United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 13-997**
	)	**Issued: June 10, 2014**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Lyons, 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:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2013 appellant, through his attorney, filed a timely appeal of a January 11, 2013 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 employment-related permanent impairment entitling him to a schedule award.

On appeal, counsel argued that the statement of accepted facts was not accurate as to appellant's accepted conditions and that the impartial medical examiner was not entitled to the weight of the medical opinion evidence.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On March 22, 2002 appellant, then a 49-year-old cook, injured his lower back and buttocks mixing a bowl of pancake batter. On April 9, 2002 OWCP accepted this claim for lumbar sprain.

Appellant, through his attorney, requested a schedule award and submitted a report dated August 6, 2003 from Dr. David Weiss, an osteopath, who concluded that appellant had 19 percent impairment of the left lower extremity due to motor strength deficit, sensory deficit and pain-related impairment. Dr. Weiss also found that appellant had seven percent impairment of the right lower extremity due to sensory deficit of the right S1 nerve root and pain-related impairment.

On December 27, 2005 OWCP found that there was a conflict of medical opinion evidence between Dr. Weiss and the district medical adviser and referred appellant to Dr. William Head, Jr., a Board-certified neurologist, for an impartial medical examination. Dr. Head stated that appellant had no impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated January 8, 2007, OWCP denied appellant's request for a schedule award. By decision dated August 31, 2007, an OWCP hearing representative set aside OWCP's January 8, 2007 decision and remanded for further development of the medical evidence.

OWCP amended the statement of accepted facts to include additional accepted employment injuries to appellant's low back including: a May 13, 1996 lumbosacral sprain; a March 7, 1997 lumbosacral strain; a July 14, 1997 lumbosacral strain; an August 17, 1999 muscle spasm in the lumbosacral region; a May 17, 2000 herniated disc at L5-S1; an April 9, 2001 lumbosacral sprain and neuritis; an October 1, 2001 lumbosacral sprain; a June 28, 2001 lumbar disc displacement; and a March 12, 2002 lumbosacral sprain.[2]

On October 18, 2007 Dr. Head stated, "It is my medical opinion that [appellant] has sustained a zero percent impairment to the lower extremity due to the accepted condition of lumbar sprain. There was no objective evidence of any neurological abnormality in the lower extremities." The district medical adviser concurred with Dr. Head's impairment rating in a December 21, 2007 report.

By decision dated December 21, 2007, OWCP denied appellant's request for a schedule award. The hearing representative affirmed OWCP's December 21, 2007 decision on June 20, 2008.

In a decision dated July 7, 2009,[3] the Board found that there was no conflict in medical opinion at the time Dr. Head was designated as an impartial medical examiner. Therefore, Dr. Head's reports were considered as those of a second opinion physician, which resulted in a

[2] OWCP also combined these claims under the current claim number.

[3] Docket No. 09-38 (issued July 7, 2009).

conflict with Dr. Weiss. The Board directed OWCP to refer appellant, a statement of accepted facts and a list of specific questions to a Board-certified specialist to determine the extent of any permanent impairment to his lower extremities. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

On April 25, 2008 appellant underwent a lumbar magnetic resonance imaging (MRI) scan, which demonstrated degenerative disc disease at L4-5 with a right lateral small herniation of the disc impinging on the right L4 nerve root and stenosis of the right neural foramina and L5-S1 degenerative disc disease with moderate-size central herniation impinging on the thecal sac with no stenosis.

Following the Board's July 7, 2009 decision, OWCP initially referred appellant for an impartial examination with Dr. Michael Suhl, a Board-certified neurologist. However, Dr. Suhl was unable to provide a fully rationalized rating of impairment under the sixth edition of the A.M.A., *Guides*.

In a letter dated May 17, 2011, OWCP referred appellant for a second opinion with Dr. Sean Lager, a Board-certified orthopedic surgeon, to address his permanent impairment for schedule award purposes. Dr. Lager completed a report on June 1, 2011 after reviewing the statement of accepted facts. He noted appellant's complaints of stiffness, radiating pain and paresthesias down his left leg. Dr. Lager recommended spinal surgery and opined that appellant was not at maximum medical improvement.

By decision dated August 3, 2011, OWCP opined that appellant had not reached maximum medical improvement and was not entitled to a schedule award. Counsel requested an oral hearing before an OWCP hearing representative. In a letter dated November 10, 2011, appellant stated that he was not willing to undergo back surgery.

On October 28, 2011 Dr. Weiss appended his August 6, 2005 report to reflect application of the sixth edition of the A.M.A., *Guides* to his findings from examination six years prior. He found that appellant had class 1 sensory deficit of the right S1 nerve root or four percent impairment. Dr. Weiss listed appellant's functional history modifier as 2, his clinical studies modifier as 2 due to the MRI scan and applied the mathematical formula to reach a net adjustment of 2 for right lower extremity impairment of nine percent. He provided a rating impairment for class 1 motor strength deficit of the right foot due to the sciatic nerve of 9 percent based on the same grade modifiers for a combined right lower extremity impairment of 21 percent. Dr. Weiss reached similar impairments for appellant's left foot, but added 1 percent impairment due to left foot contusion with functional history modifier of 2, physical examination modifier of 1 and clinical studies modifier of 0 to reach a net adjustment of 0 and a final combined left lower extremity rating of 22 percent.

By decision dated January 10, 2012, the hearing representative remanded the case for referral to a new impartial medical specialist as Dr. Suhl did not resolve the conflict and as Dr. Lager was selected as only a second opinion physician who could not resolve the existing conflict.

On March 22, 2012 OWCP referred appellant for an impartial medical examination with Dr. Dean Carlson a Board-certified orthopedic surgeon. It provided Dr. Carlson with the September 24, 2009 statement of accepted facts which listed his accepted conditions from nine claims including herniated disc L5-S1, lumbar disc displacement and six lumbar sprains between 1996 and 2002. In an April 12, 2012 report, Dr. Carlson found no objective evidence for any neurological impairment of appellant's lower extremities. On physical examination he found no list or lumbar muscle spasm and a nonantalgic gait. Dr. Carlson reported normal range of motion in appellant's lower extremities and normal strength below the knees. He found 4/5 motor testing in both hip flexors. Dr. Carlson diagnosed herniated discs at L4-5 and L5-S1. He applied Table 16-12 of the A.M.A., *Guides* and diagnosed sciatic nerve dysfunction and noted that appellant had no sensory or motor objective findings for a grade, class and functional history adjustment of zero. Dr. Carlson concluded that appellant had no ratable impairment of either lower extremity. He explained that Dr. Weiss had examined appellant more than eight years earlier and stated that it was well documented that healing occurred in patients with nerve compression syndromes due to herniated nucleus pulposus. Dr. Carlson stated that appellant had neither sensory nor motor objective impairments to L4, L5 or S1, the involved roots in the human sciatic nerve. He stated, "I find the claimant who has a history of chronic recurring lumbar disc attacks to have no objective or subjective evidence for impairments of his lower extremities."

The medical adviser reviewed Dr. Carlson's report on May 14, 2012. As appellant had normal findings on examination, he had no ratable impairment of either lower extremity.

By decision dated July 9, 2012, OWCP denied appellant's claim for a schedule award based on Dr. Carlson's report. Counsel requested an oral hearing before an OWCP hearing representative on July 13, 2012. Appellant completed a statement dated October 11, 2012 and stated that Dr. Carlson spent 15 minutes examining him. At the oral hearing on October 25, 2012, counsel appeared and argued that Dr. Carlson's examination and report was insufficient.

By decision dated January 11, 2013, the hearing representative found that Dr. Carlson's report was sufficient and was based on the accurate statement of accepted facts. He affirmed the July 9, 2012 decision of OWCP.[4]

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing regulations[6] 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

[4] Following the decision of the hearing representative, counsel requested another hearing on January 24, 2013. The Branch of Hearings and Review denied this request on February 4, 2013. Counsel did not appeal this decision to the Board and the Board will not review this decision on appeal. *See* 20 C.F.R. § 501.3(a).

[5] 5 U.S.C. §§ 8101-8193, 8107.

[6] 20 C.F.R. § 10.404.

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*.[7]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[8] Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,[9] no claimant is entitled to such an award.[10]

Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[11]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.[12] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures.[13] Specifically, it will address lower extremity impairments originating in the spine through Table 16-11[14] and upper extremity impairment originating in the spine through Table 15-14.[15]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers

[7] 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).

[8] *W.D.*, Docket No. 10-274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

[9] FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[10] *W.D., supra* note 8. *Timothy J. McGuire*, 34 ECAB 189 (1982).

[11] *W.D., id*. *Rozella L. Skinner*, 37 ECAB 398 (1986).

[12] FECA Transmittal No. 10-04 (issued January 9, 2010); *supra* note 7 at Chapter 3.700 (Exhibit 4) (January 2010).

[13] *Supra* note 7 at Chapter 3.700 (Exhibits 1, 4) (January 2010).

[14] A.M.A., *Guides* 533, Table 16-11.

[15] *Id*. at 425, Table 15-14.

based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16]

In situations where there are 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 on a proper factual background, must be given special weight.[17]

The Board has held that medical opinion based upon stale clinical or physical examination evidence is unpersuasive.[18] The Board has evaluated the probative value of medical opinion evidence by looking to the quality of the information cited in the report rather than limiting its review to the putative date of the report.[19] Where a physician prepares a report without a contemporaneous clinical examination and record review, the physician should explain why new information was unnecessary to reach the medical opinion expressed in the report.[20]

ANALYSIS

The Board found in its previous decision that there was an unresolved conflict of medical opinion evidence between appellant's physician, Dr. Weiss, and Dr. Head, determined to be a second opinion physician regarding the extent of appellant's permanent impairment for schedule award purposes. The Board directed OWCP to obtain a report from an impartial medical examiner to resolve the conflict.

[16] *Id.* at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[17] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[18] *E.W.*, Docket No. 13-506 (issued May 13, 2013) (The Board held that a medical report dated May 16, 2011 which contained only clinical examination results from October 2004 and where the author of the report failed to respond, within the allotted time, to an OWCP request for a supplemental report did not support appellant's claim for a schedule award. The Board affirmed OWCP's order denying a schedule award). *B.M.*, Docket No. 13-691 (issued September 12, 2013) (The Board found that a medical report dated April 22, 2010 and based on physical examination findings from July 2004 rested on stale evidence and did not create a conflict with a second opinion report based on an examination made almost seven years later. The Board affirmed OWCP's schedule award).

[19] *D.S.*, Docket No. 13-29 (issued April 3, 2013) (The Board found a report dated November 5, 2010 which provided an impairment rating was of limited probative value because, in part, it was based on physical examination findings from 2003. The Board remanded the case to OWCP on unrelated grounds).

[20] *B.N.*, Docket No. 12-1394 (issued August 5, 2013) (The Board found a report dated November 28, 2011, by Nicholas Diamond, M.D., to be stale because the physician used his examination findings from July 2004 and applied the criteria of the sixth edition of the A.M.A., *Guides* to the results of 2004. He failed to explain why a current examination was not necessary to support the opinion offered). *R.C.*, Docket No. 12-437 (issued October 23, 2012) (The Board found that a report dated September 27, 2010, by Steven Allon, M.D., did not create a conflict of medical evidence, in part, because the physician relied on examination findings from October 2, 2007. The physician did not explain why a new examination was not necessary). There are occasions when a recent physical examination is not necessary to support a medical opinion such as when the opinion is based exclusively on diagnostic test reports or the receipt of additional treatment records. If this is the case, the physician should explain why the opinion offered is supported by a record that does not include an examination.

OWCP initially referred appellant to Dr. Suhl to resolve the conflict. However, Dr. Suhl was unable to apply the provisions of the A.M.A., *Guides* as described above to rate appellant's impairment. He did not provide the information necessary to complete the formula to determine the lower extremity impairment.

OWCP then improperly referred appellant to Dr. Lager for a second opinion examination. As Dr. Lager was not selected under the necessary requirements for serving as an impartial medical adviser, he could not resolve the existing conflict of medical opinion evidence.

On remand, from the hearing representative, OWCP properly referred appellant to Dr. Carlson to determine appellant's permanent impairment for schedule award purposes and to resolve the existing conflict of medical opinion evidence. Contrary to the assertions of counsel, OWCP provided Dr. Carlson with the September 24, 2009 statement of accepted facts which listed all of appellant's accepted conditions from nine claims including herniated disc L5-S1, lumbar disc displacement and six lumbar sprains between 1996 and 2002. Dr. Carlson based his April 12, 2012 report on this statement of accepted facts. He also provided detailed findings on physical examination noting that appellant had no objective evidence for any neurological impairment of appellant's lower extremities. Dr. Carlson reported normal range of motion, no list or lumbar muscle spasm and a nonantalgic gait. He reported normal range of motion in appellant's lower extremities and normal strength below the knees. Dr. Carlson found 4/5 motor testing in both hip flexors. He diagnosed herniated discs at L4-5 and L5-S1. Dr. Carlson then applied Table 16-12 of the A.M.A., *Guides*[21] and diagnosed sciatic nerve dysfunction. He found no sensory or motor objective findings for a grade, class and functional history adjustment of zero and concluded that appellant had no ratable impairment of either lower extremity. The medical adviser reviewed this report and agreed with Dr. Carlson's conclusions.

The Board finds that Dr. Carlson relied on a proper history of injury, that he provided detailed findings on physical examination listed above including range of motion, motor strength and the lack of sensory deficits. Dr. Carlson applied the appropriate provisions of the A.M.A., *Guides* to reach his conclusion that appellant had no ratable impairment of his lower extremities entitling him to a schedule award.

Dr. Carlson also provided medical reasoning explaining why his findings differed so dramatically from Dr. Weiss. He noted that Dr. Weiss had examined appellant more than eight years earlier and stated that it was well documented that healing occurred in patients with nerve compression syndromes due to herniated nucleus pulposus. Dr. Carlson stated that appellant had neither sensory nor motor objective impairments to L4, L5 or S1, the involved roots in the human sciatic nerve. The Board finds that Dr. Weiss' 2003 report and addendum are of reduced probative value as he is relying on physical findings eight years old to make his impairment

[21] A.M.A., *Guides* 534, Table 16-12.

rating.[22] Dr. Weiss' 2003 physical examination findings constitute stale medical evidence and are not sufficient to establish appellant's permanent impairment. The report does not create a conflict with Dr. Carlson's report which is more recent by eight years.[23]

The Board finds that Dr. Carlson's report is entitled to the special weight of the medical evidence based on the detailed findings and rationale and that this report establishes that appellant does not currently have a ratable impairment due to his accepted back injuries.

CONCLUSION

The Board finds that appellant has not established permanent impairment of a scheduled member entitling him to a schedule award.

[22] *P.S.*, Docket No. 12-649 (issued February 13, 2013) (The Board found a report by Dr. Weiss dated January 2010 of reduced probative value because he relied on physical findings from an October 2007 report. The Board affirmed an OWCP order which denied an increase in appellant's schedule award). *W.M.*, Docket No. 12-773 (issued March 29, 2013), Judge Haynes concurring. (The Board found that a medical report by Dr. Weiss dated June 25, 2010 was based on a physical examination done in May 2004 and that because this evidence was stale, the report did not generate a conflict of opinion evidence with a second opinion physician who examined appellant four years later. The Board affirmed an OWCP order which denied an increased schedule award).

[23] *See H.C.*, Docket No. 11-1407 (issued May 11, 2012) (finding that Dr. Weiss did not reexamine appellant and based his physical findings on a 2004 examination such that his report constituted stale medical evidence and did not create a conflict of medical opinion evidence).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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