United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 09-2251**
	)	**Issued: July 14, 2010**
U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Bellmawr, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2009 appellant, through counsel, filed a timely appeal from October 7, 2008 and June 1, 2009 decisions of the Office of Workers' Compensation Programs granting him a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has more than six percent permanent impairment of the right lower extremity for which he received a schedule award.

On appeal, appellant contends that the opinion of the impartial medical examiner is insufficiently detailed or rationalized to represent the special weight of the medical evidence.

FACTUAL HISTORY

On January 27, 2006 appellant, then a 53-year-old automotive technician, filed a traumatic injury claim alleging that on December 22, 2005 he injured his right hip while stocking

tires onto a tire dolly. The Office accepted the claim for sciatica and a recurrence of disability beginning March 31, 2006.[1] On April 6, 2007 appellant filed a claim for a schedule award.

In a November 7, 2007 report, Dr. Mitchell K. Freedman, an attending Board-certified physiatrist with a subspecialty in pain medicine, noted the date of maximum medical improvement as November 6, 2006. He identified the lumbar nerve root and noted right knee pain. Dr. Freedman found that there was Grade 4/5 strength loss in the right quadriceps.

Appellant submitted a December 6, 2006 report from Dr. Nicholas P. Diamond, an osteopath, who diagnosed L5-S1 herniated nucleus pulposus, degenerative L4-5, L5-S1 disc disease and right lumbosacral radiculitis. Dr. Diamond stated that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition, appellant had 39 percent impairment of the right lower extremity. He found 19 percent impairment for Grade 4/5 motor strength deficit of the right quadriceps (sciatic nerve),[2] 16 percent impairment for right hip abductor (superior gluteal nerve) motor strength deficit,[3] 2 percent impairment for right hip adductor (obturator nerve) motor strength deficit, a 4 percent impairment for Grade 2 sensory deficit of the right L3 nerve root[4] and a 4 percent impairment for Grade 2 sensory deficit of the right L4 nerve root.[5]

In a report dated December 17, 2007, Dr. Harry J. Magilato, an Office medical adviser, reviewed the reports by Drs. Diamond and Freedman. He determined that appellant had 15 percent lower extremity impairment. Dr. Magilato relied upon Dr. Freedman's findings as his report was more current than Dr. Diamond's. Using Figure 17-8, page 532, he concluded that appellant had 12 percent impairment based on a Grade 4/5 strength loss of the right quadriceps due to the L4 radiculopathy and 3 percent impairment for right knee pain as a result of nerve pain using Figure 18-1, page 574.

On August 7, 2008 the Office referred appellant to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between Dr. Diamond, an examining osteopath, who concluded that appellant had a 39 percent right lower extremity impairment and Dr. Magilato, an Office medical adviser, who concluded that appellant had 15 percent right lower extremity impairment.

In a February 19, 2008 report, Dr. Maslow, reviewed the medical evidence, a statement of accepted facts and set forth findings on physical examination. He diagnosed lumbar sprain with lumbar radiculitis and concluded that appellant had a six percent permanent impairment of the right lower extremity. On physical examination, the lumbar spine revealed mild tenderness,

[1] By decision dated March 9, 2008, the Office issued a loss of wage-earning capacity decision. It found that appellant had no wage loss as a result of his modified job of lead automotive mechanic. The Office found that the position represented his wage-earning capacity and reduced his wage-loss compensation to zero.

[2] A.M.A., *Guides*, Table 15-16, page 424 and Table 17-37, page 552.

[3] *Id*.

[4] *Id.* at Table 15-15 and 15-18, page 424.

[5] *Id*.

no sacroiliac notch tenderness, no sacroiliac joint tenderness, normal bilateral hip range of motion, full knee range of motion and full lumbar range of motion. Dr. Maslow reported a diminished right knee reflex on neurological examination. There was also some decreased sensation to light touch of a very minimal sort in the anterior and lateral thigh. Dr. Maslow reported that lower extremity knee strength testing was normal with no measurable atrophy. Under discussion, he noted that, while other physicians had found atrophy and weakness, that he did not. Dr. Maslow opined that appellant had an absent knee jerk and anterior lateral thigh sensory abnormality. Using the fifth edition of the A.M.A., *Guides*, he found a three percent impairment of the right lower extremity for sensory deficit of the L3 nerve root and three percent right lower extremity impairment for sensory deficit of the L4 nerve root, resulting in a total six percent right lower extremity impairment. Dr. Maslow noted that he did not understand Dr. Diamond's four percent sensory impairment or Dr. Magilato's Grade 4/5 strength loss of the quadriceps.

On April 5, 2008 Dr. Arnold T. Berman, an Office medical adviser, reviewed Dr. Maslow's report and recommended acceptance of the impairment.

On June 12, 2008 the Office requested that Dr. Maslow provide clarification on his statement regarding Dr. Diamond's strength deficit findings. It noted that he did not indicate specific strength measurements or how strength was measured.

In a July 3, 2008 addendum, Dr. Maslow stated that he performed manual strength testing when evaluating strength. He explained that in performing the test he compared appellant's strength against his, comparing side to side and adjusted for age. In testing for sensation, Dr. Maslow stated that he measured by light touch, which included either a wisp of cotton or finger on the skin and querying whether the sensation felt normal to the patient and whether there was identical sensation comparing left to right.

On July 20, 2008 Dr. Andrew A. Merola, an Office medical adviser, reviewed Dr. Maslow's July 3, 2008 report. He concurred with Dr. Maslow's findings and impairment rating.

On October 7, 2008 the Office granted appellant a schedule award for six percent permanent impairment of the right lower extremity. The period of the award was from February 19 to June 18, 2008.

On October 30, 2008 appellant's counsel requested an oral hearing before an Office hearing representative, which was held on March 17, 2009.

In a decision dated June 1, 2009, the hearing representative affirmed the October 7, 2008 decision.

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 to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[8] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment.[9]

Section 8123(a) of the Act[10] 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.[11] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[12]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[13] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[14] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the

[6] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 8107(c)(19).

[9] *Id*. at § 10.404; *see I.F.*, 60 ECAB ___ (Docket No. 08-2321, issued May 21, 2009); *A.A.*, 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008); *Billy B. Scoles*, 57 ECAB 258 (2005).

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8123(a); *see J.J.*, 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

[12] *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[13] *Phillip H. Conte*, 56 ECAB 213 (2004).

[14] *L.R. (E.R).*, 58 ECAB 369 (2007); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Roger W. Griffith*, 51 ECAB 491 (2000).

Act will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[15]

ANALYSIS

The Office accepted the claim for sciatica. On April 6, 2007 appellant filed a claim for a schedule award. Dr. Diamond, an osteopath, addressed the extent of appellant's permanent impairment and rated 39 percent impairment of the his right leg due to sensory impairments of the L3 and L4 nerve roots, loss of motor strength in the right quadriceps and loss of motor strength in the right hip adductors and abductors. The Office medical adviser reviewed this report and disagreed with the impairment rating provided by Dr. Diamond. He found that appellant had 15 percent impairment of the right leg due to loss of motor strength in the right quadriceps due to L4 radiculopathy and right knee pain. Due to the difference of opinion regarding the nature and extent of appellant's permanent impairment between Dr. Diamond and the Office medical adviser, the Office properly found a conflict in medical opinion evidence and referred appellant to Dr. Maslow, a Board-certified orthopedic surgeon, selected as the impartial medical examiner to determine the nature and extent of impairment.

On February 19, 2008 Dr. Maslow concluded that appellant had six percent impairment of his right lower extremity. He did not correlate his right lower extremity impairment rating with the A.M.A., *Guides*. On June 12, 2008 the Office requested a supplemental report. In a July 3, 2008 report, Dr. Maslow explained how he performed manual strength testing and sensation measurement.

The Board finds that Dr. Maslow's February 19 and July 3, 2008 reports are not sufficiently detailed or rationalized to constitute the weight of medical evidence or resolve the conflict in medical opinion. Dr. Maslow did not adequately explain how he determined the right lower extremity rating under the A.M.A., *Guides*. He did not set forth sufficient findings on examination of appellant to provide a sufficient description of how his left leg sensory or motor loss was due to the accepted back condition.[16] Dr. Maslow's July 3, 2008 report did not resolve the defects of his prior report. He failed to offer rationale for his determination that appellant had six percent impairment of his left lower extremity. As these reports were not sufficient to resolve the issue of appellant's permanent impairment for schedule award purposes, the Office should refer him, a statement of accepted facts and a list of specific questions, to another Board-certified physician to resolve the conflict of medical opinion evidence.

CONCLUSION

The Board finds that Dr. Maslow's report is not sufficient to resolve the conflict in the medical opinion evidence.

[15] *Id.*

[16] *See Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2009 and October 7, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded for further development consistent with this decision.

Issued: July 14, 2010
Washington, DC

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

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

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