United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	**Docket No. 11-1012**
	)	**Issued: January 13, 2012**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, East Orange, 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:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 16, 2011 appellant, through his attorney, filed a timely appeal from a December 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his schedule award claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than 13 percent impairment of the right lower extremity and more than 13 percent impairment of the left lower extremity, for which he received a schedule award.

[1] 5 U.S.C. § 8101-8193.

FACTUAL HISTORY

On June 3, 2003 appellant, then a 48-year-old electronics technician, filed a traumatic injury claim alleging that he hurt his lower back while moving a 27-inch television. OWCP accepted the claim for L5-S1 lumbar displacement and radiculopathy. Appellant underwent L5-S1 surgery on July 10, 2003 and January 22, 2004 and subsequently had a spinal cord stimulator inserted.

In a January 21, 2006 report, Dr. David Weiss, an osteopath, reported that appellant had 34 percent right lower extremity impairment and 16 percent left lower extremity impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a February 26, 2007 report, Dr. Morley Slutsky, an OWCP medical adviser, reviewed the medical record, including Dr. Weiss' January 21, 2006 findings. He recommended that a second opinion examination because of the significant discrepancies in the clinical findings reported between Dr. Weiss and the other physicians of record. On March 7, 2007 OWCP received appellant's claim for a schedule award.

By letter dated June 14, 2007, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Irving D. Strouse, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 9, 2007 report, Dr. Strouse advised that appellant had no objective findings of residual problems in his back and legs. He noted that appellant exhibited significant evidence of symptom exaggeration and indicated that electromyogram studies of October 2004 showed no electrophysiologic evidence of motor loss in the legs from lumbar radiculopathy and no objective sensory or dermatomal findings. Appellant was noted to have an absent left ankle reflex.

On November 17, 2007 Dr. Arnold T. Berman, an OWCP medical adviser, reviewed the medical evidence, including Dr. Strouse's July 9, 2007 findings. He explained why the medical evidence did not support Dr. Weiss' impairment rating. Dr. Berman found that, under the fifth edition of the A.M.A., *Guides*, there could be a grade 3 sensory loss and pain which equaled three percent impairment on each side. He also found that the absent S1 left achilles reflex could be associated with slight weakness and could be considered for an additional five percent impairment of the left lower extremity, for a total of eight percent impairment of the left leg.

On March 17, 2008 OWCP referred appellant to Dr. Nasser Ani, a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 10, 2008 report, Dr. Ani opined that appellant reached maximum medical improvement. He opined that appellant had about 25 percent impairment of each leg but did not show how he arrived at such rating. On April 30, 2008 Dr. Henry J. Magliato, an OWCP medical adviser, reviewed Dr. Ani's report and used his findings to calculate five percent right lower extremity and five percent left lower extremity impairment under the fifth edition of the A.M.A., *Guides*. He stated that Dr. Ani needed more data to support his rating. In letters dated May 30 and June 27, 2008, OWCP requested an addendum report from Dr. Ani to clarify the deficiency. In a July 25, 2008 letter, Dr. Ani indicated that his impairment rating was based on his physical examination findings and objective testing. On August 15, 2008 Dr. Magliato, the medical adviser, indicated that Dr. Ani

had not shown how he calculated a 25 percent loss. He found Dr. Ani's reliance on the magnetic resonance imaging (MRI) scan and myelogram tests was not recognized by the A.M.A., *Guides* and that he could only rate the neurological status of the lower extremities, of which there was no documented motor or sensory loss.

On December 9, 2008 OWCP referred appellant for an impartial medical examination with Dr. Robert Dennis, a Board-certified orthopedist, to resolve the conflict between Dr. Weiss and Drs. Strouse and Berman. Regarding Dr. Dennis' selection, the record contains bypass forms for three other Board-certified orthopedic surgeons who were bypassed because they were hand specialists.[2]

In a January 5, 2009 report, Dr. Dennis noted his review of the medical records and set forth his physical examination findings. He opined that appellant reached maximum medical improvement on January 21, 2006. Based on the sixth edition of the A.M.A., *Guides*, Dr. Dennis opined that appellant had 13 percent whole body impairment or 33 percent impairment of the lower extremities. Under Table 17-4, page 570, he opined that appellant fit into a class 2 with a default whole person impairment of 12 percent. Under Table 17-6, page 575, Dr. Dennis indicated a grade 3 modifier for functional history as appellant had continuing pain symptoms after treatment and with less than normal activity. Under Table 17-7, page 576, a grade 2 modifier was given for physical examination as appellant had straight leg raising. Under Table 17-9, page 581, a grade 2 modifier was given for clinical studies due to persistent abnormalities on MRI scan despite two surgeries. Dr. Dennis applied the net adjustment formula and found a net adjustment of 1, which modified the default impairment plus 1 or 13 percent whole person impairment. On April 11, 2009 Dr. Slutsky, an OWCP medical adviser, opined maximum medical improvement was reached on January 5, 2009, the date of Dr. Dennis' examination. He further opined that Dr. Dennis' calculations were invalid as OWCP had not yet adopted the sixth edition of the A.M.A., *Guides.*

Effective May 1, 2009, OWCP formally adopted the sixth edition of the A.M.A., *Guides*. Accordingly, it referred Dr. Dennis' report back to its medical adviser for consideration. In a November 30, 2009 report, Dr. Slutsky, the medical adviser, opined that appellant reached maximum medical improvement on January 5, 2009, the date of Dr. Dennis' examination. He indicated that Dr. Dennis rated appellant under Chapter 17 (spine chapter), which was not appropriate. Dr. Slutsky indicated that Chapter 16 (lower extremity chapter) was used as directed by FECA Bulletin No. 09-03. He applied Dr. Dennis' findings and calculated 13 percent permanent impairment of the left lower extremity and 13 percent permanent impairment of the right lower extremity. Dr. Slutsky noted that Dr. Dennis found that appellant had slight residual sensory deficit in the toes in both feet and indicated any one of the L4, L5 and S1 roots could be affected. Under Table 16-11, page 533, he found a mild or severity 1, sensory loss. This equated to class 1 loss for sciatic nerve sensory deficit under Table 16-12, page 535 with a default impairment of four percent lower extremity impairment. Dr. Slutsky found no net adjustment. For the bilateral sciatic nerve root motor deficit, he found that appellant had a mild motor deficit of the S1 nerve root under Table 16-11, page 533, which equated to class 1 sciatic

[2] The bypassed physicians were Drs. Teddy Atik, George Babuzda and Raymond Decker, all Board-certified orthopedic surgeons, who specialized in hand surgery.

nerve motor deficit with default value of nine percent lower extremity impairment. No net adjustment was found. Dr. Slutsky combined the 4 percent and 9 percent impairments and found 13 percent impairment for both legs.

On January 6, 2010 OWCP requested that Dr. Dennis review the medical adviser's impairment rating and calculations along with the date of maximum medical improvement. In a January 15, 2010 response, Dr. Dennis restated his previous calculations under the sixth edition of the A.M.A., *Guides*. He further opined that the date of maximum medical improvement was January 21, 2006 based on appellant's clinical status. In an April 21, 2010 report, Dr. Slutsky reviewed the medical record and explained why he chose the date of Dr. Dennis' examination as the date of maximum medical improvement. He further reiterated his justification of this final impairment rating as Dr. Dennis had used the wrong chapter in calculating impairment. Dr. Slutsky noted relying on findings of Drs. Ani, Magliato and Dennis in determining appellant's impairment.

By decision dated May 20, 2010, OWCP granted appellant a schedule award for 13 percent right lower extremity and 13 percent left lower extremity. The date of maximum medical improvement was noted to be January 21, 2006. The award ran 74.88 weeks for the period January 21, 2006 through June 29, 2007.

In a May 27, 2010 letter, appellant through counsel, requested an oral hearing which was held *via* videoconference on September 21, 2010. After the hearing, OWCP received a September 17, 2010 impairment report from Dr. Weiss, who applied his January 21, 2006 findings to the sixth edition of the A.M.A., *Guides*. Dr. Weiss calculated 35 percent right lower extremity impairment and 19 percent left lower extremity impairment.

In a December 13, 2010 decision, an OWCP hearing representative affirmed OWCP's May 20, 2010 decision with modification to reflect the correct date of maximum medial improvement as January 5, 2009. The hearing representative found that an OWCP's medical adviser could represent the weight of the medical evidence and that the medical adviser had properly applied the findings of the impartial medical examiner, Dr. Dennis, to the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[5] For consistent results and to ensure equal justice under the law to all claimants, good administrative

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

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.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

Section 8123(a) of FECA 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.[10] 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11] 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.[12]

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[13] However, when the impartial specialist is unable to clarify or elaborate on the original report or if a supplemental report is also vague, speculative or lacking in rationale,

[6] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides* 494-531.

[9] *Id.* at 521.

[10] 5 U.S.C. § 8123(a).

[11] 20 C.F.R. § 10.321.

[12] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[13] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

OWCP must submit the case record and a detailed statement of accepted facts to another impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[14]

To properly resolve a conflict in a schedule award claim, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An OWCP medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[15]

It is well established that OWCP 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.[16] The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, OWCP 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.[17] The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.[18] The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.[19] The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.[20] The PDS database of physicians is obtained from the American Board of Medical Specialties which contains the names of physicians who are Board-certified in certain specialties. It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.[21]

[14] *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[15] *See Richard R. LeMay*, 56 ECAB 341 (2005); *Thomas J. Fragale*, 55 ECAB 619 (2004).

[16] *See LaDonna M. Andrews*, 55 ECAB 301 (2004); *A.R.*, Docket No. 09-1566 (issued June 2, 2010).

[17] *See Raymond J. Brown*, 52 ECAB 192 (2001); *A.R.*, *supra* note 16.

[18] *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

[20] *Id.* at Chapter 3.500.7 (September 1995, May 2003).

[21] *Gloria J. Godfrey*, *supra* note 12.

ANALYSIS

OWCP accepted that appellant had work-related L5-S1 displacement and radiculopathy, for which he underwent two surgeries and had a spinal cord stimulator inserted. Appellant subsequently requested a schedule award. Due to a conflict between appellant's physician, Dr. Weiss, who found that appellant had 34 percent right lower extremity impairment and 16 percent left lower extremity impairment and Dr. Berman, an OWCP medical adviser who reviewed the second opinion examiner's findings and found that appellant had three percent impairment of the right lower extremity and eight percent of the left lower extremity, OWCP referred appellant to Dr. Ani, as the impartial medical specialist to resolve the conflict in medical opinion. However, Dr. Ani was unresponsive to OWCP's attempts for clarification of his impairment rating. Thus, OWCP properly referred appellant to Dr. Dennis, as the second impartial specialist to resolve the conflict in medical opinion.

Counsel contended on appeal that OWCP did not properly select Dr. Dennis as the impartial medical specialist under the PDS as several other Board-certified orthopedic surgeons were bypassed for the reason of "wrong specialty." The record reflects that Dr. Dennis' selection as the impartial medical specialist occurred after three Board-certified orthopedic surgeons were bypassed because they were hand specialists. It is reasonable for OWCP to conclude that a hand specialist was not the proper subspecialty where appellant had an accepted low back condition. In this context, it was proper to bypass such physicians. The Board finds that there is no evidence that OWCP did not properly select Dr. Dennis from the PDS or that it failed to comply with its rotational procedures.

Appellant's counsel next argues that Dr. Dennis did not resolve the conflict in medical evidence; rather, an OWCP medical adviser resolved the conflict and OWCP erred by relying on the medical adviser's opinion. Dr. Dennis stated that he utilized the sixth edition of the A.M.A., *Guides* and opined that appellant had 13 percent whole body impairment or 33 percent impairment of the lower extremities based on spinal impairment. Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. FECA itself specifically excludes the back from the definition of organ.[22] However, a schedule award is payable for a permanent impairment of any of the extremities that is due to an employment-related back condition.[23] Dr. Dennis did not otherwise explain in his January 5, 2009 initial report or in his January 15, 2010 supplemental report how appellant had any impairment of a scheduled body member under the sixth edition of the A.M.A., *Guides*. As such, his finding on impairment is of diminished probative value and is insufficient to establish a particular degree of permanent impairment to a scheduled body member.[24] Thus, Dr. Dennis' opinion is insufficient to resolve the medical conflict. The hearing representative relied on OWCP's medical adviser's opinion on permanent impairment and stated

[22] 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[23] *Denise D. Cason*, 48 ECAB 530, 531 (1997); *S. Gordon McNeil*, 42 ECAB 140 (1990).

[24] *See Carl J. Cleary*, 57 ECAB 563, 568 at note 14 (2006) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

that an OWCP medical adviser may be the weight of the evidence. However, the Board has held that, where there is a medical conflict in a schedule award situation, an OWCP medical adviser may review the opinion of the impartial specialist with regard to permanent impairment but the resolution of the conflict is the responsibility of the impartial medial specialist.

Accordingly, the case will be remanded to OWCP for appropriate further development as OWCP deems necessary and a *de novo* decision.

Appellant's counsel additionally argues that Dr. Weiss' September 17, 2010 impairment report, wherein he provides an impairment rating under the sixth edition of the A.M.A., *Guides*, should carry the weight of the medical evidence or create a new conflict in medical opinion. Dr. Weiss, however, was involved in the original conflict in medical opinion evidence. Additional reports from physicians who had been on one side of the original conflict in medical opinion are typically insufficient to resolve the conflict.[25] Dr. Weiss did not perform a current evaluation or provide current examination findings. Thus, his application of the January 2006 findings to the sixth edition of the A.M.A., *Guides* is of limited probative value.

CONCLUSION

The Board finds that the case is not in posture for decision as there remains an outstanding conflict in medical evidence regarding the extent of appellant's permanent impairment to his legs.

[25] *See Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 13, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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