United States Department of Labor
Employees' Compensation Appeals Board

H.W., Appellant	)	
and	)	**Docket No. 07-2372**
	)	**Issued: October 10, 2008**
U.S. POSTAL SERVICE, POST OFFICE, DOWNTOWN STATION, Trenton, NJ, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2007 appellant, through his attorney, filed a timely appeal from a September 5, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a seven percent permanent impairment of the left lower extremity, for which he received schedule awards.

FACTUAL HISTORY

On November 18, 1987 appellant, then a 25-year-old carrier, filed a claim for a traumatic injury occurring on November 16, 1987 when he fell on a sidewalk, injuring his left side and twisting his knee. The Office accepted the claim, assigned file number 02-0580912, for lumbosacral sprain and a disc herniation at L5-S1. He worked in a light-duty capacity from

November 18, 1987 to January 3, 1988. On December 20, 1988 appellant filed a traumatic injury claim alleging that on December 17, 1988 he reinjured his back and left side. The Office accepted the claim for sacroiliitis and combined the case, assigned file number 02-596011, into file number 02-0580912.

On July 27, 1990 appellant underwent a laminectomy and discectomy at L5-S1. He lost intermittent time from work until October 1, 1990. By decision dated January 5, 1993, the Office granted appellant a schedule award for a three percent permanent impairment of the left lower extremity. On September 23, 1993 it granted him a schedule award for an additional four percent permanent impairment of the left lower extremity.[1] Appellant began working as a modified city carrier on September 9, 1998.[2]

On November 10, 2001 appellant sustained an aggravation of lumbar radiculopathy when he injured his back pulling open a vehicle door. The Office assigned the case file number 02-2019045. Appellant missed intermittent time from work.

On February 18, 2004 appellant requested an increased schedule award under file number 02-0580912. On April 2, 2004 he sustained a sprain of the lumbar spine, left knee and left ankle when he fell off a dock while loading a box. The Office assigned the case file number 02-2052296.

In an impairment evaluation dated September 30, 2004, Dr. David Weiss, an osteopath and Board-certified family practitioner, found that appellant had a 34 percent permanent impairment of the left lower extremity. On December 13, 2004 an Office medical adviser reviewed Dr. Weiss' report and found that it was insufficient to show that appellant had more than the seven percent left lower extremity impairment previously awarded.[3] By decision dated December 20, 2004, the Office denied his request for an increased schedule award. On January 3, 2005 appellant requested an oral hearing, which was held on November 15, 2005. By decision dated January 27, 2006, the hearing representative affirmed the December 20, 2004 decision.

On July 11, 2007 appellant filed a claim for a schedule award. He submitted an impairment evaluation dated March 13 and June 25, 2007 from Dr. George L. Rodriguez, a Board-certified physiatrist, who discussed appellant's history of employment injuries on

[1] In a decision dated December 7, 1994, the Office denied appellant's request for reconsideration of the September 23, 1993 decision as it was untimely and insufficient to establish clear evidence of error.

[2] On June 2, 2000 the Office determined that a conflict existed regarding whether appellant had continuing employment-related disability. In a report dated June 16, 2000, Dr. Dirk E. Skinner, a Board-certified neurologist and impartial medical examiner, found that appellant had no objective evidence of any further condition or disability due to his November 16, 1987 or December 17, 1988 work injury or surgery on July 27, 1990. Dr. Jay Kazmer, an attending osteopath, disagreed with Dr. Skinner's opinion and noted that a recent magnetic resonance imaging scan study showed an annular tear at L5-S1. In a supplemental report dated December 10, 2002, Dr. Skinner opined that the L5-S1 annular tear occurred postoperatively. He found that appellant had no residual disability from his work injury.

[3] The Office medical adviser noted that Dr. Skinner, the impartial medical examiner, determined that appellant had no residual disability from his work injury.

November 16, 1987, November 10, 2001 and April 2, 2004. He noted his current complaints of discomfort along the plantar aspect of the ankle and foot, clicking in the left hip joint, pain and swelling of the left knee and pain and loss of range of motion of the lower back. Dr. Rodriguez measured full range of motion of the left hip, knee and ankle. He diagnosed a herniated disc at L5-S1 with a laminectomy and discectomy on July 26, 1990, lumbar radiculopathy and a sprain of the lumbar spine and left hip, thigh, knee, leg and ankle. Dr. Rodriguez determined that appellant had a five percent deficit of the medial plantar and lateral plantar nerves, respectively, according to Table 17-37 on page 552 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). He classified the sensory nerve impairment as Grade 4 using Table 16-10 on page 482. Dr. Rodriguez multiplied the 25 percent graded nerve impairment by the 5 percent maximum impairment of both the medial plantar and lateral plantar nerves to find a 1 percent left lower extremity impairment for each nerve, which when combined yielded a 2 percent impairment. He further found, using Chapter 18 of the A.M.A., *Guides*, that appellant had an 8 percent left lower extremity impairment due to hip pain, a 6 percent left lower impairment due to knee pain, a 62 percent left lower impairment due to ankle pain, for a combined left lower extremity impairment of 19 percent. Dr. Rodriguez calculated the impairment due to pain of the knee, ankle and hip by finding a whole person impairment and then converting the whole person impairment to a lower extremity impairment using a mathematical formula. He opined that appellant reached maximum medical improvement on August 29, 2005.

On August 16, 2007 an Office medical adviser reviewed Dr. Rodriguez' report and applied the tables and pages of the A.M.A., *Guides* to his findings. He utilized the impairment evaluation of Dr. Rodriguez instead of Dr. Weiss as it was more current and as Dr. Rodriguez found that appellant did not reach maximum medical improvement until August 29, 2005, after Dr. Weiss' report. The Office medical adviser concurred with Dr. Rodriguez' finding of a one percent impairment due to sensory loss of the left medial plantar nerve and a one percent impairment due to sensory loss of the left lateral plantar nerve, for a total impairment of two percent.[4] He found that Dr. Rodriguez' whole person pain computations were not appropriate. The Office medical adviser determined that appellant had an additional three percent impairment due to pain according to Figure 18-1 on pages 574 of the A.M.A., *Guides*.

By decision dated September 5, 2007, the Office denied appellant's claim for an increased schedule award under file numbers 02-0580912, 02-2019045 and 02-2052296.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing federal regulation,[6] set 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

[4] A.M.A., *Guides* 552, 482, Tables 17-37, 16-10.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

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* as the uniform standard applicable to all claimants.[7] 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.[8]

The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[9]

The Act and its implementing regulation provides for the reduction of compensation for subsequent injury to the same scheduled member.[10] Benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[11]

ANALYSIS

The Office accepted that appellant sustained lumbosacral sprain and a L5-S1 disc herniation due to a November 16, 1987 injury and sacroiliitis due to a December 17, 1988 work injury under file number 02-0580912. On July 27, 1990 he underwent a laminectomy and discectomy at L5-S1. By decisions dated January 5 and September 23, 1993, the Office granted appellant a schedule award for a seven percent total impairment of the left lower extremity. It further accepted that he sustained an aggravation of lumbar radiculopathy due to a November 10, 2001 employment injury, assigned file number 02-2019045 and a sprain of the lumbar spine, left knee and left ankle on April 2, 2004, assigned file number 02-2052296.

On February 18, 2004 appellant requested an increased schedule award under file number 02-0580912. He submitted a September 30, 2004 impairment evaluation from Dr. Weiss in support of his claim for an increased award. By decisions dated December 20, 2004 and January 27, 2006, the Office denied appellant's request for an increased schedule award.

On July 11, 2007 appellant requested an increased schedule award. In a March 13 and June 25, 2007 impairment evaluation, Dr. Rodriguez considered his work injuries of

[7] *Id*. at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[9] *Id*.; A.M.A., *Guides* 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

[10] 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

[11] 20 C.F.R. § 10.404(c)(1), (2).

November 16, 1987, November 10, 2001 and April 2, 2004. He discussed appellant's complaints of left ankle and foot discomfort along the plantar aspect, left knee pain and swelling, left hip joint clicking and pain and reduced range of motion of the back. Dr. Rodriguez found that he had full range of motion of the left hip, knee and ankle and reached maximum medical improvement on August 29, 2005. He determined that the maximum allowed for sensory impairments of the medial plantar and lateral plantar nerves was five percent respectively. Dr. Rodriguez graded appellant's complaints of pain as 25 percent, which he multiplied by the 5 percent maximum for sensory impairments of the medial and lateral plantar nerves to find a 1 percent impairment of each nerve or a combined 2 percent impairment.[12] He then utilized Chapter 18 of the A.M.A., *Guides* to find that appellant had an 8 percent left lower extremity impairment due to hip pain, a 6 percent left lower impairment due to knee pain, a 62 percent left lower impairment due to ankle pain, for a combined left lower extremity impairment of 19 percent. Section 18.3(d) of the A.M.A., *Guides* instructs a physician to first conduct a body or organ based impairment rating and determine an impairment percentage, at which point the additional percentage for pain may be added on at the physician's discretion.[13] Section 18.3(b) on page 571 states that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment ratings systems given in other chapters of the A.M.A., *Guides*.[14] Dr. Rodriguez did not provide an impairment rating for the knee, ankle or hip based on either the body or organ systems but rather based the rating entirely on pain, against the direction of the A.M.A., *Guides*. Further, in calculating the percentage impairment due to pain, he incorrectly utilized a formula outlined in the Office's procedure manual which applies to converting a whole person impairment to an impairment of a particular organ.[15] Consequently, Dr. Rodriguez' impairment rating does not conform to the A.M.A., *Guides* or Office protocols.

An Office medical adviser reviewed Dr. Rodriguez' report and concurred with his findings of a two percent impairment due to sensory loss of the medial and lateral plantar nerves. He further found that appellant had an additional three percent impairment due to pain based on section 18.3(d) of the A.M.A., *Guides*. The Office medical adviser, however, did not explain why the pain-related impairment could not be adequately addressed by applying the body and organ impairment rating methods in other chapters. Moreover, he found that appellant had an impairment due to pain under Chapter 17. Office procedures provide that Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain.[16] Additionally, the Office medical adviser did not consider whether appellant's impairment due to sensory loss of the medial and lateral plantar nerves duplicated in whole or in part the

[12] A.M.A., *Guides* 552, 482, Tables 17-37, 16-10.

[13] *Id*. at 573, § 18.3(d).

[14] *Id*. at 571, § 18.3(b); *see also A.G.*, 58 ECAB ___ (Docket No. 07-677, issued June 21, 2007).

[15] *See E.P.*, 58 ECAB ___ (Docket No. 07-1244, issued September 25, 2007).

[16] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

compensation previously paid for the seven percent impairment of the left lower extremity or whether it should be combined with the prior award.[17]

Accordingly, the Board finds that the medical evidence of record does not provide a probative medical opinion on the nature and extent of appellant's impairment of the left lower extremity.[18] The case will be remanded to the Office for further development of the medical evidence, as appropriate, to be followed by a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 5, 2007 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *See* 20 C.F.R. § 10.404(c)(1), (2).

[18] *See Philip A. Norulak*, *supra* note 9.