United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-28**
	)	**Issued: July 9, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Wilmington, DE, 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 October 1, 2009 appellant filed a timely appeal from a July 2, 2009 schedule award decision of the Office of Workers' Compensation Programs. Under 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than five percent permanent impairment of her left lower extremity.

FACTUAL HISTORY

This case has previously been before the Board. On November 25, 2005 appellant sustained injury to her left knee which was accepted by the Office for a torn medial meniscus. She underwent arthroscopic surgery for a partial medial meniscectomy on April 19, 2006. On March 5, 2007 the Office granted appellant a schedule award for five percent permanent impairment to the left leg. In a November 3, 2008 decision, the Board set aside the schedule award finding a conflict in medical opinion between Dr. David Weiss, appellant's physician, and

Dr. Robert A. Smith, a second opinion physician.[1] The case was remanded to the Office for referral of appellant to an impartial medical specialist for an opinion on the nature and extent of permanent impairment related to the accepted injury. The facts of the case as set forth in the Board's prior decision are incorporated by reference.

The Office referred appellant, together with a statement of accepted facts, to Dr. Jerry L. Case, Board-certified in orthopedic surgery, selected as the impartial medical specialist. In a December 2, 2008 report, Dr. Case reviewed the medical history and statement of accepted facts. He reviewed the April 19, 2006 surgical report, noting that the medial compartment showed a longitudinal split on the anterior third of the meniscus. On physical examination, appellant walked with a normal gait, there was no joint effusion and flexion was from 0 to 120 degrees. There was no subpatellar crepitus, patellar instability, or atrophy of the quadriceps. Dr. Case noted that appellant experienced some tenderness medially and laterally. McMurray and Lachman testing was negative. Dr. Case stated that he agreed with Dr. Smith that appellant had two percent impairment for a partial meniscectomy and, given her complaint of ongoing pain, an additional three percent was given to find five percent impairment. He stated, "In my opinion, that evaluation is accurate and I would see no need to increase her permanency rating over that figure." Dr. Case noted that it was difficult to explain appellant's complaints in terms of the minimal meniscectomy and that no further treatment was necessary other than quad strengthening that she could do on her own at home.

In a December 12, 2008 decision, the Office denied appellant's claim for an additional schedule award as the medical evidence did not establish greater impairment. It found that Dr. Case's opinion represented the special weight of the medical evidence.

By letter dated December 16, 2008, appellant, through counsel, requested an oral hearing that was held on May 19, 2009. Counsel contended that appellant had greater than five percent impairment to her left leg and argued that Dr. Case's medical opinion was not sufficiently rationalized to constitute the weight of medical evidence. He also contended that Dr. Case had simply stated his agreement with Dr. Smith and did not cite to the applicable sections of the A.M.A., *Guides*. Lastly, counsel noted that an Office medical adviser did not review Dr. Case's referee report as required.

In a July 2, 2009 decision, an Office hearing representative affirmed the December 12, 2008 schedule award denial.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] 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 loss of use.[3] However, the Act does not

[1] Docket No. 08-1207 (issued November 3, 2008).

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 5 U.S.C. § 8107(c)(19).

specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[4]

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[5]

Board case precedent provides that, 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 deficiency in his original report. If the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is incomplete, vague, speculative or lacking in rationale, the Office should refer the claimant to a second impartial specialist.[6]

ANALYSIS

The Office found that appellant did not have greater than five percent impairment of the left leg based on Dr. Case's referee medical opinion. However, the Board finds that Dr. Case did not adequately explain his rating of impairment in the December 2, 2008 report. The Board finds that the Office improperly relied on his opinion, which is not sufficiently thorough or well reasoned to represent the special weight accorded an impartial medical examiner. Dr. Case did not adequately set forth findings from examination in sufficient detail to allow the Board to make fully visualize the nature and extent of permanent impairment. It is well established that a physician's opinion should include a description of impairment, including the loss in degrees range of motion of affected members, any atrophy or deformity, decreases in strength or disturbance of sensation in such detail as those reviewing the file will be able to clearly visualize the impairment with all its limitations.[7] On appeal, counsel noted that Dr. Case only measured flexion of the left leg and did not provide any measurements of atrophy to the quadriceps or gastrocnemius muscles or conduct adequate strength or motor tests. The Board finds that Dr. Case did not provide sufficient explanation or factual support regarding why he concurred with Dr. Smith's method of calculating impairment for appellant's left lower extremity, as opposed to that presented by Dr. Weiss. The opinion of Dr. Case does not resolve the medical conflict regarding the percentage of impairment to appellant's left leg.

[4] 20 C.F.R. § 10.404.

[5] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

[6] *See Nancy Keenan*, 56 ECAB 687 (2005).

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

The Board will set aside the Office's July 2, 2009 decision and remand the case to the Office to request a supplemental report from Dr. Case.[8] After such further development as may be required, the Office shall issue an appropriate final decision on appellant's claim for a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion as to the extent of permanent impairment to appellant's left leg.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further action consistent with this decision of the Board.

Issued: July 9, 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

[8] *See Richard R. LeMay*, 56 ECAB 341 (2005) (where the Board found that if a referee physician's opinion required clarification, the Office should request a supplemental opinion); *see also Harry T. Mosier*, 49 ECAB 688, 693 (1998).