United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	**Docket No. 09-1216**
	)	**Issued: January 26, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Mansfield, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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 April 6, 2009 appellant filed a timely appeal from the March 12, 2009 decision of the Office of Workers' Compensation Programs denying a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant sustained permanent impairment of his right leg.

FACTUAL HISTORY

On July 28, 2005 appellant, then a 44-year-old mail handler, was injured when he slipped and fell between a truck and a dock at work. He stopped work on that date and returned to work on July 29, 2005. Appellant stopped work intermittently thereafter.[1] The Office accepted his claim for right knee contusion, right knee sprain and pulmonary embolism. Appellant received wage-loss appropriate compensation benefits.

[1] Appellant was placed off work from August 2 to 6, 2005 and stopped work on September 6, 2005. He was released to work with a 40-hour workweek restriction on May 1, 2006.

On December 29, 2005 the Office referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for a second opinion to clarify the nature and extent of any continuing injury-related medical residuals and disability related to the accepted right knee conditions. In a January 30, 2006 report, Dr. Ghanma opined that appellant's right knee sprain had resolved. He advised that appellant had reached maximum medical improvement with respect to the accepted conditions but not for the side effects of treatment for these conditions. Dr. Ghanma indicated that appellant would reach maximum medical improvement within six to eight weeks.

On February 15, 2006 the Office requested that Dr. Jeff Harwood, a Board-certified family practitioner and treating physician, review the report of Dr. Ghanma and provide any comments. In a March 9, 2006 report, Dr. Harwood concurred with Dr. Ghanma's opinion that appellant's right knee and leg issues had resolved. He also advised that appellant's pulmonary embolism was a direct result of his knee/leg injuries and had resolved. Dr. Harwood noted that appellant continued to have severe headaches that were caused by venous sinus thrombosis due to a hypercoagulable state related to appellant's Coumadin therapy. He advised that he could not determine when appellant would reach maximum medical improvement with respect to the side effects.

Appellant was released to full duties not to exceed 40 hours per week on or about May 9, 2006. However, he was placed off work due to headaches.

By letter dated May 24, 2006, the Office referred appellant to Dr. Mahmoud Mohamed, a Board-certified neurologist, for a determination with regard to the issue of causal relationship between his headaches and the accepted employment injury. On June 20, 2006 Dr. Mohamed reviewed appellant's history of injury and treatment. He determined that appellant's headaches were not employment related. Dr. Mohamed noted minimal findings regarding the right lower extremity and opined that appellant's right knee contusion, right knee sprain and pulmonary embolism had completely resolved.

On September 28, 2006 appellant filed a claim for a schedule award. In a February 8, 2007 report, Dr. Richard M. Ward, a Board-certified orthopedic surgeon, provided an impairment evaluation. He reviewed the history of injury and medical treatment. Appellant continued to have pain and swelling in his right knee which resulted in a mild limp, thigh muscle atrophy and weakness of extension to power of the knee. Dr. Ward noted that appellant had range of motion from 0 to 115 degrees of flexion, which was accompanied by crepitus and pain, and a difference of one inch in the circumference of the right thigh as opposed to the left. As a result of the thigh muscle atrophy, appellant had Grade 4 muscle weakness. Dr. Ward referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). Under Table 17-8, a Grade 4 for weakness of extension to the knee due to thigh muscle atrophy yielded 12 percent lower extremity impairment.[2] Dr. Ward opined that this impairment was due to the employment injury.

In a report dated July 5, 2007, an Office medical adviser rated impairment based on the January 30, 2006 report of Dr. Ghanma, who indicated that appellant's injury had resolved

[2] A.M.A., *Guides* 532.

completely with a normal right knee examination. The Office medical adviser found that appellant had no impairment to the lower extremity as the examination of the right knee was normal.

By decision dated February 14, 2008, the Office denied appellant's claim for a schedule award. It found that the medical evidence established no permanent impairment.

Appellant's representative requested a hearing.

In a May 14, 2008 decision, an Office hearing representative set aside the February 14, 2008 decision. She noted that it was not clear that the Office considered all medical evidence before issuing its decision. The hearing representative noted that the Office medical adviser did not explain why Dr. Ghanma's report was selected over the more recent report of Dr. Ward or if the medical adviser even considered that report. She directed appellant's referral for a new second opinion examination to evaluate the extent of any impairment.

On June 10, 2008 the Office referred appellant to Dr. Alan H. Wilde, a Board-certified orthopedic surgeon, for a second opinion. In a July 3, 2008 report, Dr. Wilde noted appellant's history and treatment and indicated that he reached maximum medical improvement on October 1, 2005. He examined appellant and advised that he walked with a limp on his left side, was tender to touch on the right leg and had no measurable calf atrophy. Dr. Wilde stated that appellant did not have crepitation with knee joint motion, instability or effusion in the knee. Appellant's reflexes were intact, he had normal motor power and could stand on his toes and heels equally. Dr. Wilde advised that there was no flexion contracture of the right knee and determined that appellant had full active extension of his knee. He indicated that putting appellant's knee in extension was not painful and there was no rebound. Dr. Wilde stated that appellant could only flex to 90 degrees and advised that it was due to his sciatica, which was not work related. He referred to Table 17-10 and found that appellant had no permanent impairment.[3] Dr. Wilde noted that he could not comment on Dr. Ward's report as it was not in the file that was forwarded to him.

On August 11, 2008 the Office provided Dr. Wilde with a copy of Dr. Ward's report and requested clarification. In an August 13, 2008 addendum report, Dr. Wilde noted that appellant had range of motion of 0 to 90 degrees which was limited during his examination because appellant was having sciatica. He advised that appellant did not have any crepitus or swelling of appellant's knee or any loss of motor power. Dr. Wilde indicated that appellant's motor strength in the right knee was normal. He advised that appellant related that he had low back pain with sciatica, bilaterally, which was worse on the right and worsened with sitting, standing and climbing steps and better with walking. Dr. Wilde noted that appellant did not complain of any locking in his knee only occasional giving away of the right knee and some swelling of his right knee. He concluded that appellant had no impairment of the right knee. Dr. Wilde referred to Table 17-10 and noted that appellant's measured range of motion according to Dr. Ward was 0 to 115 degrees, which would not result in impairment.

[3] *Id.* at 537.

In a September 3, 2008 report, the Office medical adviser noted that Dr. Ward found one inch of atrophy on the right thigh, or a Grade 4 weakness in right knee extension which was equivalent to a 12 percent permanent impairment of the right lower extremity based on Table 17-8.[4] However, Dr. Wilde examined appellant and reported full extension of the right knee with flexion to 90 degrees. The Office medical adviser explained that the limited flexion was due to sciatica. He indicated that there was no muscle atrophy or weakness and the knee was stable. The Office medical adviser explained that Dr. Wilde's examination was one year and five months after the examination provided by Dr. Ward and supported that appellant made further recovery from his injury. He opined that appellant had no impairment and reached maximum medical improvement on October 1, 2005.

By decision dated September 9, 2008, the Office denied appellant's claim for a schedule award as the medical evidence did not support a permanent impairment of the right lower extremity attributable to his work injury of July 28, 2005.

On September 12, 2008 appellant's representative requested a telephonic hearing, which was held on January 13, 2009.

In a March 12, 2009 decision, the Office hearing representative affirmed the Office's September 9, 2008 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[5] 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.[6] 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.[7] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8]

Section 8123(a), in pertinent part, 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 an examination.[9]

[4] *Id.* at 532.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8107.

[7] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[8] 20 C.F.R. § 10.404.

[9] 5 U.S.C. § 8123(a).

ANALYSIS

The Board finds that there is a conflict in the medical opinion between appellant's treating physician, Dr. Ward, who found 12 percent impairment of the right lower extremity due to thigh muscle atrophy, and Dr. Wilde, the second opinion physician, who found that appellant had no impairment as there was no loss of range of motion.

The Office's regulations provide 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.[10]

The Board will set aside the Office's March 12, 2009 decision and remand the case to the Office for referral to an impartial medical examiner for further opinion regarding whether appellant has any permanent impairment of his right leg causally related to his accepted conditions. Following this and any such further development as may be deemed necessary, the Office shall issue an appropriate final decision on appellant's entitlement to schedule award compensation for the right lower extremity.

CONCLUSION

The Board finds this case is not in posture for decision regarding appellant's claim for a schedule award.

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 12, 2009 and September 8, 2008 are set aside and the case remanded for further action consistent with this decision.

Issued: January 26, 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