United States Department of Labor
Employees' Compensation Appeals Board

R.T., Appellant	)	
and	)	**Docket No. 10-1417**
	)	**Issued: January 24, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, 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:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 28, 2010 appellant, through her representative, filed a timely appeal from the January 27, 2010 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 her right lower limb causally related to her April 18, 1989 employment injury.

FACTUAL HISTORY

On April 18, 1989 appellant, a 46-year-old mail handler, injured her right hip and back in the performance of duty when she stepped on something with her right heel, lifted her foot to see

what it was and fell to the ground. The Office accepted her claim for a right hip contusion and lumbosacral strain.[1] Appellant lost no time from work.[2]

In the most recent appeal,[3] the Board found a conflict in medical opinion between appellant's physician and the Office medical adviser on the extent of appellant's permanent impairment. Appellant's physician found a 27 percent impairment of the right lower limb and a 3 percent pain-related impairment. The Office medical adviser found a six percent impairment based on right thigh and calf atrophy and a two percent pain-related impairment. The Office issued a schedule award for an eight percent impairment of the right lower limb, but the Board remanded the case for an impartial medical specialist under 5 U.S.C. § 8123(a).

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Okin saw appellant on June 9, 2009. Appellant informed him that she was there only for her right knee to be evaluated. Dr. Okin reviewed her history and medical record and described his findings on clinical examination. He concluded that appellant had a normal examination of the right knee "which was crowded by a significant amount of symptom magnification." He believed the fall in 1989 most probably resulted in a contusion to the right knee, which apart from symptom magnification was within normal limits on examination with no real objective findings. As his findings were nonphysiologic, Dr. Okin explained that there was no permanent impairment. He concluded that appellant had recovered from her 1989 injury.

An Office medical adviser reviewed Dr. Okin's report and found that appellant had a two percent impairment of the right lower limb due to a partial lateral meniscal tear.[4]

On October 21, 2009 the Office denied appellant's claim for an increased schedule award. It found that the medical evidence did not support an increase in the impairment already compensated.

In a decision dated January 27, 2010, an Office hearing representative affirmed. The hearing representative noted that an Office medical adviser may not substitute his own opinion for the impartial medical examiner's opinion; however, the medical adviser merely applied the proper guidelines to Dr. Okin's findings and determined that appellant had a maximum impairment of three percent, still less than the impairment rating previously awarded.

[1] Appellant first sought treatment for her right knee pain in 1993. It was then that she described to her physician how she had landed on the lateral aspect of her right knee in 1989. In 1997 she filed a recurrence claim due to right knee pain. But as the Board found in a prior appeal, her physician failed to explain how right knee derangement developed from the accepted right hip contusion and lumbosacral strain or was otherwise causally related to the 1989 employment injury. Docket No. 00-2039 (issued June 19, 2001).

[2] OWCP File No. xxxxxx306. The Office doubled this case with a 1987 left shoulder injury under OWCP File No. xxxxxx315 (master file).

[3] Docket No. 06-1738 (issued April 5, 2007).

[4] The Office did not accept appellant's claim for a right lateral meniscus injury.

On appeal, appellant's representative argues that Dr. Okin's report cannot carry the weight of the medical evidence because he made no reference whatsoever to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) to support his finding that there was no evidence of impairment. He argued that the Office medical adviser resolved the conflict and that the case should be remanded to the impartial medical specialist to clarify his impairment rating under the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[5] 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 permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[6]

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.[7] 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.[8]

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.[9]

ANALYSIS

Consistent with the Board's 2007 decision finding a conflict in medical opinion on the extent of any permanent impairment resulting from the April 18, 1989 employment injury, the Office referred appellant to Dr. Okin, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Okin examined appellant and concluded that she had recovered from her 1989 injury, which he believed most probably resulted in a right knee contusion. He explained that she had a normal examination with no real objective findings.

[5] 5 U.S.C. § 8107.

[6] 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).

[7] 5 U.S.C. § 8123(a).

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

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

There are several questions Dr. Okin did not address. The Office accepted appellant's claim for right hip contusion and lumbosacral strain, but he did not examine her right hip or her low back. Dr. Okin focused instead on her right knee, perhaps because appellant told him she was there only for her right knee to be evaluated. This was incorrect. As the Board found in 2001, appellant's physician failed to explain how a right knee condition developed from the accepted right hip contusion and lumbosacral strain or was otherwise causally related to the 1989 employment injury. The Board has again carefully reviewed the record and finds no mention prior to 1993 that appellant might have injured her right knee when she fell in 1989. This was four years after the incident, and to date, no physician has explained the lack of bridging evidence or provided a sound medical basis for attributing any right knee condition to what happened on April 18, 1989.

The Office should modify the statement of accepted facts to reflect that appellant sustained a right hip contusion and a lumbosacral strain as a result of her April 18, 1989 fall at work. Its inquiry to the referee examiner should reflect appellant's April 18, 1989 injury, not an earlier injury to her left shoulder. Dr. Okin should be asked to explain whether any reliable findings are causally related to the right hip contusion or lumbosacral strain she sustained in 1989.[10] If so, Dr. Okin should use the appropriate grids in the sixth edition of the A.M.A., *Guides* to determine whether these findings represent a ratable permanent impairment of the right lower limb.

The Board will set aside the Office's January 27, 2010 decision and remand the case for further development of the medical evidence. The Office shall request a supplemental report from Dr. Okin resolving the extent of any permanent impairment causally related to the accepted right hip contusion or lumbosacral strain. After such further development as may become necessary, the Office shall issue an appropriate final decision on appellant's entitlement to an increased schedule award.

Appellant's representative argues that Dr. Okin made no reference to the A.M.A. *Guides*, but the issue is moot because the Board is remanding the case for further development. Likewise, whether the Office medical adviser substituted his opinion for that of the impartial medical specialist is presently moot. Dr. Okin must submit a supplemental report resolving the issue.

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant has more than an eight percent impairment of her right lower limb causally related to her April 18, 1989 employment injury, which the Office accepted for right hip contusion and lumbosacral strain. The opinion of the impartial medical specialist requires clarification.

[10] Dr. Okin provided no calf measurements.

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: January 24, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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