United States Department of Labor
Employees' Compensation Appeals Board

G.L., Appellant	)	
and	)	**Docket No. 10-950**
	)	**Issued: November 26, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Newark, 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:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 24, 2010 appellant, through his representative, filed a timely appeal from the November 24, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant has more than an eight percent impairment of his right leg.

FACTUAL HISTORY

On October 16, 2004 appellant, then a 52-year-old welder, sustained an injury in the performance of duty when, while unloading a skid from a forklift, he lost balance and fell to the ground. The Office accepted his claim for a closed fracture of the lower end of the right humerus, a closed fracture of the right radius head and a closed peritrochanteric fracture of the right femur neck.

Appellant received a schedule award for a three percent pain-related impairment of his right lower extremity. An Office hearing representative later found a conflict in medical opinion

on the extent of appellant's impairment. Dr. David Weiss, appellant's osteopath, found one centimeter right calf atrophy while Dr. David Rubinfeld, a second-opinion orthopedic surgeon, found no atrophy. The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Lawrence I. Livingston, a Board-certified orthopedic surgeon, for an impartial medical evaluation.[1]

Dr. Livingston examined appellant on March 3, 2009 and described his findings on physical examination. He provided measurements and stated: "These measurements indicated that there was atrophy of the right calf which was no more than 1 centimeter…." Dr. Livingston concluded that appellant had impairment as a result of an avulsion fracture of the greater trochanter of the right hip. "The patient has calf atrophy of the right side which is noted to be mild and is approximately one [centimeter] and, therefore, correlates to an eight percent partial disability relative to the right lower extremity...." He added that appellant also appeared to have three percent pain-related impairment. "The total disability relative to the right lower extremity, therefore, appears to be 11 percent."

An Office medical adviser reviewed Dr. Livingston's findings and determined that appellant had a five percent impairment of the right lower extremity due to loss of right hip external rotation, which Dr. Livingston did not rate, as well as a three percent pain-related impairment. He explained that the lower extremity impairment due to one centimeter calf atrophy was three percent and that appellant could not receive a schedule award for both atrophy and loss of hip motion. The Office medical adviser concluded that appellant should receive no greater than five percent impairment plus the three percent impairment for pain.

On April 7, 2009 the Office issued a schedule award for an eight percent right lower extremity impairment, representing a five percent increase over appellant's previous award. In a decision dated November 24, 2009, an Office hearing representative affirmed, finding that Dr. Livingston's report was entitled to special weight in resolving the conflict.

On appeal, appellant's representative argues that the Office medical adviser essentially changed the opinion of the impartial medical specialist and that the Office erred by failing to seek clarifying information from Dr. Livingston. Appellant's representative suggests in the alternative that Dr. Livingston's opinion was well reasoned and established an 11 percent impairment of the right lower extremity.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of

[1] Questions for Dr. Livingston included: "Please determine the extent of permanent impairment to the claimant's right lower extremity as per the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition, due to the claimant's accepted condition(s)."

[2] 5 U.S.C. § 8107.

permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[3]

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.[4] When 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.[5]

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[6] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[7]

ANALYSIS

The Office referred appellant to Dr. Livingston, the orthopedic surgeon and impartial medial specialist, to resolve the extent of right lower extremity impairment. According to Dr. Livingston's clinical findings, appellant's left calf measured 41 centimeters at a point 10 centimeters below the patella, and 40 centimeters at a point 15 centimeters before the patella. Appellant's right calf measured 40.5 and 39 centimeters at those same levels respectively.

Table 17-6, page 530 of the fifth edition of the A.M.A. *Guides*, states that Dr. Livingston was to measure the maximum circumference on the normal (left) side and compare that measurement to the circumference at the same level of the affected side. Dr. Livingston did not explicitly measure the maximum circumference on the left. Instead, he provided measurements at two points below the patella. These measurements might accurately reflect the circumference

[3] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[4] 5 U.S.C. § 8123(a).

[5] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[6] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[7] *Harold Travis*, 30 ECAB 1071 (1979).

of appellant's left calf, and if they do, it is the larger measurement -- 41 centimeters at a point 10 centimeters below the patella -- that should be used for comparison.

Using the larger circumference for comparison, appellant would have less than one centimeter calf atrophy on the right.[8] This would be nonratable under Table 17-6.

An issue has arisen over the range of values Table 17-6 provides for mild atrophy. For atrophy of 1 to 1.9 centimeter, the table offers impairment values from three to eight percent. Dr. Livingston rated the lowest ratable measurement (one centimeter) by selecting the highest impairment value in the range (eight percent). The Office medical adviser selected the lowest impairment value in the range (three percent). Example 17-4, page 530, addresses this issue directly. In the example, physical examination revealed one centimeter calf muscle atrophy. Discussing the proper impairment rating, the A.M.A. *Guides* indicates that the one centimeter calf atrophy represents a three percent lower extremity impairment. So it would appear that in the absence of medical rationale to the contrary, the lowest ratable measurement extrapolates to the lowest impairment value within the given range.

A second issue has arisen over loss of hip motion. Dr. Livingston recorded 30 degrees external rotation of the right hip but did not rate a resulting impairment. The Office medical adviser correctly noted that this represents a mild lower extremity impairment of five percent under Table 17-9, page 537. If appellant has any impairment due to calf atrophy, it may not be combined with impairment for range of motion.[9]

Given these outstanding issues, the Board finds that further development of the medical evidence is warranted. The Board will set aside the Office's November 24, 2009 decision and remand the case for a supplemental report from Dr. Livingston clarifying the extent of appellant's right lower extremity impairment. Dr. Livingston should be asked to address the issue of right calf atrophy and comment on the issue of external rotation in the right hip. After such further development as may become necessary, the Office shall issue an appropriate final decision on the extent of appellant's right lower extremity impairment.[10]

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted.

[8] Dr. Livingston wrote that there was atrophy of the right calf that was "no more than one centimeter." He also wrote that appellant had calf atrophy on the right side that was "approximately one centimeter."

[9] A.M.A., *Guides* 526 (Table 17-2).

[10] *Supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: November 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