United States Department of Labor
Employees' Compensation Appeals Board

P.D., Appellant	)	
	)	**Docket No. 09-1220**
and	)	**Issued: March 15, 2010**
	)	
DEPARTMENT OF THE NAVY, NAVAL AIR STATION MIRAMAR, San Diego, CA, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2009 appellant filed a timely appeal of September 12, 2008 and March 18, 2009 decisions of the Office of Workers' Compensation Programs adjudicating his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant is entitled to a schedule award for his April 30, 1980 or August 4, 1987 employment injuries.

FACTUAL HISTORY

On April 30, 1980 appellant, then a 42-year-old maintenance worker, sustained an acute low back strain when he fell from a bench.[1] On August 4, 1987 he sustained an acute low back strain when he slipped and fell. The two cases were combined under OWCP File No.

[1] The April 30, 1980 employment injury was accepted under OWCP File No. xxxxxx252.

xxxxxx406. On September 9, 2005 appellant filed a claim for a schedule award for his lower extremities.

In a September 27, 2005 report, Dr. Laurence M. McKinley, an attending Board-certified orthopedic surgeon, stated that appellant had a 10 percent impairment of his whole body based on signs of radiculopathy, reflex loss, loss of strength and evidence of spinal stenosis affecting the lower extremities. Appellant also had a gait disturbance caused by his lumbar spine condition.

By decision dated November 28, 2005, the Office denied appellant's schedule award claim. On November 30, 2006 an Office hearing representative remanded the case for further development of the medical evidence.

On January 18, 2007 the Office referred appellant to Dr. Hendrick J. Arnold, an orthopedic surgeon and an Office referral physician.

In a February 14, 2007 report, Dr. Arnold reviewed appellant's medical history and provided findings on physical examination. He stated that appellant had no physical findings in his lower extremities that were ratable for impairment purposes. However, appellant had permanent aggravations of underlying spinal stenosis, scoliosis and degenerative disc disease.

By decision dated February 21, 2007, the Office denied appellant's claim for a schedule award but accepted the additional conditions of permanent aggravation of preexisting spinal stenosis, lumbar scoliosis and degenerative disc disease based on Dr. Arnold's report.

In an August 8, 2007 decision, an Office hearing representative set aside the February 21, 2007 decision. She found a conflict in the medical opinion evidence between Dr. McKinley and Dr. Arnold and remanded the case for referral to a referee physician.

On October 30, 2007 the Office referred appellant, together with a statement of accepted facts, a list of questions and the case file, to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for an independent medical examination.

In a December 17, 2007 report, Dr. Sabin reviewed appellant's medical history and provided findings on physical examination. Appellant described his pain as 7 out of 10 with pain medications and he experienced pain in the L5 to S1 distribution of his spine and down his legs bilaterally. He was able to get onto the examination table without difficulty but lying flat caused discomfort. Appellant was not able to walk on his heels or toes, indicating that he could not and would not attempt these maneuvers. Dr. Sabin stated that appellant had normal range of motion in his lower extremities, without crepitus, instability or atrophy. However, he did not provide any range of motion measurements of appellant's lower extremities. Lower extremity reflexes and sensation were described as normal. Straight leg raising was negative bilaterally. Motor strength was normal in both lower extremities. There was no lower extremity atrophy. Dr. Sabin opined that appellant had pain and permanent functional loss of his lower extremities but it was caused by spinal stenosis or foraminal stenosis, not a leg condition. He stated that appellant had no lower extremity impairment because his scoliosis and stenosis conditions were degenerative in nature and would worsen with aging. Dr. Sabin stated that appellant "does not

have a permanent functional loss of his lower extremities, *per se*. [Appellant's] issues are due to his back and not to the legs."

By decision dated January 18, 2008, the Office denied appellant's claim for a schedule award for his lower extremities on the grounds that the weight of the medical evidence, represented by the report of Dr. Sabin, established that he had no impairment of his lower extremities causally related to his 1980 or 1987 back injuries.

In a February 5, 2008 report, Dr. McKinley stated his disagreement with Dr. Sabin's report. He stated that some of the findings on physical examination reported by Dr. Sabin were not credible in light of appellant's age of 72. Dr. McKinley noted a lack of lower extremity range of motion findings in Dr. Sabin's report. Also, Dr. Sabin noted lower extremity pain which is ratable under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) for sensory deficit.

In a March 8, 2008 report, Dr. Barry Maron, a Board-certified orthopedic surgeon, reviewed appellant's medical history and provided findings on physical examination, including range of motion measurements. Range of motion measurements indicated severe impairment due to decreased hip internal and external rotation, decreased hip flexion, decreased knee flexion. Hip extension was too painful for appellant to attempt. Dr. Maron found that appellant had decreased lower extremity reflexes. Straight leg raising elicited severe pain in his low back, hips and buttocks. Dr. Maron opined that appellant had 40 percent right lower extremity impairment and 30 percent left lower extremity impairment based on decreased range of motion and pain of the hips and knees. He stated that appellant's impairment was due to pathology in his lower extremities caused by his accepted aggravation of spinal stenosis.

By decision dated May 14, 2008, an Office hearing representative set aside the January 18, 2008 decision for further development of the medical evidence. The hearing representative directed the Office to obtain a supplemental medical report from Dr. Sabin after advising him that impairment of an extremity caused by an accepted back condition can be the basis for a schedule award.

The Office requested a supplemental report from Dr. Sabin and advised him that aggravation of scoliosis, stenosis and degenerative disc disease were accepted conditions. It advised Dr. Sabin that appellant would be entitled to an impairment rating for lower extremity impairment caused by his accepted spinal conditions. The Office provided copies of Dr. McKinley's and Dr. Maron's reports to Dr. Sabin. It asked him to provide a supplemental report calculating appellant's lower extremity impairment based on his findings on physical examination and the accepted conditions.

In a supplemental report dated May 23, 2008, Dr. Sabin stated that there could not be a permanent aggravation of stenosis, scoliosis and degenerative disc disease, only a temporary aggravation and the acceptance by the Office of such permanent aggravation was flawed. He stated that, if the Office wanted to accept permanent aggravation of appellant's spinal conditions, it was welcome to do so, but it would not be correct. Dr. Sabin stated that, if the Office wanted to accept these conditions, it would still not relate to lower extremity impairment, as lower extremity impairment would be related to range of motion, motor weakness or sensation

problems. He stated that appellant had leg symptoms, not leg pathology. Dr. Sabin stated, "Even if demanded of me, I would not even know how to do a lower extremity impairment in this case, anymore than I could rate a shoulder pain as the result of angina or decreased walking/leg stamina as a result of emphysema." He also described his disagreements with statements in the reports of Dr. McKinley and Dr. Maron.

By decision dated September 12, 2008, the Office denied appellant's schedule award claim on the grounds that the weight of the medical evidence, represented by the reports of Dr. Sabin, established that appellant did not have any lower extremity impairment causally related to his accepted conditions.

On October 9, 2008 appellant requested an oral hearing that was held on February 14, 2007.

By decision dated March 18, 2009, the Office affirmed the September 12, 2008 decision.[2]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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 shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (5th ed. 2001) has been adopted by the Office as the appropriate standard for evaluating schedule losses.[5]

The A.M.A., *Guides* provides for three separate methods for calculating the lower extremity permanent impairment of an individual: anatomic, functional and diagnosis based.[6] The anatomic method involves noting changes, including muscle atrophy, nerve impairment and vascular derangement, as found during physical examination.[7] The diagnosis-based method may be used to evaluate impairments caused by specific fractures and deformities, as well as ligamentous instability, bursitis and various surgical procedures, including joint replacements and meniscectomies.[8] The functional method is used for conditions when anatomic changes are

[2] Subsequent to the March 18, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*.

[6] A.M.A., *Guides* 525.

[7] *Id.*

[8] *Id.*

difficult to categorize or when functional implications have been documented and includes range of motion, gait derangement and muscle strength.[9] The evaluating physician must determine which method best describes the impairment of a specific individual based on patient history and physical examination.[10] When uncertain about which method to use, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating.[11] If more than one method can be used, the method that provides the higher impairment rating should be adopted.[12]

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."[13] 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.[14]

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. Only when the impartial specialist is unable or unwilling to clarify or elaborate on his original report or if his supplemental report is incomplete, vague, speculative or lacking in rationale, should the Office refer the claimant to a second impairment specialist.[15]

ANALYSIS

The Board finds that this case is not in posture for a decision. The reports of Dr. Sabin are not entitled to special weight and are not sufficient to resolve the conflict in the medical opinion evidence in this case.

On December 17, 2007 Dr. Sabin reviewed appellant's medical history, including test results and provided findings on physical examination and stated that appellant had no lower extremity impairment because his scoliosis and stenosis conditions were degenerative in nature and would worsen with aging. He stated that appellant "does not have a permanent functional loss of his lower extremities, *per se*. His issues are due to his back and not to the legs." The

[9] *Id*. at 525, Table 17-1.

[10] *Id*. at 548, 555.

[11] *Id*. at 526.

[12] *Id*. at 527, 555.

[13] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots,* 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan),* 45 ECAB 207 (1993).

[14] *See Roger Dingess,* 47 ECAB 123 (1995); *Glenn C. Chasteen,* 42 ECAB 493 (1991).

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

Office requested a supplemental report from Dr. Sabin and advised him that aggravation of scoliosis, stenosis and degenerative disc disease were accepted conditions. It advised that appellant would be entitled to an impairment rating for lower extremity impairment caused by his accepted spinal conditions. The Office asked Dr. Sabin to provide a supplemental report calculating appellant's lower extremity impairment based on the accepted conditions and findings on physical examination.

In a supplemental report dated May 23, 2008, Dr. Sabin opined that there could not be a permanent aggravation of stenosis, scoliosis and degenerative disc disease, only a temporary aggravation.

The Board finds that there are several deficiencies in Dr. Sabin's reports. He disagreed with the Office's acceptance of permanent aggravation of stenosis, scoliosis and degenerative disc disease. Dr. Sabin was asked, however, to provide an impairment rating based on these accepted conditions and other information included in the statement of accepted facts provided to him as part of the factual and medical background of the case. The Office advised him that, although a schedule award may not be issued for an impairment to the back under the Act, an award may be payable for permanent impairment of the lower extremities that is due to an employment-related back condition.[16] Based on statements in his supplemental report, Dr. Sabin seemed unwilling to follow the Office's instructions in preparing appellant's impairment rating. He stated that if the Office wanted to accept permanent aggravation of appellant's spinal conditions, it was welcome to do so, but it would not be correct. Dr. Sabin stated that, if the Office wanted to accept these conditions, it would still not relate to lower extremity impairment, as lower extremity impairment would be related to range of motion, motor weakness or sensation problems. He did not provide any range of motion measurements for appellant's lower extremities, although he acknowledged that range of motion impairment could be a basis for lower extremity impairment. The A.M.A., *Guides* provides for measurement of the hip, knee, ankle and foot in determining lower extremity impairment but Dr. Sabin did not provide any of these measurements. He noted in his examination that appellant experienced lower extremity pain but Dr. Sabin did not appear to understand that sensation problems include pain and pain is ratable under the A.M.A., *Guides*. As noted, when the impartial specialist is unable or unwilling to clarify or elaborate on his original report or if his supplemental report is incomplete, vague, speculative or lacking in rationale, should the Office refer the claimant to a second impairment specialist.

The Board notes also that the Office failed to follow its procedures requiring referral of the medical evidence to an Office medical adviser in cases where an impartial medical specialist examination was arranged to resolve a conflict in a schedule award case.[17] The Office did not refer the impairment rating of Dr. Sabin to an Office medical adviser as required.

On remand, the Office should refer appellant to a new Board-certified medical specialist for an independent evaluation of his left and right lower extremity impairment based on correct

[16] *See Vanessa Young*, 55 ECAB 575 (2004); *Gordon G. McNeill*, 42 ECAB 140 (1990).

[17] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5 (March 2005).

application of the A.M.A., *Guides* and the statement of accepted facts provided by the Office. The physician should provide specific findings on physical examination and any measurements necessary for application of appropriate sections of the A.M.A., *Guides.* He or she should refer to specific sections and tables in the A.M.A., *Guides* that are appropriate to a determination of appellant's impairment. The physician should provide medical rationale explaining why a particular rating method was selected. If more than one impairment rating method can be used in evaluating appellant's impairment, the method that provides the higher rating should be adopted.[18]

On appeal, appellant contends that the Office's decisions are contrary to fact and law. However, he does not provide any specific argument or evidence demonstrating error in the decisions.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should refer appellant to a new impartial medical specialist for an examination and evaluation in order to resolve the conflict in the medical opinion evidence.

[18] A.M.A., *Guides* 527.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 18, 2009 and September 12, 2008 are set aside and the case is remanded for further action consistent with this decision.

Issued: March 15, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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