United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 13-1277**
	)	**Issued: December 24, 2013**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, 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 May 1, 2013 appellant, through his attorney, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated February 19, 2013. 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 this case.

ISSUE

The issue is whether appellant has sustained any permanent impairment to his right lower extremity, thereby entitling him to a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

This case has previously been before the Board.[2] On April 18, 2003 appellant, a 61-year-old clerk, injured his back while lifting a parcel. He filed a claim for benefits on April 25, 2003,

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 12-772 (issued June 13, 2013).

which OWCP accepted for aggravation of sciatic nerve. Appellant underwent a magnetic resonance imaging (MRI) scan on September 11, 2003 which indicated that he had a very mild grade 1/4 anterolisthesis of L3 on L4 without lysis, with bilateral facet degeneration and mild disc bulges from L3 to S1.

On December 13, 2006 appellant underwent an MRI scan which indicated no gross interval change with no herniation or foraminal stenosis. He underwent x-rays on December 14, 2006 which showed mild grade 1/4 anterolisthesis of L3 on L4.

On March 4, 2010 appellant filed for a schedule award based on a partial loss of use of his right leg.

In a February 2, 2009 report, Dr. Arthur F. Becan, Board-certified in orthopedic surgery, found that appellant had a 21 percent right lower extremity impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (A.M.A., *Guides*), stemming from the accepted aggravation of sciatic nerve condition. Appellant had a sensory deficit over the L5 and S1 dermatome on the right and a decreased reflex in the right Achilles. On examination Dr. Becan advised that appellant had loss of muscle strength on manual muscle testing in the right gastrocnemius of 4/5 on the right. He diagnosed chronic post-traumatic lumbar strain and sprain, a herniated disc at L3-4, anterolisthesis with spinal instability L4 over L5, discogenic disease of the lumbar spine and left lumbar radiculopathy. Dr. Becan found a class 1 moderate sensory deficit of the right L5 and S1 nerve roots (sciatic) with a default impairment of four percent. He found that grade modifiers for functional history and clinical studies of three that yielded a net adjustment of four and a right lower extremity impairment of nine percent. As to motor strength deficit of the right quadriceps/extensor halluces longus (sciatic), Dr. Becan found that the sciatic nerve diagnosis yielded a default rating of nine percent for a class 1, mild 4/5 deficit. He noted a functional history and a clinical studies modifier of three, which produced a net adjustment of four, which totaled a 13 percent impairment of the right lower extremity. Dr. Becan rated a total right lower extremity impairment of 21 percent.

In an April 18, 2010 report, Dr. Andrew Merola, an OWCP medical adviser, reviewed Dr. Becan's report. He stated that the impairment rating for a quadriceps deficit was not allowable. Dr. Becan based the rating on deficit to the L5 or S1 nerve root, but advised that the quadriceps was enumerated by the L3 nerve root and was not part of the pathoanatomy of appellant's accepted sciatic nerve condition. Dr. Merola further stated that appellant's prior medical records indicated that he had full sensory motor function of both lower extremities without significant motor deficits, which contradicted Dr. Becan's examination findings. He recommended that appellant be referred for further medical examination.

OWCP found a conflict in medical opinion between Dr. Becan and Dr. Merola regarding the extent and nature of appellant's impairment. It referred him to Dr. Edward B. Krisiloff, Board-certified in orthopedic surgery, for a referee medical examination. In a report dated June 30, 2010, Dr. Krisiloff provided findings on examination and reviewed the medical history and statement of accepted facts. He found that appellant had no ratable impairment under the A.M.A., *Guides*, sixth edition. Dr. Krisiloff advised that although appellant had complaints of decreased sensation, the physical examination revealed no anatomic dermatomal distribution or

no reliable findings. The motor examination showed some breakaway weakness secondary to pain, but Dr. Krisiloff opined that this was not a true neurologic finding. Dr. Krisiloff diagnosed degenerative lumbar disc disease and radiculopathy in appellant's left leg, but opined that there was no basis for significant neurologic compromise based on appellant's MRI scans. Utilizing the Lumbar Spine Regional Grid, at Table 17-4, page 570 of the A.M.A., *Guides*, he found that appellant had a class 2 intervertebral disc herniation with residual radiculopathy with a default, whole person impairment of 12 percent.[3] Dr. Krisiloff then used Table 17-6, Table 17-7, and Table 17-8 at pages 575, 576 and 581 of the A.M.A., *Guides* to find a functional history grade modifier of two, for a moderate problem, a physical examination modifier of zero,[4] and a clinical studies grade modifier of two, a moderate problem,[5] and then applied these findings to the Net Adjustment Grid at page 575[6] for a net adjustment of zero. Dr. Krisiloff concluded that, because appellant did not demonstrate any neurologic findings in the lower extremities, he had no permanent neurologic residual impairment as a result of his accepted condition.

In an October 5, 2010 report, Dr. Henry J. Magliato, an OWCP medical adviser, reviewed Dr. Krisiloff's report and advised that he had improperly rated a whole person impairment. He noted that Dr. Krisiloff was required to use the peripheral nerve impairment tables if he found objective neurological deficits. The medical adviser requested a supplemental report from Dr. Krisiloff to address these issues.

In a June 14, 2011 report, Dr. Krisiloff found that appellant had no objective neurologic deficits in either lower extremity and therefore the peripheral nerve impairment table for residual radiculopathy was not applicable.

By decision dated June 27, 2011, OWCP denied appellant's claim for a schedule award. It found that the weight of the medical evidence did not establish any impairment of his right leg.

Appellant's attorney requested an oral hearing, which was held on October 12, 2011.

In a September 19, 2011 report, Dr. Becan reviewed his February 2, 2009 report and disagreed with Dr. Krisiloff's opinion that appellant had no hard neurologic findings, breakaway weakness and decreased sensation without anatomic dermatomal distribution. He stated that the A.M.A., *Guides* required that sensory and motor deficits be accurately graded to define the potential range of impairment associated with the nerve lesion. Dr. Becan stated that Dr. Krisiloff's findings were deficient because he failed to grade sensory deficits based on the results of sensibility testing such as Semmes-Weinstein monofilament testing, and failed to grade motor deficits based on muscle strength testing.

By decision dated November 23, 2011, an OWCP hearing representative set aside the June 27, 2011 decision, finding that appellant had no permanent impairment of the right leg. He

[3] A.M.A., *Guides* 570.

[4] *Id.* at 577.

[5] *Id.* at 581.

[6] *Id.* at 575.

found that Dr. Krisiloff did not clearly address whether appellant had any impairment of the right lower extremity.

In reports dated January 16 and March 5, 2012, Dr. Krisiloff opined that appellant had no impairment of his right lower extremity due to the April 18, 2003 back injury. In the March 5, 2012 report, he stated:

> "Physical examination initially done at the patient's [referee] examination on June 30, 2010 revealed no significant findings in his right lower extremity. It is detailed in the physical examination that range of motion in the lower extremities is normal in all joints. Straight leg raising examination was noted to elicit pain in the left leg, but not on the right side. Neurologic examination revealed no hard neurologic findings. The motor examination revealed some breakaway weakness oil the left side, but not on the right. There was also a complaint of some decreased sensation, but this again was in the left leg and not on the right side. Vascular examination was normal. Reflex examinations, both at the knee and at the ankle, were normal.
>
> "[Appellant's] physical examination as regards the right leg was completely normal. Therefore, I would state that [he] incurred no permanent partial impairment of his right lower extremity."

In a May 22, 2012 report, Dr. Magliato, the medical adviser, agreed with Dr. Krisiloff's opinion. He found no abnormal neurological findings involving the right lower extremity.

By decision dated August 2, 2012, OWCP found that appellant did not have any permanent impairment of the right leg from the April 18, 2003 employment injury.

By letter dated August 7, 2012, appellant's attorney requested an oral hearing, which was held on November 29, 2012.

By decision dated February 19, 2013, an OWCP hearing representative affirmed the August 2, 2012 decision finding that appellant had no permanent impairment of the right leg.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] 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, FECA 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.[9] The claimant has the burden of proving

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

[9] *Id.*

that the condition for which a schedule award is sought is causally related to his or her employment.[10]

Section 8123(a) provides that, if there is a 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.[11] 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 a proper factual and medical background, must be given special weight.[12]

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP determined that a conflict existed in the medical opinion evidence between Dr. Becan, appellant's treating physician, and Dr. Merola, a medical adviser, regarding the degree of appellant's right lower extremity permanent impairment. The case was referred to Dr. Krisiloff for an impartial medical evaluation. The Board finds that no conflict existed between Dr. Becan and Dr. Merola regarding the degree of appellant's right lower extremity impairment.

In a February 2, 2009 report, Dr. Becan evaluated appellant's right lower extremity and found a class 1 moderate sensory deficit of the right L5 and S1 nerve roots (sciatic) with a default impairment of four percent. He found that the grade modifiers yielded a net adjustment of four and a right lower extremity impairment of nine percent. In regard to appellant's motor strength deficit of the right quadriceps/extensor halluces longus (sciatic), Dr. Becan found that the sciatic nerve diagnosis yielded a default rating of nine percent for a class 1, mild 4/5 deficit. He found a functional history and a clinical studies modifier of three, which produced a net adjustment of four, which totaled a 13 percent impairment of the right lower extremity. Dr. Becan rated a total right lower extremity impairment of 21 percent.

Dr. Merola reviewed Dr. Becan's report on April 18, 2010. Dr. Merola disagreed with Dr. Becan's findings, but he did not address the nature or extent of permanent impairment. The Board notes that Dr. Merola noted that prior medical examiners did not support motor or sensory loss as found by Dr, Becan. He recommended that appellant undergo further medical evaluation.

Dr. Krisiloff examined appellant and offered an opinion regarding the degree of appellant's permanent impairment. He has the status of a second opinion physician, not an impartial medical specialist.[13] In a March 5, 2012 report, Dr. Krisiloff stated that he conducted a physical examination on June 30, 2010 that showed no significant findings to appellant's right

[10] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[11] *Regina T. Pellecchia*, 53 ECAB 155 (2001).

[12] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[13] *See Renee J. Botts*, Docket No. 05-1519 (issued June 8, 2006).

lower extremity. He conducted a neurologic examination which showed no definitive neurologic findings. On June 30, 2010 Dr. Krisiloff reported that two MRI scans revealed normal neurological results in both of the lower extremities. While Dr. Krisiloff's motor examination revealed some breakaway weakness on the left side and appellant complained of some decreased sensation, he stated that the findings pertained to the left side, not the right side. He concluded that appellant had substantially normal findings in his right leg without any permanent partial impairment.

The Board finds that a conflict in medical opinion exists between Dr. Becan and Dr. Krisiloff regarding the degree of appellant's right lower extremity impairment. This case will therefore be remanded for referral of appellant for an impartial medical evaluation. After such further development as necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision as a conflict exists in the medical opinion evidence regarding the degree of appellant's right lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2013 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further development pursuant to this decision.

Issued: December 24, 2013
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