United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 12-772**
	)	**Issued: June 13, 2013**
U.S. POSTAL SERVICE, EXPRESS MAIL UNIT, 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:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On February 23, 2012 appellant, through his attorney, filed a timely appeal of a November 23, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision denying a schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has permanent impairment of his left lower extremity causally related to an April 18, 2003 employment injury, thereby entitling him to a schedule award.

On appeal counsel argued that Dr. Edward B. Krisiloff, a Board-certified orthopedic surgeon, was not appropriately selected under the Physicians Directory System (PDS) to serve as an impartial medical examiner. Counsel further argued that the statement of accepted facts presented to Dr. Krisiloff was not complete as it did not include appellant's prior back injuries and that Dr. Krisiloff's report was not entitled to the weight of the medical evidence.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 25, 2003 appellant, then a 61-year-old clerk, filed a traumatic injury claim alleging that he injured his back while lifting a parcel on April 18, 2003 in the performance of duty. His attending physician noted that appellant had a similar episode of back pain in 1988 and stated that he had a sciatic nerve irritation in his lower back. OWCP accepted this claim for aggravation of sciatic nerve on June 12, 2003. Appellant returned to light-duty work eight hours a day on May 12, 2003. A magnetic resonance imaging (MRI) scan dated September 11, 2003 demonstrated 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. Appellant underwent x-rays on December 14, 2006 which demonstrated mild Grade 1/4 anterolisthesis of L3 on L4. He underwent a second MRI scan which found no gross interval change with no herniation or foraminal stenosis. Appellant filed a recurrence of disability claim on June 14, 2007 which OWCP accepted on September 13, 2007.

Appellant filed a request for a schedule award on March 4, 2010. In support of his claim, he submitted a report dated February 2, 2009 from Dr. Arthur Becan, an orthopedic surgeon, who noted appellant's radicular left extremity pain. Dr. Becan stated that appellant had an antalgic gait and was unable to heel or toe walk. He found a sensory deficit over the L5 and S1 dermatome on the right as well as total loss of the left Achilles reflex on the left and decreased reflex in the right Achilles. Dr. Becan reported loss of muscle strength on manual muscle testing in right gastrocnemius of 4/5 on the right and 3/5 on the left. He also found loss of hamstring and quadriceps strength on the left of 4/5. Appellant did not have any calf atrophy. Dr. Becan diagnosed chronic post-traumatic lumbar strain and sprain, herniated disc L3-4, anterolisthesis with spinal instability L4 over L5, discogenic disease of the lumbar spine and left lumbar radiculopathy. He provided an impairment rating finding that, under the A.M.A., *Guides*, appellant had class 1 severe sensory deficit of the L5 and S1 nerve root (sciatic), 12 percent impairment.[2] Dr. Becan found grade modifiers for functional history of three,[3] clinical studies of three[4] and a net adjustment of four. He opined that appellant had a left lower extremity impairment of 14 percent. Dr. Becan also provided an impairment rating based on motor strength deficit. He found that appellant had class 3 severe 2/5 motor strength deficit in the left extensor halluces longus (sciatic) equaling 47 percent. Dr. Becan awarded functional history modifier of three, clinical studies modifier of three and a net adjustment of four resulting in the left lower extremity impairment of 49 percent. He found class 1 4/5 motor strength deficit in appellant's left quadriceps (femoral) noting that the default impairment was five percent. Dr. Becan awarded functional history and clinical studies modifiers of three and a net adjustment of four to reach a left lower extremity impairment rating of nine percent. He concluded that appellant had 60 percent impairment of his left lower extremity.

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

[2] A.M.A., *Guides* 535, Table 16-12.

[3] *Id*. at 516, Table 16-6.

[4] *Id*. at 519, Table 16-8.

percent. He found functional history modifiers of three and clinical studies modifiers of three to reach a net adjustment of four and a final 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 diagnosis had a default rating of nine percent for a class 1, mild 4/5 deficit. He found functional history and clinical studies modifiers of three and a net adjustment of four to reach 13 percent impairment of the right lower extremity. Dr. Becan found a total right lower extremity impairment of 21 percent. He opined that appellant reached maximum medical improvement on February 2, 2009.

OWCP's medical adviser reviewed Dr. Becan's report on April 18, 2010 and found that quadriceps impairment was based on the L3 nerve root. He also noted that appellant's medical history did not support significant motor deficits to the left lower extremity. The medical adviser recommended further development of the medical evidence.

Due to the disagreement between Dr. Becan and OWCP's medical adviser regarding the appropriate nerve and extent of appellant's permanent impairment, on June 23, 2010 OWCP determined that there was a conflict of medical evidence requiring referral to an impartial medical examiner. The record contains an iFECS Report: MEO23 -- Appointment Schedule Notification (MEO23) indicating that Dr. Krisiloff was selected as impartial medical adviser, an RME referral form selecting Dr. Krisiloff, to serve as the impartial medical examiner and indicating that he was selected through the PDS. The record further contains screen captures of bypass history of other Board-certified orthopedic surgeons, listing Dr. Kenneth Klein, bypassed due to lack of a current telephone number, Dr. Cornelius Stover, Dr. David Tam and Dr. Lewis Zemask, bypassed because the physicians did not accept OWCP cases.

OWCP referred appellant, a statement of accepted facts and a list of specific questions to Dr. Krisiloff to determine appellant's permanent impairment due to his accepted back injury. In a report dated June 30, 2010, Dr. Krisiloff described appellant's history of injury based on the statement of accepted facts. He performed a physical examination and found no hard neurologic findings. Dr. Krisiloff stated, "The motor examination reveals some breakaway weakness that is likely secondary to pain and is not a true neurologic finding. The patient also complains of some decreased sensation, but a careful examination shows that it follows no anatomic dermatomal distribution and is therefore not a reliable finding." He diagnosed degenerative lumbar disc disease and radiculopathy in the left leg without neurological compromise. Dr. Krisiloff stated that there was no basis for significant neurologic compromise based on appellant's MRI scans. He applied the A.M.A., *Guides* and found that under the Lumbar Spine Regional Grid appellant had a class 2 Intervertebral Disc Herniation with residual radiculopathy with a default impairment of 12 percent.[5] Dr. Krisiloff found a functional history grade modifier of two,[6] physical examination modifier of zero,[7] clinical studies grade modifier two,[8] to reach a net adjustment of zero. He found that appellant had reached maximum medical improvement.

[5] *Id*. at 570.

[6] *Id*. at 575, Table 17-6.

[7] *Id*. at 576, Table 17-7.

[8] *Id*. at 581, Table 17-9.

Dr. Krisiloff concluded, "[appellant] did not exhibit any hard neurologic findings in the lower extremities on my examination. Therefore, he has no permanent neurologic residuals as a result of his condition."

OWCP's medical adviser reviewed Dr. Krisiloff's report on October 5, 2010 and noted that he had granted appellant an award for whole person impairment. He noted that Dr. Krisiloff was required instead to use the peripheral nerve impairment tables, if he found objective neurological deficits. The medical adviser requested a supplemental report addressing these issues.

Appellant's attending physician, Dr. Edward S. Rachlin, a Board-certified orthopedic surgeon, completed a note on November 16, 2010 reporting appellant's low back pain radiating into his left leg. He noted that appellant walked with a shuffling gait and was unable to walk on his heels or toes. Dr. Rachlin reported decreased sensation in left L2 to S1 in the left lower extremity. He also noted a "let go" type of weakness in the left lower extremity.

On April 29, 2011 OWCP requested a supplemental report from Dr. Krisiloff. He responded on June 14, 2011 and opined that appellant reached maximum medical improvement in July 2003. Dr. Krisiloff stated that appellant had continued issues with his lower back and left leg, but they were related to his underlying degenerative disc disease and not the employment injury of April 18, 2003. He found that appellant had no objective neurologic deficits in the lower extremities and that the peripheral nerve impairment table for residual radiculopathy could not be used. Dr. Krisiloff stated, "[l]eft lower extremity impairment would therefore, be zero."

By decision dated June 27, 2011, OWCP denied appellant's claim for a schedule award on the grounds that the weight of the medical evidence did not establish an impairment of a scheduled member. Counsel requested an oral hearing before an OWCP hearing representative on June 30, 2011.

In a report dated September 19, 2011, Dr. Becan reviewed Dr. Krisiloff's report noting no hard neurologic findings, breakaway weakness and decreased sensation without anatomic dermatomal distribution. He stated that Dr. Krisiloff did not perform Semmes Weinstein Monofilament testing and that motor strength deficits were not graded. Dr. Becan stated that he found positive findings on examination on February 2, 2009.

Appellant testified at the oral hearing on October 12, 2011. He stated that his current condition included sharp pains in his back radiating to his leg and pins and needle sensation in his left leg and foot. Appellant also testified that his left leg was weak. He stated that Dr. Krisiloff did not perform a thorough examination. Counsel argued that Dr. Krisiloff was not properly selected as the impartial medical examiner and that the statement of accepted facts provided to Dr. Krisiloff was inadequate as it did not discuss appellant's previous back injuries.

By decision dated November 23, 2011, the hearing representative affirmed OWCP's finding that appellant had no permanent impairment of the left lower extremity. He remanded the case for additional development regarding any permanent impairment of appellant's right lower extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[9] and its implementing regulations[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[11]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.[12] 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.[13]

A physician selected by OWCP to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, OWCP has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. 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.[14] FECA provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories.[15] The Board has held that an appropriate notation should be made in the Directory

[9] 5 U.S.C. §§ 8101-8193, 8107.

[10] 20 C.F.R. § 10.404.

[11] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[12] 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

[13] *R.C.*, 58 ECAB 238 (2006).

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

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

when a specialist indicates his or her unwillingness to accept a case or when, for other valid reasons it is not advisable or practicable to use his or her services.[16]

ANALYSIS

OWCP determined that a conflict arose between OWCP's medical adviser and appellant's physician, Dr. Becan, as to the extent of the permanent impairment to appellant's lower extremities as a result of his accepted back injury. Dr. Becan concluded that appellant had 60 percent impairment of his left lower extremity due to his accepted back injury including 13 percent impairment due to motor strength impairment. OWCP's medical adviser reviewed the medical evidence in the record and found that appellant's medical history did not support significant motor deficits to the left lower extremity. In order to resolve the existing conflict of medical opinion evidence, the Board finds that OWCP properly referred appellant to Dr. Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination.

On June 30, 2010 Dr. Krisiloff reviewed the statement of accepted facts and performed a physical examination. He reported no hard neurologic findings noting breakaway weakness that was likely due to pain rather than a true neurologic finding. Dr. Krisiloff found that appellant's reports of decreased sensation did not follow an anatomic dermatomal distribution and were unreliable. He diagnosed degenerative lumbar disc disease and radiculopathy in the left leg without neurological compromise. Dr. Krisiloff concluded, "[appellant] did not exhibit any hard neurologic findings in the lower extremities on my examination. Therefore, he has no permanent neurologic residuals as a result of his condition." In a supplemental report dated June 14, 2011, Dr. Krisiloff opined that appellant had no objective neurologic deficits in the lower extremities and that the peripheral nerve impairment table for residual radiculopathy could not be used. He concluded, "Left lower extremity impairment would therefore, be zero."

The Board finds that Dr. Krisiloff's reports are based on a proper factual background and include detailed physical findings as a basis for his conclusion that appellant had no impairment of the left lower extremity. He stated that there were no appropriate physical findings to correlate with the applicable tables of the A.M.A., *Guides*. These reports are entitled to the weight of the medical evidence due to the physical findings and the medical reasoning offered for the conclusion that appellant had no permanent impairment of the left lower extremity.

Following Dr. Krisiloff's initial report, Dr. Rachlin examined appellant on November 10, 2010 and found decreased sensation in left L2 to S1 in the left lower extremity as well as weakness in the left lower extremity. This report is not sufficient to establish a permanent impairment or to create a conflict with Dr. Krisiloff's reports as Dr. Rachlin did not correlate his findings with the A.M.A., *Guides*.

Dr. Becan submitted an additional report dated September 19, 2011 stating that he disagreed with Dr. Krisiloff and noting that he found positive findings on examination on February 2, 2009. This report does not include a correlation between Dr. Becan's findings and the A.M.A., *Guides*. Furthermore, as Dr. Becan was on one side of the conflict that Dr. Krisiloff

[16] *David Peisner*, 39 ECAB 1167 (1988).

resolved, the additional report from Dr. Becan is insufficient to overcome the weight accorded Dr. Krisiloff's report as the impartial medical specialist or to create a new conflict with it.[17]

On appeal, counsel argued that the record lacked evidence that Dr. Krisiloff was properly selected through the PDS rotational system. The record establishes that Dr. Krisiloff was selected through the PDS. The record contains screen shots of the selected physicians and the reasons for by passes. The record establishes that Dr. Klein was bypassed because OWCP could not ascertain his active telephone number. Drs. Stover, Tam and Zemasky were bypassed as the physicians did not accept OWCP cases. The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist. As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that the attorney's argument is not substantiated.[18]

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing a permanent impairment of his left lower extremity entitling him to a schedule award.

[17] *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

[18] *K.S.*, Docket No. 12-184 (issued September 11, 2012). *See E.M.*, Docket No. 11-1373 (issued February 3, 2012). *Cf. H.W.*, Docket No. 10-404 (issued September 28, 2011) (where the MEO23 iFECS report was the only documentation of the scheduled impartial medical specialist examination. There were no screen shots substantiating the selection of the impartial medical specialist. The Board remanded the case by an order for selection of another impartial medical specialist and the issuance of an appropriate decision following any further development).

ORDER

IT IS HEREBY ORDERED THAT November 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board