United States Department of Labor
Employees' Compensation Appeals Board

B.N., Appellant	)	
and	)	**Docket No. 09-1769**
	)	**Issued: September 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, 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 July 1, 2009 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated February 17, 2009 concerning 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.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

The Office accepted that on June 21, 2003 appellant, then a 45-year-old mail handler, sustained a right knee sprain, left wrist sprain and lumbar strain in the performance of duty.[1] He

[1] Appellant sustained a prior injury at work on October 17, 2002 that was accepted under another claim file for left trigger finger and sprains/strains of the left hand and the left third and fourth fingers. Under this claim file, he received a schedule award for a two percent impairment of his left arm.

underwent trigger finger release surgery on June 23, 2003 which was authorized by the Office. Appellant returned to limited duty in February 2004 and full duty in April 2004. He received compensation from the Office for periods of disability.

Appellant filed a claim for a schedule award due to his accepted injuries. In a July 15, 2004 report, Dr. Nicholas Diamond, an attending osteopath, described appellant's complaints and reported findings on examination, including the existence of 4/5 strength in his right quadriceps and extensor hallucis longus. He found that appellant had a 17 percent impairment of his right leg and a 25 percent impairment of his left arm under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).[2]

The file was referred to Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an Office medical adviser. On October 13, 2004 Dr. Berman opined that the medical evidence of file demonstrated that appellant had a two percent impairment of his right leg and a two percent impairment of his left arm.[3]

Based upon Dr. Berman's report, the Office issued a January 31, 2005 decision granting appellant a schedule award for a two percent permanent impairment of his right leg and a two percent permanent impairment of his left arm. The award ran for 12 weeks from July 13 to October 4, 2005.

In an October 26, 2005 decision, an Office hearing representative determined that there was a conflict in the medical opinion between Dr. Diamond and Dr. Berman regarding the extent of appellant's permanent impairment. He set aside the January 31, 2005 decision and remanded the case for referral of appellant to an impartial medical specialist for evaluation of his permanent impairment.

On remand, the Office referred appellant to Dr. Edward J. Resnick, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation of his permanent impairment. In a November 30, 2005 printout, bearing the heading "IFECS Report: ME023 -- Appointment Schedule Notification," the Office indicated that the appointment with Dr. Resnick was scheduled for December 20, 2005.[4]

On December 20, 2005 Dr. Resnick stated that appellant had a normal stance and gait. With respect to appellant's left arm, he indicated that he had a full range of motion of the joints, including the joints of the hands. With respect to appellant's lower back and right leg,

[2] With respect to the right leg, Dr. Diamond found 12 percent impairment due to motor strength deficit in the quadriceps, 2 percent impairment due to motor strength deficit in the extensor hallucis longus and 3 percent impairment due to pain. He combined these values using the Combined Values Chart on page 604 to find a total right leg impairment of 17 percent.

[3] Dr. Berman indicated that the two percent impairment of appellant's right leg was due to pain.

[4] The printout included information about Dr. Resnick, including his medical specialty and the zip code of his office. In a November 2, 2005 letter, counsel indicated that appellant wished to participate in the selection of the impartial medical specialist.

Dr. Resnick indicated that appellant had complaints of generalized nonlocalized tenderness in the lumbar area, but a full range of motion of the spine. He further stated:

> "There is a full range of motion of all joints of both lower extremities. [Appellant] complains of low back pain with hip and knee flexion as well as other motions and with straight leg raising at 80 degrees. However, he demonstrates … nonanatomic and nonphysiologic responses to the Leseague test as well as with low back pain on hip and knee flexion. The Trendelenburg test is bilaterally negative. The sitting root test is negative.
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> "[Appellant] complains of pain on flexion and rotation of either flexed knee, more on the right than on the left. However, there is no demonstrable painful click and the McMurray test is considered bilaterally negative. The knees are otherwise negative. There is no synovial thickening or effusion in either knee. There is no localized tenderness. Motion is not accompanied by any crepitus. All ligaments are intact on testing. The flexion is 0-120/0-120."

Dr. Resnick advised that neurologic testing was negative throughout all four extremities, with deep tendon reflexes and normal pinprick sensation throughout. He found no atrophy of any extremity. Dr. Resnick concluded that appellant had no residual physical impairment involving his left arm or right leg, noting the lack of any findings of range of motion restriction, decrease of strength, atrophy, ankylosis, sensory changes or other objective evidence. With respect to appellant's complaints, he wrote: "I have described the man's subjective complaint[s]. In my opinion, in the absence of objective findings, these cause no physical impairment."

In an April 12, 2006 decision, the Office found that appellant had no more than a two percent permanent impairment of his right leg and a two percent permanent impairment of his left arm, for which he received a schedule award.

Appellant requested a hearing before an Office hearing representative. At the hearing held on August 16, 2006, counsel argued that there was no evidence that Dr. Resnick was chosen by using the Physicians' Directory System (PDS), the computerized system for selecting impartial medical specialists. In an October 30, 2006 decision, the Office hearing representative affirmed the August 16, 2006 decision. She noted that the November 30, 2005 printout bearing the heading "IFECS Report: ME023 -- Appointment Schedule Notification" showed that Dr. Resnick was properly selected as an impartial medical specialist using the PDS.

In a July 2, 2008 decision, the Office affirmed its October 30, 2006 decision.

Appellant requested a hearing before an Office hearing representative. At the hearing held on November 19, 2008, counsel again argued that there was no evidence on file indicating that Dr. Resnick was chosen through the appropriate rotational system for choosing impartial medical specialists. Counsel asserted that Dr. Resnick's report did not constitute the weight of the evidence regarding appellant's permanent impairment because he did not provide specific results of range of motion testing and he did not provide sufficient rationale for his conclusions under the standards of the A.M.A., *Guides*.

In a February 17, 2009 decision, the Office hearing representative affirmed the July 2, 2008 decision with respect to the finding that appellant had no more than a two percent permanent impairment of his right leg, for which he received a schedule award. She found that the opinion of Dr. Resnick, the impartial medical specialist, showed that appellant was not entitled to a greater award.[5]

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 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* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8]

Section 8123(a) of the Act provides in pertinent part: "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."[9] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[10] 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.[11] In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[12]

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[5] The Office hearing representative also set aside the Office's July 2, 2008 decision with respect to the finding that appellant only had a two percent permanent impairment of his left arm. She found that there continued to be a conflict in the medical evidence regarding this matter and remanded the case to the Office for further development of the medical evidence. As this aspect of the claim is in an interlocutory posture, it is not before the Board. *See* 20 C.F.R. § 501.2(c)(2).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

[8] *Id*.

[9] 5 U.S.C. § 8123(a).

[10] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[11] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[12] *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

It is well established that Office procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.[13] The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.[14] These procedures contemplate selection on a strict rotating basis, under the PDS, in order to negate any appearance that preferential treatment exists between a physician and the Office.[15] Moreover, the reasons for the selection made must be documented in the case record.[16]

ANALYSIS

The Office accepted that on June 21, 2003 appellant sustained a left wrist sprain, right knee sprain and lumbar strain in the performance of duty.[17] In a February 17, 2009 decision, the Office hearing representative affirmed the Office's July 2, 2008 decision with respect to the finding that appellant had no more than a two percent permanent impairment of his right leg, for which he received a schedule award.[18] She indicated that the opinion of Dr. Resnick, a Board-certified orthopedic surgeon who served as an impartial medical specialist, showed that appellant was not entitled to a greater award.

The Board notes that the Office properly determined that there was a conflict in the medical evidence between, Dr. Diamond, an attending osteopath, and Dr. Berman, a Board-

[13] *See LaDonna M. Andrews*, 55 ECAB 301 (2004).

[14] *See Raymond J. Brown*, 52 ECAB 192 (2001).

[15] *See Miguel A. Muniz*, 54 ECAB 217 (2002). Using the PDS, specialists are selected in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and the process is repeated when the list is exhausted. A claimant may ask to participate in the selection of the impartial medical specialist under certain conditions. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003).

[16] *See A.R.*, 61 ECAB ___ (Docket No. 09-1566, issued June 2, 2010).

[17] Appellant had a prior injury at work on October 17, 2002 that was accepted under another claim file for left trigger finger and sprain/strains of the left wrist and the left third and fourth fingers.

[18] In the February 17, 2009 decision, the Office hearing representative also set aside the Office's July 2, 2008 decision with respect to the finding that appellant had a two percent permanent impairment of his left arm and remanded the case to the Office for further development of the medical evidence regarding this matter. Therefore, the question of appellant's left arm impairment is interlocutory and is not currently before the Board. *See* 20 U.S.C. § 501.2(c) (providing that the Board has jurisdiction to consider and decide appeals from final decisions; there will be no appeal with respect to any interlocutory matter decided (or not decided) during the pendency of the case).

certified orthopedic surgeon serving as an Office medical adviser, regarding appellant's permanent impairment.[19]

In order to resolve the conflict, the Office referred appellant to Dr. Resnick, a Board-certified orthopedic surgeon, for an impartial medical evaluation. On appeal, counsel argued that Dr. Resnick was not chosen through the appropriate rotational system for selecting impartial medical specialists.

The Board notes that the record contains evidence that Dr. Resnick was chosen under the PDS, the rotational system for selecting impartial specialists.[20] There is no evidence in the record showing that a physician was passed over on the PDS' alphabetical list for the appropriate specialty to reach Dr. Resnick, let alone that a physician was passed over without good cause. Appellant did not present evidence sufficient to establish that the selection of Dr. Resnick was otherwise improper according to Office procedure and Board precedent. Therefore, the record reflects that Dr. Resnick was properly selected under the appropriate standards for selecting impartial medical specialists.[21]

On December 20, 2005 Dr. Resnick determined that appellant had no impairment of his right leg under the standards of the A.M.A., *Guides*. With respect to appellant's lower back and right leg, he indicated that appellant had complaints of generalized nonlocalized tenderness in the lumbar area, but a full range of motion of the spine. Dr. Resnick further stated, "There is a full range of motion of all joints of both lower extremities." He also indicated that neurologic testing was negative throughout all four extremities, with deep tendon reflexes and normal pinprick sensation throughout. The Board notes, however, that Dr. Resnick did not provide any specific discussion of how he carried out these tests. For example, he did not provide specific range of motion findings for the right knee upon all of its various motions or provide detailed findings of his sensory examination.[22] Therefore, Dr. Resnick's opinion does not fully comport with the testing regimens and impairment rating standards of the A.M.A., *Guides*.

For these reasons, the opinion of Dr. Resnick is in need of clarification. In order to resolve the conflict in medical opinion, the case will be remanded to the Office for referral of the case record, a statement of accepted facts, and, if necessary, appellant, to Dr. Resnick for a supplemental report regarding the permanent impairment of appellant's right leg. If

[19] In a July 15, 2004 report, Dr. Diamond found that appellant had a 17 percent impairment of his right leg and a 25 percent impairment of his left arm. In contrast, Dr. Berman opined on October 13, 2004 that the medical evidence of file demonstrated that appellant had a two percent impairment of his right leg and a two percent impairment of his left arm.

[20] The record contains a November 30, 2005 printout bearing the heading "IFECS Report: ME023 -- Appointment Schedule Notification," indicating that Dr. Resnick was selected to perform an impartial medical examination scheduled for December 20, 2005. The designation ME023 shows that the selection was made using the PDS. *See A.R., supra* note 16.

[21] In a November 2, 2005 letter, counsel indicated that appellant wished to participate in the selection of the impartial medical specialist. There is no indication in the record that appellant was wrongly prevented from participating in the selection of the impartial medical specialist.

[22] *See* A.M.A., *Guides* 533-41.

Dr. Resnick is unwilling or unable to clarify or elaborate on his opinion, the case should be referred to another appropriate impartial medical examiner.[23] After such further development as the Office deems necessary, an appropriate decision should be issued regarding appellant's right leg impairment.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than a two percent permanent impairment of his right leg. The case is remanded to the Office for further development of the medical evidence to be followed by an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 8, 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

[23] *See supra* note 12.