United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 06-878**
	)	**Issued: October 5, 2006**
U.S. POSTAL SERVICE, BLUE BELL POST OFFICE, Blue Bell, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2006 appellant, through his attorney, filed a timely appeal from the February 21, 2006 merit decision of the Office of Workers' Compensation Programs, finding a one percent impairment of the right and left upper extremities and that he did not sustain a back injury causally related to his accepted employment-related cervical injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that he has more than a one percent impairment for each of his right and left upper extremities, for which he received a schedule award; and (2) whether appellant has established that he sustained a consequential back injury causally related to the accepted employment-related cervical injury.

FACTUAL HISTORY

On December 11, 2003 appellant, then a 52-year-old letter carrier, filed an occupational disease claim alleging that on July 9, 2003 he first became aware of his cervical myelopathy. He

alleged that on August 26, 2003 he first realized that this condition was caused by repetitive lifting, sorting and delivering of mail while working at the employing establishment. By letter dated April 8, 2004, the Office accepted appellant's claim for cervical degenerative disc disease and authorized a cervical hemilaminectomy and discectomy with fusion at C4-5. Surgery was performed on October 2, 2003 by Dr. Jack I. Jallo, a Board-certified neurosurgeon. Appellant returned to limited-duty work, four hours a day, on May 15, 2004. He was discharged by Dr. Jallo on July 21, 2004 and continued to work four hours a day.

On September 17, 2004 appellant filed a claim for a schedule award. By letter dated October 27, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to, Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion medical examination to determine whether he had any continuing employment-related residuals or disability. In an accompanying addendum letter dated October 21, 2004, the Office requested that Dr. Draper determine the extent of any work-related permanent impairment of the upper extremities based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).

In a November 17, 2004 medical report, Dr. Draper diagnosed cervical degenerative disc disease, noting that appellant had cervical spinal stenosis and was status post anterior cervical discectomy and fusion at C4-5. He also diagnosed nonindustrial and preexisting lumbar degenerative lumbar disc disease. Dr. Draper found that appellant could work six hours a day, five days a week, and that he had reached maximum medical improvement. Utilizing the A.M.A., *Guides* 489, Table 16-13, he determined, that the maximum sensory deficit for appellant's pain associated with radiculopathy at the C5 nerve roots of the left and right upper extremities constituted a five percent maximum impairment. Dr. Draper further determined that impairment for sensory deficit for pain at the C5 nerve root was equivalent to a 20 percent grade for each the right and left arms. He multiplied 20 percent grade for sensory deficit by the maximum impairment of 5 percent to conclude that appellant had a 1 percent impairment of the right and left upper extremities. Dr. Draper noted that there was no motor deficit in either arm. In a November 17, 2004 work capacity evaluation, he reiterated that appellant could work six hours a day with certain permanent physical restrictions.

On December 19, 2004 an Office medical adviser reviewed Dr. Draper's November 17, 2004 report. The Office medical adviser agreed with his finding that appellant had a one percent impairment each of the right and left upper extremities. The Office medical adviser found that appellant reached maximum medical improvement on November 17, 2004.

On February 24, 2005 appellant submitted a December 21, 2004 report of Dr. George L. Rodriguez, an attending Board-certified physiatrist. He diagnosed multilevel degenerative disc disease and herniated nucleus pulposus at C4-5 of the cervical spine, noting that appellant was status post anterior discectomy, hemilaminectomy and fusion on the right at C4-5. Dr. Rodriguez also diagnosed cervical radiculopathy on the left, noting sensory deficits at C5, C6, C7, C8 and T1 and motor deficits at C5 and C6 motor and on the right sensory deficits at C6, C7 and C8 with motor deficits at C6 and C7 stemming from myelopathy. He further diagnosed lumbar radiculopathy on the right with motor and sensory deficits at L1-S1 and on the left with motor deficits at L3 and sensory deficits at L4, L5 and S1 stemming from myelopathy. Dr. Rodriguez opined that the above diagnosed conditions were secondary to the accepted

employment injury. Utilizing the A.M.A., *Guides* 482, 489, Tables 16-10, 16-13, Dr. Rodriguez determined that appellant had a 13 percent impairment of the right upper extremity and a 27 percent impairment of the left upper extremity. He also determined that appellant had a 56 percent impairment of the right lower extremity and a 10 percent impairment of the left lower extremity based on the A.M.A., *Guides* 482, 484, 552, Tables 16-10, 16-11, 17-37.

In a February 13, 2005 report, Dr. Rodriguez explained the method he used in determining the extent of appellant's permanent impairment and why the approach utilized by Dr. Draper and the Office medical adviser was inadequate.

By decision dated June 24, 2005, the Office granted appellant a schedule award for a one percent impairment for the right and left upper extremities based on the opinions of Dr. Draper and the Office medical adviser. In a letter dated June 28, 2005, appellant, through his attorney, requested a review of the written record by an Office hearing representative.

In an August 23, 2005 decision, an Office hearing representative found that a conflict existed in the medical opinion evidence between Dr. Draper and Dr. Rodriguez with regard to whether appellant sustained a work-related low back injury and resultant impairment due to this injury and the nature and extent of his work-related permanent impairment of the right and left upper extremities. The hearing representative set aside the Office's June 24, 2005 decision and remanded the case to the Office for referral of appellant to an appropriate impartial medical specialist.

By letter dated October 12, 2005, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed to, Dr. Barry A. Silver, a Board-certified orthopedic surgeon, for an impartial medical examination. In a November 4, 2005 report, Dr. Silver provided a detailed review of appellant's medical records and a history of his medical and family background. He reported normal findings on physical examination of the lumbar spine and upper and lower extremities. Dr. Silver noted that appellant's cervical problems, which included multiple level degenerative changes, protrusion and myelopathy, had been accepted. He diagnosed chronic lumbar disc disease but noted that appellant was not experiencing any pain or radiculopathy as a result of this condition. Dr. Silver opined that appellant's lumbar problems were not causally related to his federal employment as they were clearly related to a degenerative process. He stated that, despite undergoing surgery for his cervical pathology, appellant still experienced myelopathic changes with evidence of spinal cord change and permanent changes in tingling, paresthesias and discomfort in his arms or legs. Dr. Silver found no evidence of motor loss, marked sensory loss or any specific weakness in appellant's extremities. He stated that appellant did not have any damaged roots. Appellant's problem was spinal cord involvement and his cervical myelopathy was affecting his four limbs but not in a motor weakness or loss of movement sense. Dr. Silver opined that appellant still experienced residuals of the accepted employment-related cervical degenerative process, herniation and myelopathy. Appellant's prognosis was poor and his neck and cervical myelopathy were not going to improve.

Dr. Silver stated that a diagnosis-related estimate, rather than a range of motion method was appropriate under the A.M.A., *Guides*, noting that the latter method would not be fair in terms of evaluating disability. He indicated that both Dr. Rodriguez and Dr. Draper used the

range of motion method which would provide a determination based on sensory and motor deficits and range of motion loss. Dr. Silver stated that this method did not work in appellant's case because he did not have any motor deficit, his sensory changes were myelopathic and he had no real loss of feeling or radicular pain. Appellant's complaints and dysfunction in the upper and lower extremities were due to cord changes and therefore fit into the category of the A.M.A., *Guides* 396, Table 15-6, which rated impairment of the corticospinal tract and related to both impairment of the upper extremities and criteria for rating impairment due to station and gait disorders. Dr. Silver stated that either Table 15-5 or Table 15-6 of the A.M.A., *Guides* could be used to rate cervical disorders. He indicated that rating appellant's whole body impairment under Table 15-6 was inappropriate since he had no real motor loss. Utilizing the A.M.A., *Guides* 392, Table 15-5, Dr. Silver found that appellant had a Category 4 impairment of the whole body due to alterations of motion segments, radiculopathy or in this case myelopathy with either a successful or unsuccessful attempt at surgical arthrodesis. He opined that appellant's impairment was in the lower range of Category 4 which constituted a 25 percent impairment of the whole person. Dr. Silver preferred this method of rating impairment rather than rating each extremity individually as calculated by Dr. Rodriguez, because appellant did not really have true motor impairment.

By letter dated December 12, 2005, the Office advised Dr. Silver that an impairment rating of the whole body was not proper under the Federal Employees' Compensation Act. The Office requested that he provide the date appellant reached maximum medical improvement and the extent of his permanent impairment due to the work-related cervical condition.

In a December 14, 2005 letter, Dr. Silver stated that appellant had no loss of movement of any of the joints of his upper extremity or motor deficit. His sensory changes were so-called myelopathic, that were due to spinal cord involvement and both his subjective and objective findings were due to the spinal cord involvement. Appellant had no lower extremity abnormalities regarding his cervical pathology. Utilizing the A.M.A., *Guides* 424, Table 15-17, Dr. Silver determined that the maximum percentage loss of function due to sensory deficit or persistent myelopathic pain was 15 percent for each arm and that the problem was symmetrical.

On January 20, 2006 an Office medical adviser reviewed Dr. Silver's November 4 and December 14, 2005 reports. The Office medical adviser agreed with Dr. Silver's opinion that appellant did not sustain a back condition causally related to his employment. Based on this conclusion, the Office medical adviser stated that it would not be appropriate to make a determination regarding the disability of appellant's lower extremities.

On February 10, 2006 the Office requested another Office medical adviser to review Dr. Silver's reports and determine whether appellant had more than a one percent impairment for each of his right and left upper extremities. In a February 12, 2006 report, an Office medical adviser provided a detailed review of appellant's medical background including Dr. Silver's reports. He agreed with Dr. Silver's finding that sensory nerve deficit at C5 constituted a Grade 4 impairment which he found constituted a 15 percent impairment of the upper extremity based on the A.M.A., *Guides* 424, Table 15-15. The Office medical adviser determined that maximum impairment for sensory deficit of a C5 nerve root constituted a five percent impairment based on the A.M.A., *Guides* 424, Table 15-17. He multiplied 15 percent impairment for sensory deficit by a maximum impairment of 5 percent to conclude that appellant had a 1 percent impairment of

the right and left upper extremity. The Office medical adviser further concluded that appellant reached maximum medical improvement on November 4, 2005.

By decision dated February 21, 2006, the Office found that appellant did not have more than a one percent impairment of his right and left upper extremities. The Office accorded special weight to Dr. Silver's opinion as an impartial medical specialist. It also found that the Office medical adviser ensured Dr. Silver's findings by properly applying the tables of the A.M.A., *Guides*. The Office further found the medical evidence of record insufficient to establish that appellant sustained a back injury causally related to the accepted work-related cervical degenerative disc disease.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[1] and its implementing regulation[2] sets 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.[3] 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 for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[4]

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.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical degenerative disc disease while in the performance of duty. On October 2, 2003 Dr. Jallo, an attending physician, performed a cervical hemilaminectomy and discectomy with fusion. The Board notes that a conflict in the medical opinion evidence was created between Dr. Rodriguez, an attending physician, and Dr. Draper, an Office referral physician, as to the extent of appellant's permanent impairment of his upper extremities causally related to the accepted employment injury. Dr. Rodriguez found that appellant had a 13 percent impairment of the right upper extremity and a 27 percent

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.404.

[3] 5 U.S.C. § 8107(c)(19).

[4] 20 C.F.R. § 10.404.

[5] *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

impairment of the left upper extremity. Dr. Draper determined that appellant had a one percent impairment of each upper extremity.

The Office properly referred appellant to Dr. Silver, selected as the impartial medical specialist. In a November 4, 2005 report, Dr. Silver noted that appellant's claim had been accepted for multiple level degenerative changes, protrusion and myelopathy with regard to his cervical spine. He stated that appellant still experienced myelopathic changes with evidence of spinal cord change and permanent changes in tingling, paresthesias and discomfort in his arms or legs. Dr. Silver found no evidence of motor or sensory loss, specific weakness in his extremities or damaged roots, despite undergoing surgery for his cervical pathology. He opined that appellant still experienced residuals of the accepted employment-related cervical degenerative process, herniation and myelopathy and that his prognosis was poor. Utilizing the A.M.A., *Guides* 392, Table 15-5, Dr. Silver determined that appellant had a Category 4 impairment of the whole body due to alterations of motion segments, radiculopathy or myelopathy, which constituted a 25 percent impairment of the whole person.

After being informed by the Office that a whole person impairment rating was not proper under the Act, Dr. Silver, submitted a December 14, 2005 letter in which he reiterated his prior findings and applied the A.M.A., *Guides* 424, Table 15-17 to these findings. He determined that the maximum percentage for loss of function due to sensory deficit or persistent myelopathic pain was 15 percent for each arm.

On February 12, 2006 an Office medical adviser reviewed appellant's medical records including Dr. Silver's reports. His finding, which was based on the reports of Dr. Silver constitutes the weight of the medical evidence. Dr. Silver provided a detailed and well-rationalized report and thus his opinion is entitled to special weight as the impartial medical examiner. The Office medical adviser applied the appropriate tables and pages of the A.M.A., *Guides* to Dr. Silver's findings in reaching his conclusion. The Office medical adviser determined, that appellant's 15 percent sensory nerve deficit constituted a Grade 4 impairment of the upper extremity based on the A.M.A., *Guides* 424, Table 15-15. He further determined, that maximum impairment for sensory deficit of a C5 nerve root constituted a five percent impairment based on the A.M.A., *Guides* 424, Table 15-17. The Office medical adviser multiplied 15 percent impairment for a Grade 4 sensory deficit by a maximum impairment of 5 percent for sensory deficit of the C5 nerve root and properly concluded that appellant had a 1 percent impairment of the right and left upper extremities.

LEGAL PRECEDENT -- ISSUE 2

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[6]

[6] *Albert F. Ranieri*, 55 ECAB __ (Docket No. 04-22, issued July 6, 2004).

Appellant bears the burden to establish his claim for a consequential injury.[7] As part of this burden, he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.[8] Rationalized medical evidence is evidence from a physician, which relates a work incident or factors of employment to a claimant's condition, with stated reasons.[9] The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[10]

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.[11]

ANALYSIS -- ISSUE 2

As noted, the Office accepted that appellant sustained cervical degenerative disc disease while in the performance of duty. The Board further notes that a conflict in the medical opinion evidence was created between Dr. Rodriguez and Dr. Draper as to whether appellant sustained a consequential back injury as a result of the accepted employment-related cervical degenerative disc disease. Dr. Rodriguez diagnosed radiculopathy of the lumbar spine causally related to the accepted employment injury. Dr. Draper diagnosed preexisting and nonindustrial degenerative lumbar disc disease.

Dr. Silver, selected by the Office as an impartial medical specialist, conducted a thorough medical examination which provided essentially normal results of the lumbar spine and upper and lower extremities and provided a detailed review of appellant's medical records. He diagnosed chronic lumbar disc disease but noted that appellant did not experience any pain or radiculopathy as a result of this condition. Dr. Silver opined that appellant's lumbar disc disease was not related to his federal employment as it was clearly a degenerative process. The Board finds that Dr. Silver's opinion is entitled to special weight in finding that appellant did not sustain a back injury causally related to the accepted employment-related cervical degenerative disc disease as it is sufficiently rationalized and based on a proper factual and medical background.

[7] *See Charles W. Downey*, 54 ECAB 421 (2003).

[8] *Id.*

[9] *Id.*

[10] *Gary L. Fowler*, 45 ECAB 365 (1994).

[11] *See* cases cited *supra* note 5.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than a one percent impairment of the right and left upper extremity, for which he received a schedule award. The Board finds that appellant has not established a consequential back injury.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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