United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 09-340**
	)	**Issued: February 16, 2010**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2008 appellant, through counsel, filed a timely appeal from the May 12, 2008 decision of the Office of Workers' Compensation Programs affirming the denial of his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether appellant met his burden of proof to establish that he has any permanent impairment of his left lower extremity.

[1] The May 12, 2008 decision remanded the case for further development of the evidence on appellant's left upper extremity impairment. As no final decision has been issued on his left upper extremity impairment, the Board is precluded from exercising jurisdiction over this interlocutory matter. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On December 2, 2002 appellant, then a 49-year-old general investigator, broke his left leg and left thumb when he was involved in an automobile accident. The Office accepted the claim for left leg and left thumb fractures. Appellant was placed on the periodic rolls for temporary total disability by letter dated February 14, 2003. He returned to work for four hours a day on April 7, 2003 and increased to six hours on April 21, 2003.

On October 25, 2005 appellant filed a claim for a schedule award.

On July 26, 2005 Dr. David Weiss, an examining Board-certified family medicine practitioner and osteopath, noted a history of appellant's work injuries from the December 2, 2002 employment-related motor vehicle accident. He diagnosed left thumb intra-articular fracture of the proximal phalanx at the interphalangeal joint, Grade 3 acromioclavicular left shoulder separation, left shoulder traumatic tendinopathy, left shoulder acromioclavicular arthropathy with impingement, left leg tibial plateau fracture and proximal fibular fracture, left knee post-traumatic internal derangement and left knee post-traumatic chondromalacia. On physical examination, there was marked crepitance and pain over the patellofemoral compression and tenderness over the medial patellar facet. Tenderness was also seen over the lateral patellar facet, along the tibial. Muscle strength testing revealed a Grade 4/5 of the quadriceps plateau, medial joint line and lateral joint line. Dr. Weiss concluded that appellant reached maximum medical improvement on July 26, 2005. Using Table 17-8, page 532 he found a 12 percent impairment based upon a Grade 4/5 left quadriceps motor strength and a 3 percent impairment for pain using Figure 18-1, page 574. Dr. Weiss opined that in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*) appellant sustained a 15 percent impairment of the left lower extremity.

On August 1, 2006 the Office medical adviser concluded that appellant had a 16 percent left lower extremity impairment.[3] Using Table 17-10, page 537, he found a zero percent impairment for knee range of motion for 0 to 140 degrees of flexion. The Office medical adviser determined that there was a five percent impairment for patellar femoral compression and patellar crepitus using Table 17-31, page 544. He found a 12 percent impairment for a Grade 4/5 left quadriceps motor strength deficit using Table 17-8, page 532.[4] The Office medical adviser noted July 26, 2005 as the date of maximum medical improvement.

The Office found a conflict of medical opinion between Dr. Weiss and the Office medical adviser. On November 15, 2006 it referred appellant to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination. The Office asked Dr. Glenn

[2] A.M.A., *Guides* (5th ed. 2001).

[3] Table 17-10, page 537, Table 17-31, page 544 and Table 17-6, page 532.

[4] This is for knee extension.

to provide an opinion as to appellant's impairment rating. It advised him that he must use the statement of accepted facts as the frame of reference for his report.[5]

On December 6, 2006 Dr. Glenn reviewed the medical records and provided a history and results on examination. A physical examination of the left knee revealed no evidence of joint effusion, bilateral adequate patellar excursion and no tenderness over the anteromedial aspect of the proximal tibia or over the lateral tibia plateau fracture. Appellant reported tenderness on palpation of the left anteromedial knee joint. Dr. Glenn reported excellent motor strength and tone in both lower extremities. He also found "no demonstrable evidence of any weakness involving any portion of either the right or left lower extremities." Range of motion for the left knee include 0 to 145 degrees flexion and "no complaints with repeated flexion and extension of either knee and full extension was obtained bilaterally." Dr. Glenn noted that the only difference between the left and right knee was approximately 10 degrees of flexion on full extension. Using Table 17-10, page 537, he found that appellant had a zero percent impairment for loss of flexion. With respect to the left quadriceps, Dr. Glenn noted that he found no findings of quadriceps weakness and patellofemoral crepitus, as found by Dr. Weiss. He stated that he "was not able to determine any such findings and therefore am of the opinion that [appellant] has no residual permanency of impairment involving his left knee" due to the accepted December 2, 2002 employment injury.

On January 24, 20007 Dr. Morley Slutsky, an Office medical adviser, stated that appellant's date of maximum medical improvement was December 6, 2006, the date of Dr. Glenn's evaluation. He concurred with Dr. Glenn's opinion that appellant had no impairment of the lower left extremity related to his accepted employment injury.

In a letter dated July 19, 2007, appellant's attorney submitted a May 29, 2007 x-ray, which he requested that the Office provide to Dr. Glenn for his review. Dr. Anil Desai, an examining radiologist, noted that the May 29, 2007 left knee x-ray revealed minimal left knee joint degenerative changes and no dislocation, joint effusion or acute fracture. He diagnosed mild left knee degenerative disease based upon his review of the x-ray.

In an August 9, 2007 addendum, Dr. Glenn reviewed the May 29, 2007 x-ray interpretation and concluded that appellant had no employment-related permanent impairment to his left knee.

On October 5, 2007 Dr. Slutsky, the Office medical adviser, reviewed Dr. Glenn's August 9, 2007 addendum and concurred with his opinion that appellant had no lower left extremity impairment related to his accepted employment injury.

By decision dated October 31, 2007, the Office denied appellant's claim for a schedule award for his left lower extremity as it found that he had no ratable impairment. It found that the opinion of the impartial medical examiner, Dr. Glenn, represented the weight of the evidence.

[5] The statement of accepted facts states that the Office accepted the conditions of left leg and left thumb fractures as arising out of the December 2, 2002 employment injury.

On November 7, 2007 appellant's counsel requested an oral hearing before an Office hearing representative, which was held on February 20, 2008.

By decision dated May 12, 2008, the Office hearing representative affirmed the denial of appellant's claim for a schedule award for his left lower extremity. She found that the report by Dr. Glenn, the impartial medical examiner, constituted the weight of the evidence that appellant had no ratable left lower extremity impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] 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 should 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 standards applicable to all claimants.[8] 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.[9]

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength.[10] All of the factors should be considered together in evaluating the degree of permanent impairment.[11]

The Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.[12] Likewise, the implementing regulations state 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 or consultant, the Office must appoint a third physician to make an examination.[13] This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[14] It is well established that, when a

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). *See S.K.*, 60 ECAB ___ (Docket No. 08-848, issued January 26, 2009).

[10] *See David D. Cumings*, 55 ECAB 285 (2004).

[11] *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Paul A. Toms*, 28 ECAB 403 (1987).

[12] 5 U.S.C. §§ 8101-8193, 8123(a). *See also J.J.*, 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009).

[13] 20 C.F.R. § 10.321.

[14] *Id. See R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008).

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 proper factual and medical background, must be given special weight.[15]

ANALYSIS

The Office accepted appellant's claim for left leg fracture. By decision dated October 31, 2007, it denied his claim for a schedule award due to impairment of the left lower extremity. In a May 12, 2008 decision, the Office hearing representative affirmed the denial of his claim.

In a report dated July 26, 2005, Dr. Weiss concluded that appellant had a 15 percent left lower extremity impairment. He determined that appellant had a 12 percent impairment using Table 17-8 for a Grade 4/5 left quadriceps motor strength deficit and a 3 percent impairment using Figure 18-1, page 574 for pain. However, the A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters.[16] Moreover, as the A.M.A., *Guides* explains: "The impairment ratings in the body organ system chapters make allowance for expected accompanying pain."[17] Dr. Weiss did not adequately explain why appellant's condition could not be rated in other chapters of the A.M.A., *Guides* or how his conditions fell within one of the several situations identified under section 18.3a (when this chapter should be used to evaluate pain-related impairment).[18] He did not explain why appellant's right lower extremity pain could not be evaluated using the chapter on lower extremity impairment, Chapter 17. Furthermore, Table 17-2, the cross-usage chart, provides that a rating for pain may not be combined with a muscle strength impairment rating.

In an August 1, 2006 report, the Office medical adviser concluded that appellant had a 16 percent left lower extremity impairment. He found that appellant had a 0 percent impairment for 0 to 140 degrees of flexion, using Table 17-10, page 537, a 5 percent impairment for patellar femoral compression and patellar crepitus using Table 17-31, page 544 and a 12 percent impairment for a Grade 4/5 left quadriceps motor strength deficit using Table 17-8, page 532. However, the medical adviser did not address the cross-usage chart. Table 17-2 of the A.M.A., *Guides* describes the types of impairment ratings that cannot be combined. Muscle strength may be combined with an impairment rating for arthritis.

The Office found that a conflict in medical opinion evidence arose between Dr. Weiss and the Office medical adviser regarding the degree of appellant's left lower extremity impairment. It properly referred appellant to Dr. Glenn, a Board-certified orthopedic surgeon, to determine the extent of his permanent impairment. In a December 6, 2006 report, Dr. Glenn

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[15] *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[16] A.M.A., *Guides* 571; *see D.N.*, 59 ECAB ___ (Docket No. 07-1940, issued June 17, 2008); *Mark A. Holloway*, 55 ECAB 321 (2004).

[17] *Id.* at 20.

[18] *Id.* at 570-71.

reviewed the medical records and provided a history and results on examination. A physical examination of the left knee revealed excellent motor strength and tone, no evidence of any demonstrable weakness, no evidence of joint effusion, adequate patellar excursion and no tenderness over the anteromedial aspect of the proximal tibia or over the lateral tibia plateau fracture. Using Table 17-10, page 537, Dr. Glenn found that appellant had a zero percent impairment for loss of flexion. With respect to the left quadriceps, he found no evidence of quadriceps weakness or patellofemoral crepitus, as noted by him. Dr. Glenn stated that he "was not able to determine any such findings and therefore am of the opinion that [appellant] has no residual permanency of impairment involving his left knee" due to the accepted December 2, 2002 employment injury.

The Board finds that the report of Dr. Glenn, the impartial medical examiner, is based on an accurate history medical and factual history and a thorough examination of appellant. Dr. Glenn reviewed the medical records of record and provided rationale for his conclusion that appellant had no left lower extremity impairment. His report is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.[19] Appellant did not establish that he sustained permanent impairment to his left leg related to his accepted injury.

On appeal, appellant's counsel contends that there was no conflict in the medical opinion evidence with respect to his left lower extremity at the time Dr. Glenn was selected as the impartial medical examiner. As noted above, the evidence of record establishes that there was a conflict in the medical opinion evidence at the time the Office referred appellant to Dr. Glenn, between Dr. Weiss and the Office medical adviser, regarding the extent and degree of appellant's left lower extremity impairment.

CONCLUSION

The Board finds that appellant has not established that he has any permanent impairment of his left lower extremity.

[19] *See B.T.*, 60 ECAB ___ (Docket No. 08-1885, issued June 3, 2009); *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 12, 2008 is affirmed.

Issued: February 16, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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