

**United States Department of Labor  
Employees' Compensation Appeals Board**

\_\_\_\_\_  
G.S., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,  
FORT LYONS VETERANS HOSPITAL,  
Lyons, NJ, Employer**

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 09-1670  
Issued: May 19, 2010**

*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 June 22, 2009 appellant, through her attorney, filed a timely appeal from an August 7, 2008 merit decision of the Office of Workers' Compensation Programs terminating her authorization for medical benefits. She also appeals the August 13, 2008 and March 3, 2009 merit decisions finding that she was not entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office properly terminated appellant's authorization for medical benefits effective December 27, 2007 on the grounds that she had no further residuals of her accepted employment injury; and (2) whether she is entitled to a schedule award for a permanent impairment due to her work injury.

## **FACTUAL HISTORY**

On July 9, 2002 appellant, then a 50-year-old nursing assistant, filed a claim alleging that she sustained an injury to her lower back on May 2, 2002 in the performance of duty. She stopped work on May 4, 2002. The Office accepted her claim for a herniated disc at L4-5. Appellant returned to limited-duty employment on May 27, 2003.<sup>1</sup> The Office accepted that she sustained a recurrence of disability on December 3, 2006 and paid her compensation for total disability beginning that date.

In a report dated December 14, 2006, Dr. Allen S. Glushakow, a Board-certified internist and orthopedic surgeon, diagnosed lumbosacral radiculitis and a herniated disc at L5-S1. In a form report dated February 1, 2007, he diagnosed lumbosacral neuritis and a herniated disc. Dr. Glushakow found that appellant was totally disabled from December 19, 2006 to February 1, 2007 and could resume light-duty employment with no lifting over 10 pounds on February 5, 2007. On March 15, 2007 appellant returned to limited-duty employment.

On March 22, 2007 the Office referred appellant to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated April 8, 2007, Dr. Rubinfeld diagnosed status post lumbar spine sprain and L4-5 disc herniation due to her May 2, 2002 work injury. He opined that appellant's condition had resolved and that she had no further disability or need for further medical treatment.

On April 27, 2007 the Office notified appellant of its proposed termination of her medical benefits as the evidence established that she had no further residuals of her work injury. By decision dated June 7, 2007, it finalized its termination of her medical benefits effective May 30, 2007.

On June 12, 2007 appellant, through her attorney, requested an oral hearing. Following a preliminary review, in a decision dated August 1, 2007, the hearing representative set aside the June 7, 2007 termination decision. He found that Dr. Rubinfeld's opinion was insufficiently rationalized to constitute the weight of the medical evidence. The hearing representative further determined that a conflict existed between Dr. Glushakow and Dr. Rubinfeld regarding the nature and extent of appellant's condition and disability. He remanded the case for the Office to refer her for an impartial medical examination.

On September 21, 2007 the Office referred appellant to Dr. Andrew Carollo, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated October 16, 2007, Dr. Carollo reviewed the history of injury and the medical evidence of record. He noted that appellant currently worked limited duty and discussed her current complaints of low back pain radiating into the right leg and difficulty performing certain activities. On examination Dr. Carollo found negative straight leg raising bilaterally, no motor deficits or objective evidence of muscle spasms and no significant pain with range of motion. He found decreased sensation to pinprick around appellant's left foot and the lack of an ankle reflex on the right side. Dr. Carollo

---

<sup>1</sup> By decision dated May 23, 2003, the Office suspended appellant's compensation benefits for failing to appear at a scheduled second opinion examination. On May 6, 2004 it vacated its May 13, 2004 decision suspending her compensation.

diagnosed lumbosacral sprain with findings on magnetic resonance imaging (MRI) scan study of a L4-5 disc herniation. He attributed the diagnoses to appellant's May 2, 2002 employment injury. Dr. Carollo stated:

"Recently, [appellant] had a flare-up of her lower back condition which has resolved. Presently, there is no objective finding of disability on [her].

"I believe that [appellant] should be able to return to her usual occupation as a nursing assistant without restriction.

"I believe that [she] has reached maximum benefit from her treatment and I see no cause for additional diagnostic studies to be performed at this time. Surgery has not been contemplated on [appellant] and none is planned.

"With regard to the specific question regarding the directive of Dr. Glushakow for [appellant] to resume light duty as of February 5, 2007 with no lifting over 10 pounds, I would have to upgrade her functional capacity at this time based upon her most recent examination. I believe that she is able to return to full duty on an unrestricted basis."

On November 21, 2007 the Office notified appellant of its proposed termination of her medical benefits based on the findings of Dr. Carollo, the impartial medical examiner. In a response dated November 30, 2007, appellant's attorney questioned whether Dr. Carollo was aware of the physical requirements of appellant's position. Counsel also argued that he could not diagnose a herniated disc and find no residuals of appellant's condition.

By decision dated December 27, 2007, the Office terminated appellant's authorization for medical benefits effective that date on the grounds that she required no further medical treatment for her accepted employment injury. On January 2, 2008 appellant requested an oral hearing.

In a report dated February 8, 2008, Dr. Glushakow diagnosed lumbosacral radiculitis, a herniated disc at L5-S1 and a probable herniated disc at L4-5. He attributed the diagnosed conditions to appellant's May 2, 2002 work injury. On examination Dr. Glushakow found "lumbosacral tenderness and spasm." He stated, "Within a reasonable degree of medical probability, the injuries sustained as a result of the accident of May 2, 2002 are permanent in nature. Appellant will have loss of body function with respect to her back. Further, follow[-]up evaluation would be most important."

In a report dated March 3, 2008, Dr. David Weiss, a osteopath who is Board-certified in family practice, applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6<sup>th</sup> ed. 2008) and found that appellant had a 1 percent impairment of the left upper extremity and an 11 percent permanent impairment to each lower extremity.

At the hearing, held on May 17, 2008, appellant's attorney contended that Dr. Carollo's report was insufficient to constitute the weight of the evidence. He noted that diagnostic studies, including an electromyogram (EMG), showed residuals bilateral radiculopathy and found decreased pinprick on examination.

On June 9, 2006 the Office informed appellant's attorney that it could not use Dr. Weiss' report because it was not based on the fifth edition of the A.M.A., *Guides*. It advised that it was currently using the standards found in the fifth edition of the A.M.A., *Guides*.<sup>2</sup>

In a report received July 25, 2008, Dr. Weiss applied the fifth edition of the A.M.A., *Guides* to the findings in his March 3, 2008 report. He discussed appellant's complaints of pain and stiffness in the lower back radiating into her right anterior thigh and left calf. Dr. Weiss measured Grade 4/5 strength of the hip flexors of the lower extremities through manual muscle testing. He concluded that appellant had one percent impairment due to loss of left shoulder flexion. Dr. Weiss further found eight percent impairment due to loss of motor strength in the right and left hip flexors.<sup>3</sup> He next determined that appellant had an additional three percent impairment of the lower extremities due to pain.<sup>4</sup> Dr. Weiss added the 3 percent impairment due to pain to the 8 percent impairment due to motor loss to find a total impairment of 11 percent for each lower extremity.

On July 30, 2008 an Office medical adviser reviewed Dr. Weiss' report and noted that appellant did not have an accepted left upper extremity condition. Regarding appellant's lower extremities, he stated:

"The hip flexors of L4 root are recommended to be [eight] percent impairment based upon Table 15-16 and Table 15-18 on page 424. However, the L4 nerve root is not involved on the MRI [scan] study and, therefore, would have no rationale. The L4-5 disc is involved which would involved the L5 nerve root and not the L4 nerve root and L5 musculature tests normal. Anatomically this would be incorrect to recommended [eight] percent impairment."

The Office medical adviser further found that Dr. Weiss did not explain why an additional award for pain was appropriate under Chapter 18. He concluded that appellant had no impairment of either the right or left lower extremity.

By decision dated August 7, 2008, the Office hearing representative affirmed the December 27, 2007 decision. He found that, the opinion of Dr. Carollo, the impartial medical examiner, constituted the weight of the evidence and established that appellant had no further residuals of her work injury.

An EMG and nerve conduction study of the lower extremities dated February 13, 2007, received by the Office on August 8, 2008, revealed radiculopathy on the left at L5.

In a decision dated August 13, 2008, the Office denied appellant's claim for a schedule award as the evidence did not establish that she sustained a permanent impairment due to her accepted employment injury. On August 18, 2008 her attorney requested an oral hearing. At the

---

<sup>2</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). As of May 1, 2009, the sixth edition will be used. FECA Bulletin No. 09-03 (issued March 15, 2008).

<sup>3</sup> A.M.A., *Guides* 424, Tables 15-16, 15-18.

<sup>4</sup> *Id.* at 574, Figure 18-1.

video conference hearing, held on December 18, 2008, appellant's attorney argued that a conflict existed between Dr. Weiss and the Office medical adviser.

By decision dated March 3, 2009, the hearing representative affirmed the August 13, 2008 decision. He found that the opinion of the Office medical examiner constituted the weight of the evidence and established that appellant was not entitled to a schedule award.

On appeal, appellant's attorney contends that Dr. Carollo's opinion is insufficient to constitute the weight of the evidence as he did not find that appellant had no restrictions but instead that he required another functional capacity evaluation. He further notes that Dr. Carollo diagnosed a disc herniation by MRI scan study. The attorney additionally asserts that a conflict in medical opinion exists between Dr. Weiss and the Office medical adviser regarding whether appellant has a permanent impairment of the lower extremities.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>5</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>6</sup>

Section 8123(a) of the Federal Employees' Compensation Act<sup>7</sup> 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.<sup>8</sup> 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, 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.<sup>9</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.<sup>10</sup>

---

<sup>5</sup> *Pamela K. Guesford*, 53 ECAB 727 (2002).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Id.* at § 8123(a).

<sup>9</sup> 20 C.F.R. § 10.321.

<sup>10</sup> *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained a herniated disc at L4-5 as a result of a May 2, 2002 employment injury. Appellant stopped work on May 4, 2002 and returned to limited-duty employment on May 27, 2003. She sustained a recurrence of disability on December 3, 2006. Appellant resumed limited-duty employment on March 15, 2007.

On August 1, 2007 an Office hearing representative determined that a conflict existed between Dr. Glushakow, appellant's attending physician, and Dr. Rubinfeld, who provided a second opinion examination, regarding whether she had any residuals of her work injury. The Office referred her to Dr. Carollo for an impartial medical examination.

On appeal, appellant's attorney argues that Dr. Carollo's report is insufficient to resolve the conflict in medical opinion. On October 16, 2007 Dr. Carollo diagnosed a lumbosacral sprain and MRI scan study findings of a L4-5 disc herniation as a result of appellant's May 2, 2002 work injury. He found no evidence of motor deficits or muscle spasm on examination but decreased sensation to pinprick of the left foot and no ankle reflex on the right side. Dr. Carollo opined that appellant's low back condition had resolved and that she had no disability. He asserted that she had "reached maximum benefit from treatment..." Dr. Carollo did not, however, provide any rationale for his opinion or explain why appellant's condition had resolved, especially given the continued findings of a disc herniation at L4-5 by MRI scan study and the findings on physical examination of decreased sensation. While he made statements regarding the need for further medical treatment that, were clear and unequivocal, he failed to offer adequate medical reasoning to support his conclusions.<sup>11</sup> The certainty with which Dr. Carollo expressed his opinion cannot overcome the lack of medical rationale.<sup>12</sup> As he did not sufficiently explain why appellant's herniated disc at L4-5 had resolved and she no longer required further medical treatment, his opinion is insufficient to constitute the special weight of the medical evidence and the record contains an unresolved conflict in medical opinion. The Board consequently finds that the Office has not met its burden of proof to terminate appellant's medical benefits for the accepted employment injury.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The schedule award provision of the Act<sup>14</sup> and its implementing federal regulations,<sup>15</sup> 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

---

<sup>11</sup> See *Elaine Sneed*, 56 ECAB 373 (2005).

<sup>12</sup> See *Willa M. Frazier*, 55 ECAB 379 (2004).

<sup>13</sup> In view of the Board's disposition of the merits of this issue, the Board will not address the remainder of the arguments raised by appellant's attorney regarding Dr. Carollo's opinion.

<sup>14</sup> 5 U.S.C. § 8107.

<sup>15</sup> 20 C.F.R. § 10.404.

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 standard applicable to all claimants.<sup>16</sup> For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>17</sup>

Section 8123(a) 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.<sup>18</sup> 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, 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.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

Appellant submitted an impairment evaluation dated March 3, 2008 from Dr. Weiss. The Office informed her that it could not use this report as he applied the standards from the sixth edition rather than the fifth edition of the A.M.A., *Guides*. In a report received by the Office on July 25, 2008, Dr. Weiss applied the fifth edition of the A.M.A., *Guides* to the findings in his March 3, 2008 report. He determined that appellant had Grade 4/5 strength of the hip flexors using manual muscle testing. Applying Tables 15-16 and 15-18 on page 424 of the A.M.A., *Guides*, relevant to determining lower extremity impairments due to a motor deficit of a spinal nerve, Dr. Weiss found eight percent impairment due to loss of motor strength of the right and left hip flexors. He added 3 percent impairment due to pain using Chapter 18 of the A.M.A., *Guides* to find a total lower extremity of each lower extremity of 11 percent.

An Office medical adviser reviewed Dr. Weiss' report. He found that an impairment of the hip flexors from the L4 nerve root constituted eight percent impairment according to Tables 15-16 and 15-18 on page 424 of the A.M.A., *Guides*. The Office medical adviser asserted, however, that an impairment of the L4-5 disc "involved the L5 nerve root and not the L4 nerve root and L5 musculature tests are normal." He further found that Dr. Weiss improperly added three percent impairment due to pain under Chapter 18.<sup>20</sup> The Office medical adviser concluded that appellant did not have a permanent impairment of either lower extremity.

---

<sup>16</sup> *Id.* at § 10.404(a).

<sup>17</sup> *Supra* note 2.

<sup>18</sup> 5 U.S.C. § 8123(a).

<sup>19</sup> *Supra* note 9.

<sup>20</sup> Examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*. See Federal (FECA) Procedure Manual, *supra* note 2 at Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* 18.3(b); see also *Philip Norulak*, 55 ECAB 690 (2004).

On appeal, appellant's attorney argues that a conflict exists between Dr. Weiss and the Office medical adviser. The Board finds that the case is not in posture for decision due to a conflict in medical opinion regarding whether appellant has a permanent impairment of the lower extremities. The Office medical adviser opined that an impairment of the hip flexor involved the L5 nerve root but found that there was no evidence of an L5 impairment. An EMG dated February 13, 2007, however, revealed left L5 radiculopathy. The case contains a conflict in medical opinion between Dr. Weiss, who found a permanent impairment of the right and left lower extremity and the Office medical adviser, who found that appellant had no employment-related impairment. On remand, the Office should refer her to an impartial medical examiner for resolution of the conflict. Following such further development as is deemed necessary, the Office should issue an appropriate decision.

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant's authorization for medical benefits effective December 27, 2007 on the grounds that she had no further residuals of her accepted employment injury. The Board further finds that the case is not in posture for decision regarding whether she is entitled to a schedule award due to an unresolved conflict in medical opinion.



**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 3, 2009 and August 13, 2008 are set aside and the decision dated August 7, 2008 is reversed. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 19, 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