 19, 2009 denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a four percent left leg or three percent right leg percent permanent impairment; and (2) whether the Office properly denied merit review of the claim in its May 19, 2009 decision.

FACTUAL HISTORY

On February 4, 2004 appellant, then a 51-year-old safety specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back injury when he slipped in the performance of duty on February 2, 2004. The Office accepted the claim for lumbar radiculitis. Appellant underwent a lumbar decompression laminectomy on April 28, 2004.

In a report dated December 15, 2004, Dr. David Weiss, an osteopath, provided a history and results on examination. He opined that appellant had motor deficits in the right hip flexors, gastrocnemius muscle and extensor hallucius longus tendon resulting in a 33 percent right leg impairment, with an additional 3 percent for pain. For the left leg, Dr. Weiss opined that appellant had 28 percent impairment, based on left hip flexor and gastrocnemius motor deficit and pain.

In a brief note dated October 30, 2005, an Office medical adviser noted that the right leg impairment was 33 percent and the left leg 25 percent, as there was no objective data for pain impairment. The Office then declared a conflict in the medical evidence and referred appellant to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon. In a report dated May 23, 2006, Dr. Krisiloff provided a history and results on examination. He opined that appellant had a 25 to 28 percent whole person impairment based on Table 15-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). By letter dated July 23, 2007, the Office asked Dr. Krisiloff to provide a supplemental report. In a report dated July 31, 2007, Dr. Krisiloff indicated that appellant had a right leg impairment based on sensory and motor deficit for the L5 nerve root. He identified Table 15-18 and graded the impairment under Table 15-15 (sensory) and Table 15-16 (motor). Dr. Krisiloff concluded that appellant had 31 percent right leg impairment.

An Office medical adviser reviewed the evidence and in a November 2, 2007 report stated that he disagreed with Dr. Krisiloff regarding the grading of the impairment and the application of relevant tables. The medical adviser opined that appellant had 14 percent right leg impairment and a 6 percent left leg impairment.

The Office again declared a conflict and appellant was initially referred to Dr. Alexander Russoniello, a Board-certified orthopedic surgeon. There is no indication that Dr. Russoniello submitted a report. Appellant was then referred to Dr. Ian Fries, a Board-certified orthopedic surgeon selected as a referee physician.

In a report dated May 19, 2008, Dr. Fries provided a history and results on examination. He noted that clinical findings included left and right ankle plantar flexion weakness. Dr. Fries identified the S1 nerve root and Table 15-18, grading the right leg weakness as 10 percent of the maximum 20 percent or 2 percent. For the left leg the impairment was 20 percent of the maximum or 4 percent. In addition, Dr. Fries identified Table 17-6 and found an additional one percent right leg impairment based on right thigh atrophy of one centimeter. He concluded by noting that the muscle weakness found by Dr. Weiss was not apparent on current examination. Dr. Fries opined the date of maximum medical improvement was October 12, 2004, when appellant was discharged from care by his treating physician.

By report dated August 12, 2008, an Office medical adviser stated that he concurred with the results provided by Dr. Fries. In a decision dated August 26, 2008, the Office issued a schedule award for a four percent left leg impairment and a three percent right leg impairment. The period of the award was 20.16 weeks from October 12, 2004.

Appellant requested reconsideration in a letter dated February 23, 2009. By decision dated May 19, 2009, the Office denied merit review. It found that appellant had failed to demonstrate "clear evidence of error."

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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.[3] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4]

The Act provides that, if there is a 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 the examination.[5] 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.[6]

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 a proper factual and medical background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

An attending physician, Dr. Weiss, provided a December 15, 2004 report opining that appellant had a permanent impairment of 36 percent for the right leg and 28 percent for the left leg. While the Office stated that a conflict under 5 U.S.C. § 8123(a) existed between Dr. Weiss and an Office medical adviser, the October 30, 2005 note from the medical adviser was not sufficient to create a conflict. The medical adviser's note did not provide any history or

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] *See Ronald R. Kraynak,* 53 ECAB 130 (2001); *August M. Buffa,* 12 ECAB 324 (1961).

[4] *Supra* note 2.

[5] 5 U.S.C. § 8123(a).

[6] 20 C.F.R. § 10.321 (1999).

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

summary of the case, but simply repeated the tables and percentages identified by Dr. Weiss, less three percent for pain. It is not a complete and rationalized medical report sufficient to create a conflict.[8]

The referral to Dr. Krisiloff was therefore as a second opinion physician.[9] Dr. Krisiloff provided an opinion, based on a complete background, that appellant had 31 percent right leg impairment.[10] He therefore disagreed with Dr. Weiss and his report is sufficient to create a conflict under 5 U.S.C. § 8123(a). Appellant was referred to Dr. Fries as a referee physician to resolve a conflict.

The report from Dr. Fries provided a complete factual and medical background and results on examination. As to left leg impairment, Dr. Fries identified Table 15-18 and the S1 nerve root. Under this table, the maximum leg impairment for loss of strength is 20 percent.[11] Dr. Fries graded the impairment under Table 15-16 at 20 percent,[12] for 4 percent impairment. For the right leg he graded the impairment at 10 percent of the maximum or 2 percent impairment. The Board notes that Dr. Fries then added one percent to the right leg for right thigh atrophy under Table 17-6. In this regard the Board notes that Table 17-6 would represent an alternative method of evaluation. The A.M.A., *Guides* clearly state, "Atrophy ratings should not be combined with any of the other three possible ratings of diminished muscle function (gait derangement, muscle weakness and peripheral nerve injury)."[13] Since the impairment under Table 15-18 was based on muscle weakness, Table 17-6 is not combined with weakness impairment but is an alternate method. The Board further notes that one-centimeter thigh impairment is actually three percent leg impairment under Table 17-6.[14] Using this method, appellant would have three percent right leg impairment. There is no evidence of a greater impairment based on the findings of Dr. Fries.

On appeal, appellant raises a number of arguments. He initially argues that since there was no real conflict between Dr. Weiss and the Office medical adviser, the Office should not have referred the case for additional development and the award should be based on Dr. Weiss' report. While the Board agrees that, there initially was no conflict, the Office may refer the case for a second opinion examination and the referral to Dr. Krisiloff was appropriate. Appellant

[8] *See Bailey Varnado, Jr.*, 53 ECAB 755 (2002); *Adrienne L. Wintrip,* 38 ECAB 373 (1987).

[9] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Adrienne L. Wintrip, supra* note 8.

[10] While an Office medical adviser may have disagreed with Dr. Krisiloff's application of the A.M.A., *Guides*, Dr. Krisiloff identified the appropriate tables in his supplemental report applied the tables consistent with his findings.

[11] A.M.A., *Guides* 424, Table 15-18.

[12] A Grade 4 classification is "active movement against gravity with some resistance" and the range is 1 [to] 25 percent of the maximum. *Id.* at 426, Table 15-16.

[13] A.M.A., *Guides* 530. The Board also notes that Table 17-2 indicates a muscle atrophy method should not be combined with a muscle weakness method. *Id.* at 526.

[14] The one percent impairment noted by Dr. Fries is whole person impairment under Table 17-6. A.M.A., *Guides* 530, Table 17-6.

also questions the selection of Dr. Fries as a referee physician, as the record does not clarify why Dr. Russoniello did not provide a report or explain why two other physicians were bypassed. There is no indication that appellant raised an issue regarding the selection of Dr. Fries prior to the schedule examination.[15] As to Dr. Russoniello, the record contains a March 14, 2008 telephone memorandum indicating that the physician's office was contacted regarding a report but there is no evidence a report was provided. With respect to bypassed physicians, the record indicated that two physicians were bypassed as being unable to schedule an examination within a reasonable time period. The Board finds no probative evidence of record that the selection of Dr. Fries was inappropriate or in violation of established procedures. Appellant also argued that there was no "conflict statement" sent to Dr. Fries. The April 18, 2008 letter to Dr. Fries and the record indicated that he was advised of a conflict in the evidence and provided with a proper background on which to base his opinion.

With respect to the probative value of Dr. Fries' report, appellant argued that he did not perform manual muscle testing or tests such as Semmes-Weinstein. Manual muscle testing is, as the A.M.A., *Guides* explains, dependant on the examinee's cooperation and is best used for pathology that does not have a primary neurologic basis.[16] A test such as Semmes-Weinstein may be useful in some cases such as compression neuropathies,[17] but is not a required test to evaluate sensory deficit.

The Board finds that Dr. Fries provided a rationalized medical opinion based on a complete background that resolves the conflict in the medical evidence. The weight of the evidence rests with him and the Office properly issued a schedule award for three percent right leg impairment and a four percent left leg impairment.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). Since appellant's impairment totaled seven percent, he is entitled to seven percent of 288 weeks or 20.16 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[18] In this case, Dr. Fries concluded that the date of maximum medical improvement was October 12, 2004, when appellant was released from care by an attending physician. The award therefore properly runs for 20.16 weeks commencing on October 12, 2004

LEGAL PRECEDERNT -- ISSUE 2

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[19]

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[15] *See L.W.*, 59 ECAB __ (Docket No. 07-1346, issued April 23, 2008).

[16] A.M.A., *Guides* 531.

[17] *Id.* at 493.

[18] *Albert Valverde*, 36 ECAB 233, 237 (1984).

[19] 5 U.S.C. § 8128(a).

The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[20] An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[21]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office.[22]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration within one year of the August 26, 2008 Office decision, as his request was dated February 23, 2009. The Office should have considered the application under 20 C.F.R. § 10.606(b)(2), as noted above. The May 19, 2009 Office decision applied an incorrect standard of review. The "clear evidence of error" standard is applicable to applications for review filed more than one year after the Office merit decision.[23] The case will therefore be remanded for proper consideration of the application for reconsideration.

CONCLUSION

The Board finds that the weight of the medical evidence does not establish more than a four percent left leg impairment or a three percent right leg impairment. On return of the case record, the Office should properly consider appellant's February 23, 2009 application for reconsideration.

[20] 20 C.F.R. § 10.605 (1999).

[21] *Id*. at § 10.607(a).

[22] *Id*. at § 10.606(b)(2).

[23] *See Leona N. Travis*, 43 ECAB 227 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2008 is affirmed. The decision dated May 19, 2009 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 7, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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