

**United States Department of Labor
Employees' Compensation Appeals Board**

D.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 09-1463
Issued: August 12, 2010**

Appearances:

*Jeffrey P. Zeelander, 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 May 26, 2009 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated April 17, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.¹

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she has permanent impairment of the right leg causally related to her employment injury.

FACTUAL HISTORY

On February 1, 2007 appellant, then a 40-year-old laborer/custodian, filed a traumatic injury claim alleging that on that date she was cleaning the top of lockers that gave way causing

¹ The record also contains a July 1, 2008 decision, which denied her claim for disability compensation for the period April 29 to May 9, 2008. Appellant has not appealed this decision.

her to fall and injure her right ankle and leg. On April 16, 2007 the Office accepted her claim for closed fracture of the right distal fibula. Appellant received appropriate compensation benefits.

An April 18, 2008 magnetic resonance imaging (MRI) scan read by Dr. Marta Jaramillo, a radiologist, revealed a healed distal fibular syndesmotic level fracture. Dr. Jaramillo advised that there was evidence of an old avulsion injury/fracture involving the anterior tibiofibular ligament.

On May 10, 2008 appellant filed a claim for a schedule award. On July 1, 2008 the Office denied appellant's schedule award claim finding that maximum medical improvement had not been reached and that no medical evidence was submitted that supported permanent impairment.

Appellant's representative requested reconsideration on January 23, 2009 and submitted additional evidence. The evidence included a December 4, 2008 report from appellant's physician, Dr. Daisy A. Rodriguez, a Board-certified internist, who noted appellant's history. Dr. Rodriguez examined appellant and provided range of motion findings which included flexion of 150 degrees and extension of 0 degrees and full eversion and inversion. She diagnosed a closed fracture of the leg, chronic pain and gait abnormality. In a December 6, 2008 report, Dr. Rodriguez noted appellant's history and noted that she could "understand why you have right ankle pain, there is no evidence of any other ongoing pathology or injury." She repeated her diagnoses of closed fracture of the leg, chronic pain and gait abnormality.

December 11, 2008 right ankle x-rays, read by Dr. Akbar Bonakdarpour, a Board-certified radiologist, were compared to the April 18, 2008 MRI scan. Dr. Bonakdarpour advised that it revealed no acute fracture, dislocation or soft tissue abnormality. He noted some irregularity of the distal fibula, which was suggestive of an old healed fracture, but advised that no discrete deformity was identified. Dr. Bonakdarpour noted that the remaining bones were normal.

In a report dated December 30 and 31, 2008, Dr. Rodriguez utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (hereinafter A.M.A., *Guides*) and noted that appellant reached maximum medical improvement on August 30, 2008. She explained that appellant had an arthritis impairment based on cartilage intervals of two millimeters equal to 15 percent of the right lower extremity according to Table 17-31.² Dr. Rodriguez also explained that appellant had daily edema which would support an impairment of nine percent according to Table 4-5.³ She referred to the Combined Values Chart and concluded that appellant had 23 percent impairment of the right leg.

In a February 12, 2009 report, an Office medical adviser noted appellant's history and utilized the A.M.A., *Guides*. He noted that he did not agree with Dr. Rodriguez's rating for right ankle arthritis and explained that he had reviewed appellant's diagnostic test results and noted that there was "no mention of significant arthritis changes or narrowing of the joint spaces."

² A.M.A., *Guides* 544.

³ *Id.* at 76.

The Office medical adviser explained that he did not believe the rating was justified based upon objective testing. He recommended a current right ankle x-ray, which should be read by a radiologist, for impairment rating purposes as directed in the arthritis section (17.2h).⁴ The Office medical adviser also disagreed with Dr. Rodriguez's rating for right ankle peripheral vascular disease. He indicated that appellant had intermittent right ankle swelling that was not a permanent impairment as it was transient. The Office medical adviser noted that appellant's diagnostic reports did not reveal significant effusion in the right ankle that would limit the joint or appellant's activities of daily living. He also advised that, while Dr. Rodriguez rated appellant for peripheral vascular disease, other than observing some swelling, she did not provide further clinical or diagnostic testing to support the diagnosis. The Office medical adviser noted that no other providers had identified peripheral vascular disease and he did not believe the diagnosis was justified. He explained "intermittent swelling does not equal peripheral vascular disease." Regarding pain, the Office medical adviser stated that appellant had "excess pain in the context of a verifiable medical condition (pain secondary status post healed distal fibular fracture) that causes pain which has not been addressed by other impairment methods used in the [A.M.A.] *Guides* for this condition." He found that three percent right leg impairment was consistent with Office procedures and Chapter 18 of the A.M.A., *Guides*.

On February 27, 2009 the Office referred appellant along with a statement of accepted facts, and the medical record to Dr. Bong Lee, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Rodriguez and the Office medical adviser regarding appellant's entitlement to a schedule award.⁵

In a letter dated March 4, 2009, appellant's representative requested that the Office advise him as to how many times, Dr. Lee was utilized for the prior 12-month period. He also requested that the Office provide him with the bypass sheets for physicians whose zip codes were closer to appellant than Dr. Lee. Appellant's representative alleged that there were numerous Board-certified physicians who were much closer to appellant. He alleged that the Office was not carrying out its obligations when scheduling referee examinations and requested that he be provided with the names of three additional physicians so that appellant could select one to perform her examination.

In a March 26, 2009 letter, the Office responded to appellant's representative regarding the scheduling of Dr. Lee. It indicated that no records were kept regarding the number of examinations that Dr. Lee performed. The Office also included copies of the bypass pages utilized when Dr. Lee was selected, and noted that the physicians who were not used were bypassed because they did not perform impairment ratings. It advised appellant's representative that Dr. Lee was selected in strict accordance with Office procedures.

On April 10, 2009 the Office received a March 23, 2009 report from Dr. Lee, who noted appellant's history of injury and treatment. Dr. Lee examined appellant and reported findings which included that both extremities were symmetrical with no gross deformities or leg length

⁴ *Id.* at 544.

⁵ The record reflects that Drs. William Hamilton and Walter Dearolf, Board-certified orthopedic surgeons, were bypassed in the selection process because they did not perform impairment ratings.

discrepancies and normal alignment. Regarding the ankles, he noted that the right ankle showed no gross deformity and no noticeable swelling or edema. Dr. Lee indicated that both ankles were equal at 9 inches and the midfeet were equal at 8.5 inches bilaterally. Regarding ankle joint motion, he determined that appellant had 10 degrees of dorsiflexion and 60 degrees of plantar flexion with no complaints of pain. Dr. Lee indicated that the subtalar joints of both feet were also equal bilaterally with compatible inversion and eversion and no tenderness over the lateral malleolus, no instability of the collateral or deltoid ligaments on stress testing, no joint swelling, no joint tenderness and no palpable masses in the ankles and feet. He found that the calves were soft and nontender and noted a negative Homans' sign. Circumference of both ankles and calves were equal bilaterally. Both knees were symmetrical with no gross deformity, full range of motion, no joint swelling, no joint tenderness and no instability of the collateral and cruciate ligaments. Dr. Lee noted that appellant's patella was normally aligned and there was no joint tenderness on palpation and no palpable masses in the popliteal space. He advised that the remainder of his examination was normal. Dr. Lee referred to the initial x-ray and the most recent study of April 18, 2008 and determined that appellant had a completely healed fracture of the distal fibula of the right ankle with no evidence of any complications such as post-traumatic arthritis or delayed union or any other problem. He opined that appellant had complete healing with no complications and no permanent impairment of the right lower extremity function related to the February 1, 2007 work injury and that she no longer needed any further treatment. Dr. Lee indicated that appellant had reached maximum medical improvement.

By decision dated April 17, 2009, the Office denied modification of its prior decision. It determined that the weight of the evidence rested with Dr. Lee.

LEGAL PRECEDENT

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.⁶

Section 8107 of the Federal Employees' Compensation Act⁷ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁸ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁹ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰

⁶ *J.P.*, 60 ECAB ____ (Docket No. 08-832, issued November 13, 2008).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Id.* at § 8107.

⁹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁰ 20 C.F.R. § 10.404.

Section 8123(a) of the Act provides, in pertinent part: “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.”¹¹ Where 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.¹²

ANALYSIS

The evidence of record does not establish that appellant has permanent impairment of the right leg causally related to her employment injury.

In this case, Dr. Rodriguez, a treating physician and Board-certified physiatrist, determined that appellant had 23 percent permanent impairment of the right leg. An Office medical adviser reviewed Dr. Rodriguez’s report and determined that appellant had three percent impairment of the right lower extremity due to the work injury. As a conflict existed in the medical opinion evidence between Dr. Rodriguez and the Office medical adviser, the Office properly referred appellant to Dr. Lee for an impartial medical examination.

The Board finds that the thorough and well-documented report of Dr. Lee, the impartial medical specialist selected to resolve the conflict in medical opinion, is entitled to special weight. Dr. Lee reviewed appellant’s history and explained his findings on examination. He advised that appellant’s examination was normal with no gross deformities or leg length discrepancies and normal alignment. Dr. Lee noted that there was no swelling of the right ankle and equal range of motion bilaterally. He also found that both knees were symmetrical with no gross deformity, full range of motion, no joint swelling, no joint tenderness and no instability of the collateral and cruciate ligaments. Dr. Lee indicated that appellant’s patella was normally aligned, that she had no joint tenderness on palpation and no palpable masses in the popliteal space and the remainder of his examination was normal. He also referred to the initial x-ray and the most recent study of April 17, 2008 and determined that appellant had a completely healed fracture of the distal fibula of the right ankle with no evidence of any complications such as post-traumatic arthritis or delayed union or any other complication. Dr. Lee opined that appellant had completely healed with no complications. He concluded that there was no permanent impairment of the right leg related to the February 1, 2007 work injury and that she no longer needed treatment. Dr. Lee also noted that appellant had reached maximum medical improvement.

The Board finds that Dr. Lee’s opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant had no permanent impairment of the right leg causally related to her employment injury. Dr. Lee examined appellant, reviewed his medical records and reported an accurate medical history. There is no probative medical evidence of

¹¹ 5 U.S.C. § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

¹² *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

record establishing that appellant has an impairment of the right lower extremity due to her work injury.

On appeal, appellant's representative alleged that it was incorrect for the Office to deem a conflict between appellant's physician and the Office medical adviser. However, as noted above, 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.¹³ The Board notes that a conflict arose between Dr. Rodriguez and the Office medical adviser regarding the extent of any permanent impairment and the Office properly selected Dr. Lee as the impartial medical examiner.

Appellant's representative also alleged that in the process of selecting Dr. Lee, the Office failed to follow the Physicians' Directory System (PDS) process. Under its procedures, the Office claims examiner is to assure that the impartial medical specialist is selected in conformance with the PDS from those Board-certified specialists who are qualified and available to conduct the examination.¹⁴ The procedure manual provides that the case file is to be supplemented with documentation of those instances in which a physician was contacted and declined the referral or examination was not otherwise feasible.¹⁵ The Office is to document in the case record how the rotational procedures were followed. In this case, the Office provided bypass pages that explain why two physicians, Drs. Dearolf and Hamilton, were not selected. In each case, the bypass page documents that the bypassed physicians did not perform impairment ratings. It also advised that Dr. Lee was selected in strict accordance with the PDS procedures. Appellant did not provide any evidence supporting her assertion that Dr. Lee was not properly selected. Therefore, there is no showing that the use of Dr. Lee's medical opinion would undermine the appearance of impartiality or compromise the integrity of the system for selecting impartial medical specialists.¹⁶

Furthermore, appellant's representative alleged that the report of Dr. Lee was "untrustworthy" as it was in conflict with the reports of the other physicians. However, he has not presented any evidence to support his allegation of bias.¹⁷ Consequently, the Office properly found that Dr. Lee's opinion represented the special weight of the medical evidence and resolved the medical conflict regarding permanent impairment of appellant's the right leg.

¹³ See *supra* note 11; *Melvina Jackson*, 38 ECAB 443 (1987).

¹⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003).

¹⁵ *Id.* at Chapter 3.500.4(b)(7).

¹⁶ Compare, *D.A.*, 61 ECAB ____ (Docket No. 09-936, issued January 13, 2010) (the evidence supported appellant's contentions that the Office did not follow its procedures in selecting an impartial specialist where there were no notes in the PDS explaining the referral to the designated physician and where it appeared that another physician was actually selected to perform the examination).

¹⁷ See *L.W.*, 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008) (the Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias).

CONCLUSION

The Board finds that appellant has not established that she has permanent impairment of the right leg causally related to her employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 17, 2009 is affirmed.

Issued: August 12, 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