United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM T. BALL, Appellant	)	
and	)	**Docket No. 03-1759**
	)	**Issued: December 2, 2003**
DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Phoenix, AZ, Employer	)	

William T. Ball, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 7, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 9, 2003, which denied modification of his claim for a schedule award. Under 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 six percent impairment of the right lower extremity, for which he received schedule awards.

FACTUAL HISTORY

This is the second appeal in this case. In a decision dated May 23, 2002, the Board set aside decisions of the Office dated January 24, 2001 and July 19, 2000 and remanded the case for referral to another impartial medical specialist to resolve a conflict

in the medical opinion evidence. The facts of this case are set forth in the Board's May 23, 2002 decision and are herein incorporated by reference.[1]

On remand the Office referred appellant, together with the medical record, a statement of accepted facts and specific questions to Dr. Jonathan R. Fox, a Board-certified orthopedic surgeon selected as the impartial medical examiner, for a determination as to whether maximum medical improvement had occurred and for a recommendation of an impairment rating of appellant's right lower extremity. The Office requested that Dr. Fox evaluate appellant according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

In a report dated August 22, 2002, Dr. Fox related appellant's history of injury and medical treatment and described his findings on physical examination. He reviewed the statement of accepted facts, and appellant's previous medical and surgical records, including his authorized L5-S1 discectomies of May 16 and June 14, 1994. Dr. Fox stated that appellant complained of heaviness in his right leg occasionally while walking long distances or working in the yard. Appellant also had back discomfort at night. Dr. Fox noted that appellant reached maximum medical improvement sometime around October to December 1994 when he was released to return to work, and that he needed no further treatment.[2] In determining appellant's impairment rating of the right lower extremity, Dr. Fox noted on physical examination that appellant had normal strength in both lower extremities based on manual muscle testing. He found that appellant's gait was normal and that he was able to walk on his heels without difficulty. Dr. Fox indicated that appellant had at least a better than Grade 4 muscle function and referenced prior examinations which found full strength except for the right calf muscle. Dr. Fox found no impairment for a Grade 5 strength deficit, and no impairment based on gait abnormality or loss of range of motion.[3] Dr. Fox observed a 0.5 centimeter atrophy in the right calf which resulted in no impairment. In a form report, Dr. Fox noted that appellant's affected nerve root was S1 which caused appellant "mild occasional pain." Dr. Fox stated that, based on the A.M.A., *Guides* at Chapter 17.2d, Methods of Assessment,[4] the rating method that most accurately and objectively reflected appellant's impairment was muscle atrophy and concluded that appellant had six percent impairment of his right lower extremity.

In a decision dated September 25, 2002, the Office found that the weight of the medical evidence rested with the opinion of Dr. Fox who established that appellant had

[1] Docket No. 01-1248 (issued May 23, 2002). Appellant sustained an injury on March 26, 1994 accepted for an L5-S1 disc for which he underwent a discectomy.

[2] The statement of accepted facts noted that appellant returned to work on October 17, 1994.

[3] A.M.A., *Guides*, 531, Table 17-7; 532, Table 17-8.

[4] *Id.* at 530, Chapter 17.2d, Muscle Atrophy (Unilateral).

no greater than a six percent impairment of the right lower extremity for which he had received schedule awards.[5]

In a letter dated April 1, 2003, appellant, through counsel, requested reconsideration.[6] In support of his request, appellant submitted a November 18, 2002 report from Dr. Diskant. In his report, Dr. Diskant found that appellant had a 10 percent right lower extremity impairment based on the absence of right ankle reflex.[7] Regarding sensory loss, he stated that appellant had a three percent impairment of the lower extremity for right S1 sensory radiculopathy.[8] Dr. Diskant then combined impairments based on the Combined Values Chart to arrive at a 13 percent permanent impairment of the right lower extremity.[9]

On May 20, 2003 the Office referred the claim to Dr. Arthur M. Harris, an Office consultant and a Board-certified orthopedic surgeon, for an impairment rating and noted the reports of Drs. Fox and Diskant.

In a report dated May 27, 2003, Dr. Harris noted that he had reviewed the reports of Drs. Fox and Diskant and recommended a three percent impairment based on S1 radiculopathy. He noted that Dr. Fox found decreased bilateral sensation, an absent right ankle reflex and a 0.5 centimeter atrophy of the right calf and recommended a 6 or 7 percent impairment based on muscle weakness. Dr. Harris further noted that, although Dr. Diskant recommended a 10 percent impairment based on an absent ankle reflex, Dr. Fox did not find any muscle weakness on examination. Dr. Harris noted that appellant had a Grade 3 impairment for a 60 percent sensory deficit[10] of the right S1 nerve root which resulted in a 3 percent impairment based on S1 radiculopathy.[11] Dr. Harris also noted that appellant's 0.5 centimeter atrophy of the right calf was not ratable under the A.M.A., *Guides.*[12] Dr. Harris noted that the A.M.A., *Guides* do not allow for an impairment rating for loss of ankle reflex with normal muscle strength.

[5] By decision dated March 9, 1999, the Office granted schedule awards for a three percent impairment of the left lower extremity and three percent impairment of the right lower extremity. On June 30, 1999 the Office granted an additional three percent impairment of the right lower extremity.

[6] Appellant stated that the Office signed a receipt for his initial request for reconsideration on December 19, 2002. Dr. Barry M. Diskant, a specialist in occupational medicine's, November 18, 2002 report was received on December 19, 2002; however, the file did not include a request for reconsideration received on that date.

[7] A.M.A., *Guides* at 424, Tables 15-18 and 15-16.

[8] *Id.* at 424, Tables 15-18 and 15-15.

[9] *Id.* at 604.

[10] *Id.* at 482, Table 16-10.

[11] *Id.* at 424, Table 15-18.

[12] *Id.* at 530, Table 17-6.

In a decision dated June 9, 2003, the Office denied modification of its September 25, 2002 decision.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act[13] and its implementing regulation 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. However, the Act does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. The Board has held, however, that, for consistent results and to ensure equal justice under the law to 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 Office has adopted the A.M.A., *Guides*, as an appropriate standard for evaluating schedule losses and to ensure equal justice for all claimants. The Board has concurred with the adoption of these A.M.A., *Guides*.[14]

ANALYSIS

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Fox, the impartial medical examiner who was selected to resolve the conflict in the medical evidence. Dr. Fox noted several inconsistencies among appellant's medical reports, performed his own physical examination and carefully evaluated appellant's diminished muscle function using four different methods as listed in the A.M.A., *Guides*.[15] Dr. Fox stated that appellant had a normal gait arrangement and no significant muscle loss. Regarding appellant's peripheral nerve injury, Dr. Fox combined appellant's sensory and motor deficits to arrive at a seven percent impairment based on peripheral nerve injury. However, he noted that the Grade 4 motor deficit finding was made by a physician who also found that appellant had a normal gait. Dr. Fox considered appellant's muscle atrophy method which resulted in a six percent impairment to the right lower extremity based on atrophy to most accurately and objectively reflect appellant's impairment.[16] The Board notes that Dr. Diskant, in his November 18, 2002 report, stated that appellant had a 10 percent impairment rating based on appellant's muscle weakness. However, Dr. Fox specifically noted that appellant had normal muscle strength in all muscle groups of both lower extremities. The Board has held that the report of an impartial medical examiner, if sufficiently well rationalized and based on a proper factual background, will be given special weight.[17]

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[13] 5 U.S.C. § 8101-8193.

[14] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000)

[15] *Supra* note 11 at 530, section 17.2d.

[16] Dr. Fox also rated appellant based on an absent right ankle reflex which resulted in a four percent impairment rating.

[17] *Solomon Polen* 51 ECAB 341 (2000).

CONCLUSION

Since Dr. Fox's impartial medical report established an impairment of no more than six percent, appellant failed to establish that his right lower extremity exceeds six percent as awarded by the Office.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 9, 2003 and September 25, 2002 are affirmed.[18]

Issued: December 2, 2003
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[18] The Board notes that this case record contains evidence which was submitted subsequent to the Office's June 9, 2003 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).