United States Department of Labor
Employees' Compensation Appeals Board

K.K., Appellant	)	
and	)	**Docket No. 07-982**
U.S. POSTAL SERVICE, POST OFFICE, Havertown, PA, Employer	)	**Issued: January 7, 2008**

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 February 22, 2007 appellant timely appealed the February 20, 2007 merit decision of the Office of Workers' Compensation Programs granting him a schedule award for a 12 percent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has more than 12 percent impairment of the left lower extremity.

FACTUAL HISTORY

This is the third appeal to the Board in this case. On September 26, 2006 the Board remanded the case to the Office for reconstruction of the record and appropriate development, in order to obtain a copy of a November 2005 decision referenced by the Office in its most recent merit decision.[1] In a September 25, 2007 decision, the Board reversed the Office's January 12,

[1] Docket No. 06-775 (issued September 26, 2006).

2007 decision, which reduced appellant's compensation benefits pursuant to 5 U.S.C. § 8115.[2] The facts and the law in those cases are incorporated herein by reference. This appeal concerns the Office's February 20, 2007 decision granting appellant a schedule award for a 12 percent impairment of the left lower extremity.

On February 27, 2002 appellant, a 29-year-old mail carrier, filed a traumatic injury claim, alleging that he sustained an injury to his lower back while lifting a mail tray. The Office accepted his claim for aggravation of a herniated lumbar disc. Appellant subsequently underwent a lumbar laminectomy and was placed on the periodic rolls.

The record contains an August 9, 2006 report from Dr. Richard Levenberg, a Board-certified orthopedic surgeon, who examined appellant on that date, following a laminectomy for foot drop. He noted obvious atrophy in the left lower extremity and indicated that appellant had chronic pain and radiculopathy. In an accompanying work capacity evaluation, Dr. Levenberg stated that appellant had no strength in the left leg. On August 29, 2006 he stated that appellant had reached maximum medical improvement and reiterated his opinion that appellant's requirements of sedentary employment were permanent. On January 4, 2007 appellant requested a schedule award.

Appellant submitted a report dated November 16, 2006 from Dr. George L. Rodriguez, a Board-certified physiatrist, who reviewed the history of injury and provided findings on examination of appellant. Dr. Rodriquez noted radiating pain and weakness in the left lower extremity. He opined that appellant's conditions of herniated nucleus pulpous at L3-4, L4-5 and L5-S1 with multiple surgical procedures, lumbar radiculopathy at L5 and S1, degenerative disc disease and Les Planus (left) were secondary to the work-related injury of February 27, 2002 and that appellant reached maximum medical improvement on July 31, 2004. Dr. Rodriquez opined that appellant had a 34 percent left leg impairment based on motor impairment of the entire sciatic nerve and the peroneal nerve, according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He found that appellant had motor nerve impairment to the upper sciatic nerve and the tibial nerve and provided a rating utilizing Tables 16-11 and 17-37 and Figure 17-9, as well as the Combined Values Chart in the A.M.A., *Guides*. Under Table 16-11 on page 484, appellant's motor impairment of the upper sciatic and tibial nerves would be classified as a Grade 3 motor deficit, which he stated corresponded to a 60 percent motor deficit. The maximum motor impairment of the sciatic nerve was 75 percent and the maximum motor impairment of the peroneal nerve was 42 percent under Table 17-37 on page 552. Finding that the maximum deficit was 57 percent, he utilized the Combined Values Chart on page 604 to find that the combined left lower extremity impairment was 34 percent impairment.

In a January 11, 2007 report, a district medical adviser rejected Dr. Rodriguez' impairment rating, stating that it was inappropriately based on the sciatic peroneal and tibial nerves, rather than specific nerve roots, namely L4 and 5 on the left side, which were the only nerve roots involved in appellant's case. Utilizing Dr. Levenberg's August 9, 2006 report and the results of Dr. Rodriguez' examination, the adviser recommended that appellant be awarded a schedule award for 12 percent permanent impairment to his left leg. Under Table 15-18, page

[2] Docket No. 07-786 (issued September 25, 2007).

424, entitled "*Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity*," the Office medical adviser found that the maximum loss for an impairment to the L5 nerve root was five percent due to sensory deficit or pain and the maximum loss for an impairment to the S1 nerve root was five percent due to sensory deficit or pain. He also found that the maximum rating for an impaired S1 nerve root due to loss of power was 20 percent. Under Table 15-15 on page 424, a Grade 4 sensory loss of 25 percent multiplied by the 5 percent maximum sensory loss of the L5 nerve root resulted in a 1.25 sensory loss for the L5 nerve root, rounded off to 1 percent. A Grade 4 sensory loss of 25 percent multiplied by the 5 percent maximum sensory loss of the S1 nerve root resulted in a 1.25 sensory loss for the S1 nerve root, rounded off to 1 percent. Under Table 15-16 on page 424, a Grade 3 motor loss for plantar flexion (which is S1 nerve root) equated to a 50 percent motor deficit which, when multiplied by an S1 maximum motor impairment of 20 percent, yielded a 10 percent impairment for the S1 nerve root. The medical adviser determined that the one percent impairment rating for sensory loss of the L5 nerve root and the one percent rating for sensory loss of the S1 nerve root could be added, rather than combined, as they were from the same table, resulting in a two percent rating for sensory loss. The Office medical adviser then combined the 10 percent S1 impairment due to motor deficit and loss of power with the 2 percent sensory impairment, pursuant to the A.M.A., *Guides*' Combined Values Chart at page 604 and concluded that appellant had a total left lower extremity impairment of 12 percent. He opined that the date of maximum medical improvement was November 16, 2006.

On February 20, 2007 the Office awarded appellant a schedule award for a 12 percent impairment of his left lower extremity, finding that the date of maximum medical improvement was November 16, 2006. The award was for the period November 16, 2006 to July 15, 2007. The order reflected that appellant's compensation payments received for the period November 16, 2006 to February 17, 2007, in the gross amount of $4,515.80, would be deducted from his first schedule award payment.

On appeal, appellant's representative requested that payment of the schedule award be deferred until such time as appellant was no longer entitled to receive compensation benefits. He stated that it was "patently unfair" that the amount of the schedule award must be reduced by loss of wage-earning capacity payments, contending that to do so was to reduce the value of the award.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.404 of the implementing federal regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not 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

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

A.M.A., *Guides*[5] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[6] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[7] The Board notes that section 8109(19) specifically excludes the back from the definition of organ.[8] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[9]

Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.[10]

ANALYSIS

The Board finds that appellant has not established that he has more than a 12 percent left lower extremity impairment. Therefore, the Office's February 20, 2007 schedule award will be affirmed.

The Office based appellant's schedule award on the January 11, 2007 report of its Office medical adviser. The medical adviser indicated that, based on the findings contained in the reports of Drs. Levenberg and Rodriguez, appellant had both sensory and motor impairments stemming from his accepted work-related conditions. He then applied Dr. Rodriguez' findings to the provisions of the A.M.A., *Guides* pertaining to impairments due to spinal nerve root impairments affecting the lower extremity under Tables 15-15 and 15-18 and opined that appellant had a 12 percent left lower extremity impairment.[11] Dr. Rodriguez calculated an impairment rating based on impairment of the sciatic and the peroneal nerves. However, as the medical adviser concluded, the sciatic nerve was not involved. Therefore, an impairment rating based on the sciatic peroneal and tibial nerves, rather than specific nerve roots, was inappropriate in this case. As appellant's accepted conditions pertain to various nerve roots, namely L4-5 and L5-S1, the Office medical adviser's rationale for not using Dr. Rodriguez' impairment rating is supported by the record. Additionally, Dr. Rodriguez did not fully explain and the Board is unable to determine, how he made his impairment rating under the A.M.A., *Guides*.

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[5] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[6] *See Joseph Lawrence, Jr., supra* note 5; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

[7] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[8] 5 U.S.C. § 8107; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[9] 5 U.S.C. § 8109(c).

[10] *Thomas J. Engelhart, supra* note 7.

[11] *See Thomas J. Fragale*, 55 ECAB 619 (2004). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002).

The Board finds that the Office medical adviser presented a well-rationalized explanation of the manner in which he calculated appellant's impairment rating. He properly referred to and applied the appropriate tables and figures in the A.M.A., *Guides*.[12] Pursuant to Table 15-18, page 424, he correctly found that the maximum loss for an impairment to the L5 nerve root was 5 percent due to sensory deficit or pain; the maximum loss for an impairment to the S1 nerve root was 5 percent due to sensory deficit or pain; and that the maximum rating for an impaired S1 nerve root due to loss of power was 20 percent.[13] Under Table 15-15 on page 424, a Grade 4 sensory loss of 25 percent, multiplied by the 5 percent maximum sensory loss of the L5 nerve root, resulted in a 1.25 percent sensory loss for L5 nerve root, rounded off to 1 percent.[14] A Grade 4 sensory loss of 25 percent, multiplied by the 5 percent maximum sensory loss of the S1 nerve root, resulted in a 1.25 percent sensory loss for the S1 nerve root, rounded off to 1 percent.[15] Under Table 15-16 on page 424, a Grade 3 motor loss for plantar flexion (which is S1 nerve root) equated to a 50 percent motor deficit, which, when multiplied by an S1 maximum motor impairment of 20 percent, yielded a 10 percent impairment for the S1 nerve root.[16] The medical adviser correctly determined that the 1 percent impairment rating for sensory loss of the L5 nerve root and the 1 percent rating for sensory loss of the S1 nerve root could be added, rather than combined, as they were from the same table, resulting in a 2 percent rating for sensory loss. He then properly referred to the Combined Values Chart at page 604 and combined the 10 percent S1 impairment due to motor deficit and loss of power with the 2 percent sensory impairment and concluded that appellant had a total left lower extremity impairment of 12 percent.[17]

The Board also finds that the medical adviser properly concluded that the date of maximum medical improvement (MMI) was November 16, 2006, the date of Dr. Rodriguez' examination. Dr. Rodriguez stated that July 31, 2004 was the date of MMI. However, the Board has noted a reluctance to find a date of maximum medical improvement which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of maximum medical improvement in the selection of

[12] *See* A.M.A., *Guides* 423, § 15.12, Nerve Root and/or Spinal Cord, which 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 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. *Id.*

[13] A.M.A., *Guides* 424, Table 15-18.

[14] A.M.A., *Guides* 424, Table 15-15. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter, 3.700.3.b. (October 1990) (the policy of the Office is to round the calculated percentage of impairment to the nearest whole point).

[15] *Id*.

[16] A.M.A., *Guides* 424, Table 15-16.

[17] A.M.A., *Guides* 604. The A.M.A., *Guides* states that, if there is both sensory and motor impairment of a nerve root, the impairment percents are combined using the Combined Values Chart on page 604. A.M.A., *Guides* 423.

a retroactive date of maximum medical improvement.[18] No evidence has been submitted to support a retroactive date.[19]

The January 11, 2007 impairment rating provided by the Office medical adviser conforms to the A.M.A., *Guides* and his finding constitutes the weight of the medical evidence. He provided a well-rationalized explanation as to why an impairment rating based on nerve roots, as opposed to nerves, was provided. Appellant has not submitted probative medical evidence to establish that he has greater than a 12 percent impairment of the left lower extremity.[20]

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[18] The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office. *J.C.,* 58 ECAB ___ (Docket No. 06-1018, issued January 10, 2007); *D.R.*, 57 ECAB ___ (Docket No. 06-668, issued August 22, 2006); *James E. Earle*, 51 ECAB 567 (2000). *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[19] The Board notes that neither the Act nor its implementing regulations provides for deferral of a schedule award until such time as a claimant is no longer entitled to receive compensation benefits, as requested by appellant's representative. With respect to benefits under the Act, the Board has held that "an employee cannot [con]currently receive compensation under a schedule award and compensation for disability for work." *James E. Earle, supra* note 18; *Andrew B. Poe*, 27 ECAB 510 (1976). It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. *Id.* 5 U.S.C. § 8116(a) prohibits the receipt of dual benefits but would not prohibit an employee from receiving a schedule award at the same time he or she was receiving retirement benefits. The Board notes that appellant's rights under section 8116(a) were not violated, as he was not entitled to retirement benefits during the period of his schedule award.

CONCLUSION

The Board finds that appellant has not established that he has more than a 12 percent left lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2008
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