United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 13-2072**
	)	**Issued: September 19, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Flemington, 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:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 10, 2013 appellant, through counsel, filed a timely appeal from a June 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 decision.

ISSUE

The issue is whether appellant has greater than four percent impairment of the left lower extremity and 20 percent impairment of the right lower extremity for which he received schedule awards.

On appeal appellant's attorney asserts that the referee physician, Dr. Barry J. Snyder, a Board-certified orthopedic surgeon, was improperly selected and, thus, a conflict remains regarding appellant's lower extremity impairment. Counsel further asserts that the statement of accepted facts provided to Dr. Snyder was incomplete, that he did not address polyneuropathy or

[1] 5 U.S.C. §§ 8101-8193.

preexisting conditions, that his report is not well reasoned, and that there was inappropriate contact between Dr. Snyder and OWCP.

FACTUAL HISTORY

This case consists of two claim files, an October 2, 2004 traumatic injury accepted for lumbar sprain and thoracic or lumbosacral neuritis or radiculitis and a 2007 occupational disease claim accepted for aggravation of preexisting diabetic neuropathy, right; right flat foot; arthropathies associated with neurological disorders, right; and tear of the medial meniscus of the knee, right. The claims were adjudicated by OWCP under file numbers xxxxxx316 and xxxxxx373, respectively.[2]

Claim number xxxxxx316 has previously been before the Board. In a January 14, 2009 decision, the Board affirmed July 26, 2007 and March 7, 2008 OWCP decisions, finding that appellant had established four percent permanent impairment for each lower extremity due to sensory deficits in both legs. The Board also found the evidence insufficient to establish diabetes or the Charcot foot condition to preexist the employment injury of 2004.[3] The law and facts of the previous Board decision are incorporated herein by reference.

Regarding claim number xxxxxx373, following an initial denial on April 30, 2008, by decision dated January 2, 2009, an OWCP hearing representative found that a medical conflict had been created as to whether appellant had sustained additional work-related conditions, and remanded the case for OWCP to obtain an impartial evaluation. Following evaluation by Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, on April 24, 2009 OWCP accepted that appellant's federal employment contributed to preexisting diabetic peripheral neuropathy and flatfoot of the right foot. Appellant filed a schedule award claim for the additional conditions.

On February 19, 2010 appellant was granted a schedule award for 13 percent impairment of the right lower extremity. After subtracting the previous four percent of the right lower extremity, he received an additional nine percent impairment of the right lower extremity. The schedule award was increased due to the effects of weight-bearing on the arthritic condition of the right foot. Appellant requested a hearing. On August 10, 2010 an OWCP hearing representative found the conflict in medical evidence remained regarding appellant's accepted right knee condition and remanded the case to OWCP for a new referee examination with special attention to whether the right knee condition was causally related to work and whether appellant would be entitled to an increased schedule award due to the right knee condition.

OWCP referred appellant to Dr. David N. Bosacco, a Board-certified orthopedic surgeon, along with an updated statement of accepted facts, for an impartial evaluation. Dr. Bosacco's report was forwarded to an OWCP medical adviser who found 10 percent impairment for the right knee based on range of motion, 11 percent for the right foot and no rating for lumbar.

[2] Appellant, then a 52-year-old distribution window clerk, filed claim number xxxxxx316 on October 4, 2004. He filed claim number xxxxxx373 on March 12, 2007.

[3] Docket No. 08-1744 (issued January 14, 2009).

Using the Combined Values Chart, the total impairment was 20 percent right lower extremity. In a November 10, 2010 decision, OWCP credited Dr. Bosacco's September 8, 2010 opinion and granted appellant a schedule award for an additional seven percent right lower extremity impairment, for a total of 20 percent.

Appellant disagreed and requested another hearing. In a June 28, 2011 decision, an OWCP hearing representative again remanded the case to OWCP to combine file numbers xxxxxx316 and xxxxxx373 and prepare a new statement of accepted facts for both files. OWCP was to obtain a supplemental report from Dr. Bosacco, to be followed by a *de novo* decision regarding appellant's complete impairment of the right leg, including any lumbar-related nerve root impairment and all preexisting conditions.

OWCP referred appellant to Dr. Snyder, a Board-certified orthopedic surgeon, for a new impartial evaluation. Dr. Snyder was provided an updated statement of accepted facts. He was asked to address accepted conditions on appellant's right side and provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[4] (hereinafter A.M.A., *Guides*).

In a February 29, 2012 report, Dr. Snyder noted his review of an extensive medical record. He provided physical examination findings including right pes planus; right bimalleolar pain during plantar flexion; decreased right dorsalis pedis; normal deep tendon reflexes; diminished protective sensation in the lateral forefoot and toes on the right and all toes on the left; diminished light touch sensation of the medial foot bilaterally; and normal light touch and protective sensation of the lateral hind foot bilaterally. Tinel's sign was present bilaterally. Dr. Snyder diagnosed Charcot arthropathy of the right foot; exogenous morbid obesity; insulin-dependent diabetes mellitus, complicated by diabetic polyneuropathy; peripheral vascular disease, *i.e.*, diabetic vasculopathy; and degenerative arthrosis with meniscal tear of the right knee, and additional accepted conditions of lumbar sprain and thoracic or lumbosacral neuritis or radiculitis. He opined that the diabetic polyneuropathy and meniscal degeneration were not caused by appellant's employment but noted that these conditions had been accepted and that the sixth edition of the A.M.A., *Guides* emphasized diagnosis-based impairment. Dr. Snyder noted that the more appropriate diagnoses for analyzing impairment were talonavicular arthritis, calcaneal cuboid arthritis, meniscal injury and patellofemoral arthritis. He then stated that the following impairment analysis was presented for appellant's left lower extremity, based on his diagnoses of the right foot and right knee.[5]

Dr. Snyder indicated that the impairing diagnoses were talonavicular arthritis, calcaneal cuboid arthritis, meniscal injury and patellofemoral arthritis. He found that under Table 16-2, Foot and Ankle Regional Grid,[6] for the diagnosis of talonavicular arthritis, appellant had a class 1 impairment with a default value of one percent. Dr. Snyder found a grade modifier of 2 for

[4] A.M.A., *Guides* (6th ed. 2008).

[5] Dr. Snyder's use of "left" appears to be a typographical error. The substance of the report clearly refers to the right lower extremity.

[6] Dr. Snyder's report referenced Table "15-2," an obvious typographical error since that table of the A.M.A., *Guides* is the Digit Regional Grid. A.M.A., *Guides* 391.

functional history, a modifier of 1 for physical examination and a modifier of 3 for clinical studies. After applying the net adjustment formula, he concluded that appellant had two percent right leg impairment for the diagnosis of talonavicular arthritis. Dr. Snyder found that, for calcaneal cuboid arthritis, under Table 16-2 appellant had a class 1 impairment with a default value of 5, with grade modifiers of 2 for functional history and physical examination, and a grade modifier of 3 for clinical studies. After applying the net adjustment formula, he concluded that appellant had seven percent leg impairment for the diagnosis of calcaneal cuboid arthritis. Dr. Snyder then combined these values, indicating that, due to impairment of his right foot, appellant had nine percent impairment of the left lower extremity for ankle arthritis.

Regarding the right meniscal injury, Dr. Snyder found a class 1 radial tear under Table 15-3, Knee Regional Grid, with a default value of two percent with grade modifiers of one each for functional history, physical examination and clinical studies. After applying the net adjustment formula, he concluded that appellant had two percent impairment for a right radial tear.

Dr. Snyder also indicated that, for a diagnosis of chondromalacia patella, appellant had a class 0 impairment. He then combined the 2 percent right knee impairment with the 9 percent ankle impairment and concluded that appellant had 11 percent right lower leg impairment. Dr. Snyder attached charts demonstrating his impairment analysis.

In a March 9, 2012 report, Dr. Morley Slutsky, an OWCP medical adviser who is Board-certified in occupational medicine, noted his review of the record, including Dr. Snyder's report. OWCP's medical adviser indicated that additional information was needed and found the report flawed. He found that Dr. Snyder had failed to order x-rays to measure cartilage intervals in the foot and ankle joints and right knee, a requirement of the A.M.A., *Guides*.

By decision dated March 16, 2012, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Snyder who concluded that appellant had 11 percent impairment of the right lower extremity and, thus, was not entitled to a schedule award greater than the 20 percent previously granted. Appellant requested a hearing.

In a June 25, 2012 decision, an OWCP hearing representative noted that OWCP procedures provide that, if the opinion of a referee physician is insufficient, OWCP should request a supplemental report and that, in this case, instead of requesting a clarifying report from the original independent medical specialist, Dr. Bosacco, OWCP improperly referred appellant to Dr. Snyder for a new impartial evaluation. The hearing representative instructed that Dr. Snyder's report be excluded and that OWCP should request a supplemental opinion from Dr. Bosacco. The hearing representative again instructed OWCP to combine file numbers xxxxxx373 and xxxxxx316 and prepare a new statement of accepted facts and request a supplemental report from Dr. Bosacco, and that, if he was unable or unwilling to provide the requested supplementary report, OWCP should then arrange another impartial evaluation.

OWCP thereafter doubled the claim files and prepared a July 16, 2012 addendum to the statement of accepted facts. An August 8, 2012 OWCP memorandum indicated that it was unable to comply with the June 28, 2011 decision because Dr. Bosacco had passed away in early 2011. OWCP stated that it had therefore arranged a new "referee" with Dr. Snyder and would

provide him with the new statement of accepted facts and medical records as required. On August 8, 2012 it asked Dr. Snyder for further clarification. OWCP noted that the claims had been doubled and provided medical evidence regarding claim number xxxxxx316. It asked the physician to determine if residuals of claim number xxxxxx316 were included in the 11 percent right lower extremity impairment he previously found.

In an October 27, 2012 response, Dr. Snyder indicated that the 11 percent right lower extremity impairment included all diagnoses accepted on the statement of accepted facts. He indicated that he did not incorporate lumbar sprain and thoracic or lumbosacral neuritis or radiculitis but stated that to the best of his knowledge the percentage he found was comprehensive and accurate to include all applicable impairments.

In a November 19, 2012 decision, OWCP noted that appellant had been seen by Dr. Snyder for an impartial evaluation on August 25, 2011 and found that the weight of the medical evidence rested with his opinion that appellant had 11 percent impairment of the right leg. Another hearing was requested by appellant. On June 12, 2013 an OWCP hearing representative affirmed the November 29, 2012 decision. The hearing representative again noted that Dr. Bosacco had died before OWCP had been able to obtain a clarifying report from him and that OWCP, therefore, properly obtained a new impartial evaluation from Dr. Snyder, who provided a thorough evaluation. The hearing representative concluded that there was no need to disqualify Dr. Snyder, noting that he addressed all accepted conditions, and did not identify the need for or request additional testing.

LEGAL PRECEDENT

The schedule award provision of FECA,[7] and its implementing federal 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used.[10]

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.[11] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (2011).

[9] *Id*.

[10] FECA Bulletin No. 09-03 (issued March 15, 2009); *supra* note 4.

[11] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[12]

OWCP procedures provide that a medical record must be excluded if a second referee specialist's report is requested before it has attempted to clarify the original referee specialist's report.[13] Only if the selected physician fails to provide an adequate and clear response after a specific request for clarification may OWCP seek a second referee specialist's opinion.[14]

ANALYSIS

In the November 19, 2012 OWCP decision denying appellant's request for an additional schedule award, as affirmed by an OWCP hearing representative on June 12, 2013, OWCP relied on the February 29, 2012 opinion of Dr. Snyder. In a decision dated June 25, 2012, an OWCP hearing representative found that OWCP improperly referred appellant to Dr. Snyder for an impartial evaluation instead of securing a supplemental report from Dr. Bosacco who provided an impartial medical evaluation on September 9, 2010. However as noted by OWCP in the November 19, 2012 and June 12, 2013 decisions, Dr. Bosacco died in 2011 and was thus unavailable. It was therefore permissible for OWCP to select Dr. Snyder as an impartial physician.

The Board also finds that the statement of accepted facts, dated May 11, 2007 with an addendum dated October 25, 2010, provided Dr. Snyder was sufficient. In his initial report dated February 29, 2012, Dr. Snyder's discussion of accepted conditions and the medical record was very extensive. He provided an impairment evaluation and concluded that appellant had 11 percent lower extremity impairment.[15]

The Board nonetheless finds that this case is not in posture for decision. As noted above, OWCP's medical adviser had found the impairment evaluation by Dr. Synder to be inadequate. He noted that the A.M.A., *Guides* required x-rays to be taken to properly determine the cartilage intervals.[16]

[12] *Manuel Gill*, 52 ECAB 282 (2001).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.12.a(2) (September 2010).

[14] *Id*.

[15] As to inappropriate contact, the record indicates that Dr. Snyder called OWCP on December 9, 2011 asking whether the back was to be included in the impairment rating and OWCP responded. There is no evidence of inappropriate contact. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.12(a)(3) (September 2010).

[16] *Supra* note 4 at 501, Table 16-2.

The Board finds that Dr. Snyder's opinion is not consistent with the A.M.A., *Guides* and cannot be entitled to the special weight accorded a referee physician.[17] Thus, a conflict in medical evidence remains.

The case must therefore be remanded to OWCP. On remand it should prepare a new statement of accepted facts that clearly describes the accepted conditions in both cases, and forward it to a new impartial medical specialist.[18] After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision on the issue of appellant's entitlement to schedule awards for the accepted conditions under both claims.[19]

CONCLUSION

The Board finds that this case is not in posture for decision regarding appellant's lower extremity impairments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 12, 2013 is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: September 19, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[17] *Supra* note 12.

[18] *Supra* note 13 at 2.810.11(e).

[19] *See M.D.*, Docket No. 13-503 (issued September 19, 2013).