United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 06-925**
	)	**Issued: October 13, 2006**
DEPARTMENT OF THE ARMY, NEW CUMBERLAND ARMY DEPOT, New Cumberland, 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:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 14, 2006 appellant, through his attorney, filed an appeal from schedule award decisions of the Office of Workers' Compensation Programs dated January 9 and March 6, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

ISSUE

The issue is whether appellant has more than a 5 percent permanent impairment of the left lower extremity and a 71 percent permanent impairment of his penis.

FACTUAL HISTORY

This case is before the Board for the third time. In the first appeal, the Board set aside an October 26, 1989 decision granting appellant a schedule award for a five percent permanent impairment of his left leg and remanded the case for further development.[1] On appeal for the

[1] Docket No. 90-632 (issued November 7, 1990).

second time, the Board affirmed an October 31, 2002 decision finding that appellant had not established a recurrence of disability on April 3, 1993 due to his July 13, 1983 employment injury and an April 7, 2003 decision finding that he was not entitled to a schedule award for more than a five percent impairment of his left leg as the weight of the evidence established that he had not reached maximum medical improvement.[2] The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On November 8, 2004 appellant, through his attorney, submitted an October 25, 2004 impairment evaluation from Dr. James J. Sullivan, an osteopath, who discussed appellant's history of a lumbar laminectomy and discectomy at L4-5 and L5-S1 on the left side in August 1983 and a left L4-5 hemilaminectomy and removal of a large left L4-5 disc protrusion in October 1999. Dr. Sullivan noted that appellant reported "residual chronic low back pain and pain and sensory deficits in both legs since then as well as erectile dysfunction." He stated:

> "[Appellant] has pain affecting his left posterior medial thigh, calf and foot going into the great toe rated 5/10 on the visual analog scale. He has had numbness and tingling in his left anterior thigh since 1983. [Appellant] has numbness and tingling in both posterior medial and lateral calves and his right foot is numb more so than the left foot."

Dr. Sullivan noted that appellant was unable to have an erection subsequent to 1999. Citing the American Medical Association, *Guides to the Evauation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*), Dr. Sullivan related:

> "[Appellant] does have sensory and pain deficits which are ratable. Using Table 15-18 on page 424 [he] has nerve root impairments including levels L3, L4, L5 and S1. This gives a maximum percent loss of function due to sensory deficit or pain equaling 20 percent. Referring to Table 15-15 on page 424, [appellant] has a [G]rade 2 sensory deficit which equals a 70 percent sensory deficit. The 70 percent sensory deficit is multiplied by the 20 percent maximal percent loss of function due to sensory deficit or pain in the L3 through S1 dermatomes. This gives a 14 percent lower extremity impairment."

Dr. Sullivan converted the 14 percent lower extremity impairment to a 6 percent whole person impairment and, after noting the involvement of both legs, combined it with a 6 percent whole person impairment of the opposing leg, for a total whole person impairment of 12 percent. He further found that, according to Table 7-5 on page 156 of the A.M.A., *Guides*, appellant had a Class 3 penile impairment due to his total loss of sexual function, for a 20 percent whole person impairment.

An Office medical adviser reviewed Dr. Sullivan's report on December 22, 2004 and recommended an evaluation by a urologist on the issue of appellant's penile function. The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Sammy C. Vick, a Board-certified urologist, for an opinion on the cause of his penile

[2] Docket No. 03-1244 (issued September 9, 2003).

dysfunction and the extent of any permanent impairment. In a report dated March 9, 2005, Dr. Vick diagnosed "penile nerve injury secondary to his lumbar disc disease as the result of multiple back surgeries and the initial trauma." He found that appellant's condition was permanent. In an impairment evaluation dated April 5, 2005, Dr. Vick opined that he had a 20 percent whole person impairment due to his complete loss of sexual function according to Table 7-5 on page 156 of the A.M.A., *Guides*. He concluded that appellant had reached maximum medical improvement on March 4, 2005.

By letter dated April 17, 2005, appellant's attorney requested that the Office medical adviser determine whether one year following the 1999 back surgery was a "more appropriate" date of maximum medical improvement.

On April 28, 2005 an Office medical adviser determined that appellant had a Class 3, or 20 percent whole person impairment of his penis pursuant to Table 7-5 on page 156 of the A.M.A., *Guides*. Using the ratio provided by the Office's procedure manual, he multiplied the 20 percent whole person impairment by 100, and the 28 percent maximum whole person impairment ascribed to the particular organ by 100, and then divided the results to find a 71.4 percent permanent impairment of the penis, which he rounded down to 71 percent. He further found that the date of maximum medical improvement should be one year following appellant's last back surgery in 1999.

By decision dated August 10, 2005, the Office issued appellant a schedule award for a 71 percent impairment of his penis. The period of the award ran for 144.55 weeks from October 27, 2000 to August 11, 2003 at a two-thirds compensation pay rate of $236.80. In a letter dated August 12, 2005, appellant's attorney challenged the pay rate used in the schedule award as it did not include adjustments for cost of living and augmented compensation at the three-quarters rate as he was married. Counsel also noted that the Office did not provide a lower extremity rating based on Dr. Sullivan's findings.

In a decision dated January 9, 2006, the Office modified its August 10, 2005 decision to utilize an effective pay rate of March 21, 1985 at the three-quarters compensation rate and including increases for cost of living. The Office further noted that an Office medical adviser would review the evidence to determine appellant's entitlement to an additional award for the lower extremities.

On January 9, 2006 the Office medical adviser reviewed Dr. Sullivan's report and noted that he included L3, L4, L5 and S1 as the involved nerve roots. He indicated that the laminectomy involved L4-5 and L5-S1 and stated:

> "The L4-5 level would involve the L5 nerve root on the left and the L5-S1 level would involve the S1 nerve root on the left. Therefore according to the medical records it is not appropriate to include the levels L3 and L4 in his calculation for the schedule award. There is no evidence in the clinical evaluation that L3 and L4 levels were involved."

The Office medical adviser found that the maximum loss for a sensory deficit at L5 and S1 according to Table 15-18 on page 424 of the A.M.A., *Guides* was five percent, respectively.

He multiplied the 5 percent by a Grade 4 sensory loss of 25 percent to find a 1.25 percent impairment of both L5 and S1. The Office medical adviser multiplied the 1.25 percent impairment of L5 and S1 together to find a 2.5 percent impairment of the left lower extremity, which he rounded to 3 percent. As the three percent lower extremity impairment finding was less than the five percent previously awarded, he recommended no additional schedule award for the lower extremity. The Office medical adviser also opined that it was more appropriate to use a Class 2 rather than a Class 3 penile impairment and noted that the maximum whole person impairment for loss of sexual and urethral function was 28 percent. He stated:

> "Therefore using the maximum of Class 2 of 19 percent impairment of the whole person, a ratio would be created where 19 percent is to 28 percent as x is to 100. This equals 67.8 percent, rounded to 68 percent impairment for the penis. If on the other hand the Class 3 calculation is made for the penis with 20 percent impairment of the whole person and if similar calculations were made of 20 divided by 28 and x over 100, this would result in 71 percent impairment which is what he was previously awarded."

By decision dated March 6, 2006, the Office denied appellant's claim for an additional schedule award after finding that he had no more than a 5 percent left lower extremity impairment and a 71 percent impairment of his penis.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[3] and its implementing federal regulation,[4] sets 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, the Act 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, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[5] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[6]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities. The nerves involved are first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] 20 C.F.R. § 10.404(a).

[6] *See* FECA Bulletin No. 01-5 (issued January 29, 2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[7]

The Office's procedure manual provides as follows:

> "*Loss of Function of Other Organs*. While the A.M.A., *Guides* express the impairment of internal organs in terms of the whole person, schedule awards under the [Act] are based on the percentage of impairment of the particular organ."[8]

The Office procedure manual provides a formula to measure the percentage of impairment of organ when the whole person impairment is provided. The whole person impairment of the claimant, identified as A, is divided by B, the maximum impairment of the organ, which equals X, the impairment rating, divided by 100.[9]

The Office procedure manual further provides:

> "For organs such as the penis, which have more than one physiologic function, the A.M.A., *Guides* provide whole person impairment levels for each function. When calculating the impairment of these organs, the DMA [district medical adviser] must consider all functions as instructed in the A.M.A., *Guides*. In these cases, the maximum whole person impairment ascribed to the particular organ (B) is obtained by combining the maximum levels for all functions using the Combined Values [Chart] in the current edition of the A.M.A., *Guides*. The actual whole person impairment (A) is obtained by combining all functional impairments found using the Combined Values [Chart] in the [A.M.A.,] *Guides*. For example:
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> > A claimant has a Class 2 sexual whole person impairment of the penis amounting to 15 percent, and there is no objective urethral impairment. A 15 percent whole person sexual impairment combined with a 0 percent whole person urethral impairment results in a whole person impairment of the penis of 15 percent. The maximum whole person impairment for the sexual and urethral functions of the penis is 28 percent.[10]

[7] A.M.A., *Guides* 423.

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.(c)(2) (November 1998).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.(c)(2)(a) (August 2002).

[10] *Id*.

Thus, the Office procedure manual provides that in the above example the DMA should divide 15 by 28 which equals x divided by 100, for a total impairment of the penis of 54 percent."[11]

ANALYSIS

The Office accepted that appellant sustained a lumbar disc biotusion due to a July 14, 1983 employment injury. He underwent a laminectomy at L4-5 and L5-S1 in August 1983 and a second lumbar laminectomy at L4-5 on October 27, 1999. Appellant filed a claim for a schedule award. The Office determined that he was entitled to a schedule award for a 71 percent permanent impairment of the penis. The Office further found that appellant did not have more than a five percent permanent impairment of the left lower extremity for which he had previously received a schedule award.

The Board finds that appellant has no more than a 71 percent permanent impairment of the penis. In a report dated October 25, 2004, Dr. Sullivan discussed appellant's complaints of no sexual function subsequent to 1999. He concluded that appellant had a Class 3 penile impairment according to Table 7-5 on page 156 of the A.M.A., *Guides*, which constituted a 20 percent whole person impairment. The Office referred appellant to Dr. Vick for a second opinion evaluation on the cause of appellant's sexual dysfunction and the extent of any impairment. Dr. Vick diagnosed penile nerve injury due to his employment injury and resulting back surgery. In an impairment evaluation dated April 5, 2005, Dr. Vick opined that appellant had a 20 percent whole person impairment due to his complete loss of sexual function according to Table 7-5 on page 156 of the A.M.A., *Guides*. An Office medical adviser reviewed Dr. Vick's report on April 28, 2005. He concurred with the physician's finding of a Class 3, or 20 percent, whole person impairment according to Table 7-5 on page 156 of the A.M.A., *Guides*. The Office medical adviser, utilizing the ratio provided in the procedure manual, found that the 20 percent whole person impairment divided by the 28 percent maximum whole person impairment for the penis equaled x divided by 100, or a 71.4 percent permanent impairment of the penis, which he properly rounded down to find a 71 percent penile impairment.[12] He further found that the date of maximum medical improvement should be one year following appellant's final back surgery in 1999. A second Office medical adviser reviewed the evidence on January 9, 2006 and found that appellant had no more than a 71 percent impairment of his penis.[13]

The Board further finds that the case is not in posture for decision on the extent of appellant's permanent impairment of the lower extremities due to a conflict in medical opinion. In a report dated October 25, 2004, appellant's attending physician, Dr. Sullivan, noted that appellant had complaints of pain and sensory deficits in his legs with pain in the left leg which he classified as 5 out of 10 in severity. Dr. Sullivan further found that he had numbness and tingling in the left posterior, medial and anterior thigh, calf and foot, and numbness in this right

[11] *Id*.

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (June 2003).

[13] The statement by the second Office medical adviser in his January 9, 2006 report that appellant's penile impairment constituted a Class 2 impairment does not correspond to Table 7-5 on page 156, which provides a Class 3 impairment for the total loss of sexual function.

medial and lateral calf and foot. He determined that appellant had a nerve root impairment at L3 through S1 for a maximum loss of function due to pain of 20 percent according to Table 15-18 on page 424. Dr. Sullivan graded his pain as Grade 2, or 70 percent of the maximum, for abnormal sensation or moderate pain which may prevent some activities according to Table 15-15 on page 424 of the A.M.A., *Guides*. He multiplied the 70 percent graded impairment due to sensory loss by the 20 percent maximum impairment of the involved nerve roots to find a 14 percent lower extremity impairment for both legs.

An Office medical adviser reviewed Dr. Sullivan's report and determined that the involved nerve roots were the L5 and S1 nerve roots on the left side. He found that the maximum impairment due to a sensory deficit for each nerve was 5 percent according to Table 15-18 on page 424 of the A.M.A., *Guides*. The Office medical adviser next asserted that appellant had a Grade 4 sensory impairment, or 25 percent of the maximum, for decreased sensation with or without pain which was forgotten during activity according to Table 15-15 on page 424. He multiplied the 25 percent graded pain by the 5 percent impairment of the L5 and S1 nerve root to find a 1.25 percent impairment of L5 and S1, respectively, which he added together to find a 2.5 percent left lower extremity impairment, which he rounded to 3 percent.

The record contains a conflict between Dr. Sullivan, who found that appellant had a 14 percent bilateral lower extremity impairment and the Office medical adviser, who found that he had a 3 percent left lower extremity impairment. Section 8123(a) 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.[14] The case, therefore, shall be remanded for the Office to refer appellant for an impartial medical examination on the issue of the extent of his permanent impairment of the lower extremities.

CONCLUSION

The Board finds that appellant has no more than a 71 percent permanent impairment of his penis. The Board further finds that the case is not in posture for decision on the issue of the extent of his lower extremity impairment due to a conflict in medical opinion.

[14] 5 U.S.C. § 8123(a); *Alfred R. Anderson*, 54 ECAB 179 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 6, 2006 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board and the January 9, 2006 decision is affirmed.

Issued: October 13, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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