

FACTUAL HISTORY

The Office accepted that on May 8, 2002 appellant, then a 45-year-old tractor trailer operator, sustained a lumbosacral sprain, left knee sprain and medial collateral tear of his left knee when he was involved in an altercation with a postal service contractor at work. It paid compensation for various periods of disability and appellant returned to his regular work by July 2002. In a July 9, 2002 report, Dr. Andrew M. Star, an attending Board-certified orthopedic surgeon, stated that appellant's left knee was much better and he reported feeling "terrific." He indicated that the stability of the left knee was good, there was full range of motion and there was no tenderness or warmth in the knee whatsoever. Dr. Star indicated that appellant was released to his regular work on a full-time basis.

On March 13, 2007 appellant filed a claim for a schedule award due to his accepted employment injuries.

In a December 7, 2006 report, Dr. David Weiss, an attending osteopath, diagnosed post-traumatic internal derangement with an intrasubstance tear of the medial meniscus of the left knee and post-traumatic chondromalacia patella of the left knee. He indicated that, under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), appellant had a six percent permanent impairment of his left leg, comprised of a three percent impairment for left thigh atrophy and a three percent impairment for pain.² On August 21, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon who served as an Office medical adviser, found that the December 7, 2006 report of Dr. Weiss was of limited probative value. Dr. Weiss did not explain why the thigh atrophy was related to the relatively minor work injuries and did not adequately explain the basis for the pain rating.

In a September 6, 2007 decision, the Office denied appellant's claim for a schedule award. In a February 25, 2008 decision, an Office hearing representative set aside the Office's September 6, 2007 decision and remanded the case to the Office for further development. It was determined that there was a conflict in the medical opinion between Dr. Weiss and Dr. Berman regarding appellant's permanent impairment. The Office was directed to refer appellant to an impartial medical specialist for an examination and opinion regarding his claim for a schedule award.

In a May 29, 2008 report, Dr. Zohar Stark, a Board-certified orthopedic surgeon who served as an Office referral physician, provided a history of appellant's injury and the findings on examination.³ He stated that appellant did not have any objective findings to substantiate any orthopedic pathology. The radiological studies showed no acute bony pathology and magnetic resonance imaging (MRI) scan testing did not show any pathology regarding his medial or lateral collateral ligament or his anterior or posterior cruciate ligament. Dr. Stark noted that by July 9, 2002 Dr. Star found appellant to be completely asymptomatic and able to return to regular work.

² Dr. Weiss indicated that appellant's right thigh was one centimeter larger than his left thigh.

³ It is unclear why appellant was referred to an Office referral physician rather than to an impartial medical specialist at this time.

Appellant currently had no complaints regarding his left knee and there were no findings regarding his left knee. Dr. Stark felt that appellant had completely recovered from his May 8, 2002 injury and the left leg showed no restriction of motion, weakness or atrophy. Appellant had a zero percent impairment of his left leg under the standards of the fifth edition of the A.M.A., *Guides*.

In a June 26, 2008 decision, the Office denied appellant's claim finding that he was not entitled to a schedule award for his legs. It found that the weight of the medical opinion on this matter rested with the opinion of Dr. Stark. In a December 15, 2008 decision, an Office hearing representative set aside the Office's June 26, 2008 decision and remanded the case to the Office for further development. It was determined that there had been a conflict in the medical opinion between Dr. Weiss and Dr. Berman regarding appellant's entitlement to schedule award compensation and that the instructions in the Office's February 25, 2008 decision to refer appellant to an impartial medical specialist had not been carried out. The Office was directed to refer appellant for an impartial medical examination and opinion regarding his claim for a schedule award.

In order to resolve the conflict in the medical opinion regarding appellant's entitlement to schedule award compensation, the Office referred appellant to Dr. Ronald B. Greene, a Board-certified orthopedic surgeon. The Physicians' Directory System (PDS), the computerized system for selecting impartial medical specialists, was used to select Dr. Greene. Several physicians on an alphabetical list were bypassed before Dr. Greene was reached: three were bypassed because they did not perform impartial medical examinations, one because he required prepayment for his services and one because he did not return telephone calls. Dr. Jack Abboudi, a Board-certified hand surgeon, was passed over because he was the "wrong specialty."

In a June 4, 2009 report, Dr. Greene described appellant's factual and medical history and reported findings on examination. Appellant reported that his current left knee condition did not prevent him from his performing his daily activities either at work or home. Dr. Greene noted that examination of the lumbosacral spine showed full range of motion, there was no spasm or tenderness and appellant could stand on his heels and toes without difficulty. Straight leg raising and sciatic stretch testing were negative. Examination of the knees showed a complaint of patellofemoral compression pain, slight greater on the left. There was no other notable pain in the knees and the cruciate and collateral ligaments were stable and intact. Dr. Greene indicated that appellant had 5/5 strength in both legs and that sensation was the same in both legs.

Dr. Greene found that appellant had a "full and complete recovery, with no residuals from any and all injuries that he may have sustained in the incident of May 8, 2002." He stated that appellant's recovery was "valid as of July 9, 2002 according to the note of Dr. Star and his return to his regular job." Appellant's MRI scan showed age-related findings but no findings related to the May 8, 2002 employment injury and his current bilateral patellar complaints were age related, consistent with his body weight and without clinical significance. Dr. Greene noted that appellant's activities at work and home had not been affected by the May 8, 2002 employment injury and stated, "This is appropriate since he has fully and completely recovered from this incident with no residuals." He indicated that, with respect to the May 8, 2002 employment injury, appellant had a zero percent impairment rating.

On July 10, 2009 Dr. Morley Slutsky, a Board-certified internist serving as an Office medical adviser, found that appellant had no ratable impairment. He felt that the weight of the medical opinion on this matter rested with the opinion of Dr. Greene.

In a July 24, 2009 decision, the Office denied appellant's claim for a schedule award on the grounds that the weight of the medical opinion, represented by the opinion of Dr. Greene, established that appellant had no permanent impairment as a result of his accepted work injuries.

Appellant requested a hearing before an Office hearing representative. At the November 17, 2009 hearing, counsel argued that the report of Dr. Greene did not constitute the weight of the medical evidence regarding appellant's entitlement to a schedule award.

Subsequent to the hearing, the Office received a statement from counsel dated December 29, 2009. Counsel argued that Dr. Abboudi had been improperly bypassed to get to Dr. Greene under the PDS. In a December 18, 2009 report, Dr. Weiss found that appellant had a two percent permanent impairment of his left leg under the standards of the sixth edition of the A.M.A., *Guides*.⁴

In a February 4, 2010 decision, the Office hearing representative affirmed the Office's July 24, 2009 decision.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act⁵ has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.⁶

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷

⁴ Dr. Weiss applied the standards of the sixth edition of the A.M.A., *Guides* to the findings contained in his December 7, 2006 report. He indicated that appellant's impairment was based on a "Class 1 left knee medial meniscal tear" from Table 16-3 on page 506 of the sixth edition.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

⁷ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

The schedule award provision of the Act⁸ and its implementing regulations⁹ 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹¹

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.”¹² 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.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ These procedures contemplate selection on a strict rotating basis, under the PDS, in order to negate any appearance

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

¹⁰ *Id.*

¹¹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹² 5 U.S.C. § 8123(a).

¹³ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹⁴ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁵ *See LaDonna M. Andrews*, 55 ECAB 301 (2004).

¹⁶ *See Raymond J. Brown*, 52 ECAB 192 (2001).

that preferential treatment exists between a physician and the Office.¹⁷ Moreover, the reasons for the selection made must be documented in the case record.¹⁸

ANALYSIS

The Office accepted that on May 8, 2002 appellant sustained a lumbosacral sprain, left knee sprain and medial collateral tear of his left knee when he was involved in an altercation with a postal service contractor at work. On March 13, 2007 appellant filed a claim for a schedule award due to his accepted employment injuries.

The Board finds that the Office properly determined that there was a conflict in the medical opinion regarding whether appellant had work-related permanent impairment entitling him to a schedule award between Dr. Weiss, an attending osteopath, and Dr. Berman, a Board-certified orthopedic surgeon who served as an Office medical adviser.¹⁹

In order to resolve the conflict in the medical opinion regarding appellant's entitlement to schedule award compensation, the Office properly referred appellant to Dr. Greene, a Board-certified orthopedic surgeon. On appeal and before the Office, counsel argued that Dr. Greene was improperly selected as an impartial medical specialist because other physicians on the PDS, the rotational system for selecting impartial specialists, were bypassed without good cause.

The Board finds that there is no evidence in the record showing that a physician was passed over on the PDS' alphabetical specialty list without good cause to reach Dr. Greene. Three physicians were bypassed because they did not perform impartial medical examinations, one because he required prepayment for his services and one because he did not return telephone calls. These were all valid reasons for bypass. Counsel argued that it was improper to bypass Dr. Abboudi for having the "wrong specialty" because he had the same specialty as Dr. Greene. However, Dr. Abboudi is a Board-certified hand surgeon and his specialty was not appropriate for evaluating appellant's lower extremity condition. The evidence of record is insufficient to establish that the selection of Dr. Greene was improper according to Office procedure and Board precedent.

¹⁷ 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).

¹⁸ See *A.R.*, Docket No. 09-1566 (issued June 2, 2010).

¹⁹ See *supra* notes 12 and 13. In a December 7, 2006 report, Dr. Weiss indicated that, under the standards of the fifth edition of the A.M.A., *Guides*, appellant had a six percent permanent impairment of his left leg, comprised of a three percent impairment for left thigh atrophy and a three percent impairment for pain. In contrast, Dr. Berman stated in an August 21, 2007 report that Dr. Weiss did not explain why the thigh atrophy was related to the relatively minor work injuries and did not adequately explain the basis for the pain rating. He found to work-related permanent impairment.

The Board further finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Greene.²⁰ The June 4, 2009 report of Dr. Greene establishes that appellant had no work-related permanent impairment entitling him to schedule award compensation.

Dr. Greene indicated in his report that appellant had extremely limited findings on examination. He noted that examination of the lumbosacral spine showed full range of motion, there was no spasm or tenderness and appellant could stand on his heels and toes without difficulty. Straight leg raising and sciatic stretch testing were negative and there was limited pain reported in the knees. Dr. Greene indicated that appellant had 5/5 strength in both legs and that sensation was the same in both legs. He found that appellant had a full and complete recovery, with no residuals from any of the injuries he sustained on May 8, 2002. On appeal, counsel asserted that Dr. Greene's opinion was faulty because he did not carry out range of motion testing. However, a review of his report reveals that he did in fact carry out such testing. Counsel objected to the fact that Dr. Greene did not reference the A.M.A., *Guides* in detail, but this was not necessary as he found no work-related permanent impairment at all. Appellant submitted a December 18, 2009 report in which Dr. Weiss found that he had a two percent permanent impairment of his left leg under the standards of the sixth edition of the A.M.A., *Guides*. However, as Dr. Weiss was on one side of the conflict, his additional report is essentially duplicative of his stated opinion and is insufficient to give rise to a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001).

The Board has carefully reviewed the opinion of Dr. Greene and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Greene provided a thorough factual and medical history and accurately summarized the relevant medical evidence.²¹ He provided medical rationale for his opinion by explaining that appellant had returned to regular work without apparent symptoms two months after his injury and by noting that diagnostic testing showed no findings that could be considered related to the May 8, 2002 employment injury.²² Dr. Greene indicated that appellant's current bilateral patellar complaints were age related, consistent with his body weight and without clinical significance.

For these reasons, appellant did not establish work-related permanent impairment and the Office properly denied his schedule award claim.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish entitlement to schedule award compensation.

²⁰ *See supra* note 14.

²¹ *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

²² Moreover, appellant reported that his current left knee condition did not prevent him from performing his daily activities either at work or home.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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