United States Department of Labor
Employees' Compensation Appeals Board

T.P., Appellant	)	
and	)	**Docket No. 10-2178**
	)	**Issued: June 3, 2011**
DEPARTMENT OF THE ARMY,	)	
Fort Monmouth, 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:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant, through his attorney, filed a timely appeal from a May 25, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Employees' Compensation Act[1] 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 more than a four percent left leg permanent impairment or a three percent right leg permanent impairment.

FACTUAL HISTORY

This case was before the Board on a prior appeal. In a decision dated April 7, 2010, the Board affirmed an August 26, 2008 schedule award decision, finding that appellant did not

[1] 5 U.S.C. § 8101 *et seq.*

establish more than a four percent left leg and three percent right leg permanent impairment.[2] The Board found that a referee physician, Dr. Ian Fries, a Board-certified orthopedic surgeon, represented the weight of the medical evidence. With respect to a May 19, 2009 Office decision, the Board found the Office had applied the standard of review for an untimely application for reconsideration, but the application was timely filed. The case was remanded for proper consideration of the February 23, 2009 application for reconsideration. The history of the case provided in the Board's prior decision is incorporated herein by reference.

By letter dated April 13, 2010, appellant's representative stated that appellant wanted to participate in the selection of an impartial specialist, should such a referral be necessary. He requested the name of three physicians in appellant's area.

In a decision dated May 25, 2010, the Office reviewed the case on its merits. It discussed the arguments raised by appellant in a February 23, 2009 application for reconsideration, including: (1) there was no conflict in the medical evidence; (2) the referee physician was not properly selected; (3) Dr. Fries did not represent the weight of the evidence; and (4) the representative did not timely receive a copy of the August 26, 2008 Office decision. The Office denied modification of its prior decision.

LEGAL PRECEDENT

Section 8107 of the Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[3] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[4]

The Board has held that in the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee.[5] This presumption applies equally to the Office and claimant's representatives.[6]

ANALYSIS

In his February 23, 2009 application for reconsideration, appellant raised a number of arguments with respect to the medical evidence. He argued that there was no conflict under 5

[2] Docket No. 09-1562 (issued April 7, 2010).

[3] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[4] *A. George Lampo*, 45 ECAB 441 (1994).

[5] *See Larry L. Hill*, 42 ECAB 596, 600 (1991).

[6] *Id.*

U.S.C. § 8123(a) requiring referral to a referee physician.[7] The Board addressed this argument in the April 7, 2010 decision, finding there was a conflict between attending osteopath Dr. Weiss and Dr. Krisiloff, a Board-certified orthopedic surgeon serving as a second opinion physician.

Appellant argued that Dr. Fries was not properly selected as a referee physician in accord with Office procedures. The Board also addressed this issue in its prior decision, noting there was no probative evidence of record that the selection of Dr. Fries was improper. The decision explained that the evidence of record indicated that two physicians were bypassed as being unable to schedule an examination in a reasonable time. Appellant did not submit any additional probative evidence on the issue. With respect to the probative value of Dr. Fries' May 19, 2008 report, the Board reviewed the report in detail in its prior decision and found that it represented the weight of the medical evidence.

As to the representative's statement that he did not receive a copy of the August 26, 2008 schedule award decision, the Board notes that the decision contains end notations with the representative's name and address, as well as, the address of the employing establishment. The notation includes the address of record for appellant's representative. The evidence therefore on its face indicated that notice of the decision was sent to the representative of record.[8] As noted above, it is presumed that a mailing in the ordinary course of business was received by the addressee, absent contrary evidence. No probative contrary evidence was submitted in this case.

Appellant did not submit any additional medical evidence regarding a right or left leg permanent impairment causally related to his federal employment. The Board accordingly finds that the record does not establish more than a four percent left leg or three percent right leg permanent impairment.

On appeal, appellant reiterated the arguments that Dr. Fries was not properly selected and the probative value of his report was insufficient to constitute the weight of the evidence. The Board has addressed these issues and reaffirms that Dr. Fries represents the weight of the medical evidence on the issue presented.

CONCLUSION

The Board finds that appellant has not established more than a four percent left leg and three percent right leg permanent impairment.

[7] 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

[8] *Newton D. Lashmett*, 45 ECAB 181 (1993) (where a notice of hearing did not on its face establish that it was properly sent to the representative).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 25, 2010 is affirmed.

Issued: June 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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