

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PARISH T. SIM'KEN and DEPARTMENT OF THE NAVY, NORFOLK
NAVEL SHIPYARD, EMPLOYEE SERVICES DIVISION, Portsmouth, VA

*Docket No. 97-1238; Submitted on the Record;
Issued February 25, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to more than a 17 percent permanent impairment of the left knee, for which he has already received a schedule award.

The Board has duly reviewed the case record in this appeal and finds that appellant is not entitled to more than a 17 percent permanent impairment of the left knee, for which he has already received a schedule award.

Appellant, a 33-year-old truck driver, filed a traumatic injury claim (Form CA-1) assigned number A25-286975 alleging that on May 13, 1986 he injured his right knee when he stepped into a hole.¹

¹ Prior to the instant claim, appellant filed a Form CA-1 assigned number A25-237195 on July 28, 1983 alleging that he sustained a right knee injury on that date. By letter dated May 26, 1987, the Office of Workers' Compensation Programs accepted appellant's claim for traumatic synovitis of the right knee. On February 4, 1992 appellant filed a Form CA-1 assigned number A25-407822 alleging that he sustained a left knee injury on that date. On September 10, 1992 the Office accepted appellant's claim for contusion of the left knee. On February 19 1992 appellant, filed a Form CA-1 assigned number A25-400811 alleging that he sustained a right knee injury on that date. In a May 20, 1992 decision, the Office found the evidence of record insufficient to establish that appellant sustained an injury while in the performance of duty. By letter dated September 9, 1992, the Office vacated its May 20, 1992 decision and accepted appellant's claim for a contusion of the right knee. The Office consolidated appellant's claims numbered A25-400811 and A25-407822 into a master claim filed A25-286975.

The Office accepted appellant's claim for right knee sprain, right knee post-traumatic chondromalacia-permanent residuals, secondary left knee pain consequential to the May 13, 1986 employment injury and lateral patellar stabilizing knee sleeves on both knees.²

On June 14, 1993 appellant, filed a claim (Form CA-7) for a schedule award for his left lower extremity.

On September 10, 1993 the Office granted appellant a schedule award for a 17 percent permanent impairment of the left leg for the period August 28, 1993 through September 3, 1994.

On January 13, 1995 appellant, filed a Form CA-7 requesting an additional schedule award based on the January 9, 1995 finding of Dr. Lawrence R. Morales, a Board-certified orthopedic surgeon and appellant's treating physician, that he had a 37 percent permanent impairment of the left lower extremity.

On March 10, 1995 an Office medical adviser reviewed appellant's medical records and determined that appellant was not entitled to an additional schedule award for the left lower extremity. The Office medical adviser stated that it was necessary to refer appellant to a second opinion physician due to Dr. Morales' contradictory medical reports regarding appellant's range of motion.

By letter dated April 12, 1995, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Robert Neff, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Neff of the referral. Dr. Neff submitted a May 12, 1995 medical report indicating that appellant was not entitled to an additional impairment rating for the left lower extremity.

By decision dated May 31, 1995, the Office found the evidence of record insufficient to establish that appellant was entitled to more than a 17 percent impairment, for which he had already received a schedule award. In a June 27, 1995 letter, appellant requested an oral hearing before an Office representative.

In a February 21, 1996 decision, the hearing representative vacated the Office's decision and remanded the case due to a conflict in the medical opinion evidence between Drs. Morales and Neff.

By letter dated October 8, 1996, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Bernard A. Lublin, a Board-certified orthopedic surgeon, for an impartial medical examination. By letter of the same date, the

² By decision dated October 25, 1989, the Office granted appellant a schedule award for a 35 percent permanent impairment of the right lower extremity for the period August 28, 1989 through August 3, 1991. On April 29, 1993 the Office granted appellant a schedule award for an additional 7 percent permanent impairment of the right lower extremity for the period April 8 through August 27, 1993, thus, totaling a schedule award for a 42 percent impairment of the right lower extremity.

Office advised Dr. Lublin of the referral.³ He submitted a November 8, 1996 medical report revealing that appellant was not entitled to an additional impairment rating for the left lower extremity.

By decision dated December 4, 1996, the Office found that the weight of the medical evidence rested with Dr. Lublin's opinion. Accordingly, the Office found that appellant was not entitled to a schedule award for more than a 17 percent permanent impairment of the left lower extremity for which he has already received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation,⁵ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁶ However, neither the Act nor the regulations specify the manner, in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁷

Section 8123(a) of the Act 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.⁸

In the present case, Dr. Morales, a Board-certified orthopedic surgeon and appellant's treating physician, determined that appellant had a 37 percent permanent impairment of the left lower extremity while Dr. Neff, a Board-certified orthopedic surgeon and second opinion physician, determined that appellant had no additional permanent impairment of the left lower extremity. As a conflict existed in the medical opinion evidence between Drs. Morales and Neff, the Office properly referred appellant to Dr. Lublin, a Board-certified orthopedic surgeon, for an impartial medical examination.

³ In an undated letter, appellant requested that the Office refer him to a physician in his area. In an internal memorandum dated August 13, 1996, the Office indicated that appellant would be scheduled for an appointment with a physician in his area. By letter dated October 17, 1996, the Office advised appellant that he was being referred to a physician in Richmond, Virginia because he had previously been examined by several physicians in his area. In a telephone memorandum, appellant expressed his desire to reschedule his appointment with Dr. Lublin.

⁴ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁵ 20 C.F.R. § 10.304.

⁶ 5 U.S.C. § 8107(c)(19).

⁷ *See James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁸ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

When 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.⁹

In his November 8, 1996 medical report, Dr. Lublin provided a history of appellant's right and left knee injuries and medical treatment. He also provided his findings on physical examination, which included voluntary restriction of the knee motion bilaterally and no mechanical derangement of the knees. Dr. Lublin indicated normal findings on x-ray examination. He further indicated a review of medical records. Dr. Lublin noted a discrepancy between those orthopedists of record who accepted the appearance of limited motion as real limitation of motion, which accorded appellant significant partial permanent disability and those orthopedists of record who believed that appellant's knee limitation of motion was not caused by organic factors, but by appellant voluntarily tensing his thigh muscles to block knee motion and to create the appearance of limited motion. He concluded that the evidence of appellant's feigned limitation of knee motion was based on: "(a) inconsistency of range of motion at various times; (b) absence of atrophy of either thigh, which atrophy *would ensue* in a patient with the alleged limitation of knee motion; (c) the hypersensitivity of the knee to gentle palpation -- finding consistent with Waddell's listing of nonorganic findings; (d) absence of radiologic basis such as severe arthritis to account for limited motion; and (e) absence of radiologic evidence of any osteoporosis which *would ensue* in a patient disabled to the degree which the patient alleges." (Emphasis in the original.) Based on his evaluation, Dr. Lublin concluded that "[appellant's] disability was feigned. I believe the diagnosis on this case is that of malingering. I find no reason why [appellant] cannot pursue full employment."

Inasmuch as Dr. Lublin's medical report is rationalized and based on an accurate factual and medical background, the Board finds that his opinion constitutes the weight of the medical opinion evidence in this case. Therefore, the Office properly determined that appellant was not entitled to more than a 17 percent permanent impairment of the left knee, for which he has already received a schedule award.

⁹ Kathryn Haggerty, 45 ECAB 383 (1994); Edward E. Wright, 43 ECAB 702 (1992).

The December 4 and February 21, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
February 25, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member