United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 09-38**
	)	**Issued: July 7, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, Lyons, NY, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 8, 2008 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated June 20, 2008. Pursuant to 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 any permanent impairment of a scheduled member entitling him to a schedule award.

FACTUAL HISTORY

On March 22, 2002 appellant, then a 49-year-old cook, filed a traumatic injury alleging that he injured his lower back and buttocks mixing a bowl of pancake batter. On April 9, 2002 the Office accepted this claim for a lumbar sprain.

Appellant, through his attorney, requested a schedule award on November 6, 2003 and February 9, 2004. In a report dated August 6, 2003, Dr. David Weiss, an osteopath, noted

appellant's initial injury in 1996. A May 31, 2000 magnetic resonance imaging (MRI) scan revealed a small herniated disc at L5-S1. On physical examination, Dr. Weiss reported an antalgic gait and tenderness along the hind left foot. He diagnosed chronic contusion to the dorsum of the left foot, chronic post-traumatic lumbosacral strain and sprain, herniated disc and bilateral lumbar radiculopathy. Dr. Weiss found that manual muscle testing revealed 4/5 strength in dorsiflexion in the left ankle and that appellant exhibited a sensory deficit over the L1 dermatome bilaterally. He concluded that appellant had 19 percent impairment of the left lower extremity due to motor strength deficit, sensory deficit and pain-related impairment. Dr. Weiss also found that appellant had seven percent impairment of the right lower extremity due to sensory deficit of the right S1 nerve root and pain-related impairment.

The Office referred the medical evidence to an Office medical adviser on October 5, 2005. On October 25, 2005 the district medical adviser opined that appellant had 26 percent impairment of the left lower extremity due to motor and sensory deficits and 4 percent impairment of the right lower extremity due to sensory impairment. He noted that appellant was not entitled to an additional three percent impairment for pain under Chapter 18.

On December 27, 2005 the Office found a conflict of medical opinion evidence between Dr. Weiss and the Office medical adviser. It referred appellant to Dr. William Head, Jr., a Board-certified neurologist, for an impartial medical examination. In a report dated April 21, 2006, Dr. Head noted appellant's March 12, 2002 employment injury. He mentioned that appellant reported a 1997 employment injury lifting a tray of chicken and that he experienced episodes of back pain at work from 1998 to 2002 while lifting pots or stirring food. Dr. Head noted, "I have been asked today to assess his neurological condition relative to the effects of his eighth claimed back injury, the injury of March 12, 2002." On physical examination, he reported a slow but normal gait and stance, no evidence of muscle atrophy, normal grip strength and a normal neurological examination except for the subjective findings of lumbar tenderness and restricted lumbosacral range of motion with no objective sign of neurological pathology. Dr. Head noted that appellant's April 3, 2006 MRI scan indicated a right central herniated disc at L5-S1. He concluded that appellant had no impairment to his lower extremities due to the accepted lumbar sprain. Dr. Head noted no objective findings of loss of strength, atrophy or sensory changes and "no objective clinical evidence of any neurological condition or disorder, relative to his reported work injuries from 1997 to 2002." He stated that appellant had no impairment in accordance with the A.M.A., *Guides*.

By decision dated January 8, 2007, the Office denied appellant's request for a schedule award. Appellant, through his attorney, requested an oral hearing on January 12, 2007. Appellant testified at the oral hearing on August 8, 2007 that he had sustained seven work-related back injuries beginning in 1996. By decision dated August 31, 2007, the hearing representative set aside the Office's January 8, 2007 decision and remanded the case for further development of the medical evidence.

The Office amended the statement of accepted facts to include nine accepted employment injuries to appellant's low back including: a May 13, 1996 lumbosacral sprain; a March 7, 1997 lumbosacral strain; a July 14, 1997 lumbosacral strain, an August 17, 1999 muscle spasm in the lumbosacral region; a May 17, 2000 herniated disc at L5-S1; an April 9, 2001 lumbosacral sprain

and neuritis; an October 1, 2001 lumbosacral sprain; a June 28, 2001 lumbar disc displacement; and a March 12, 2002 lumbosacral sprain.[1]

The Office requested a supplemental report from Dr. Head on October 4, 2007 based on the revised statement of accepted facts and additional medical records. Dr. Head responded on October 18, 2007. He reviewed the additional medical records relating to appellant's prior claims. Dr. Head stated that appellant's neurological examination revealed objectively normal findings with normal gait and stance. He found no evidence of loss of strength or muscle atrophy in the upper or lower extremities, no evidence of any radiculopathy and normal reflex and sensory testing. Dr. Head concluded, "It is my medical opinion that [appellant] has sustained a zero percent impairment to the lower extremity due to the accepted condition of lumbar sprain. There was no objective evidence of any neurological abnormality in the lower extremities." An Office medical adviser concurred with Dr. Head's opinion in a December 21, 2007 report.

By decision dated December 21, 2007, the Office denied appellant's request for a schedule award.

Appellant, through his attorney, requested an oral hearing on January 2, 2008. At the oral hearing on April 8, 2008, counsel contended that Dr. Head's report was not sufficiently detailed and well reasoned to constitute the weight of the medical evidence. Appellant further argued that the Office improperly determined that there was a conflict between Dr. Weiss and the Office medical adviser.

In a June 20, 2008 decision, the Office hearing representative affirmed the December 21, 2007 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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 loss shall be determined. 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4] Effective February 1,

[1] The Office also combined these claims under the current claim number.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id.*

2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[5]

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.[6] However, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[7]

The Act provides that, if there is a 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.[8] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[9]

ANALYSIS

Appellant requested a schedule award based on an August 6, 2003 report from Dr. Weiss, an osteopath, finding that he had 19 percent impairment of the left lower extremity due to muscle weakness, sensory deficit and pain and 7 percent impairment to the right lower extremity due to sensory deficit and pain. The Office medical adviser reviewed this report and disagreed with the inclusion of an additional impairment rating for pain under Chapter 18 of A.M.A., *Guides* while concurring with the remainder of the impairment rating. The Office found that there was a conflict of medical opinion evidence requiring resolution through an impartial medical examiner.

The Board finds that at the time the Office referred the case to Dr. Head, a Board-certified neurologist, for an impartial medical evaluation there was no conflict of medical opinion evidence. Dr. Weiss and the Office medical adviser differed only on application of the A.M.A., *Guides*, Chapter 18, for the evaluation of pain. The fifth edition of the A.M.A., *Guides* allows for 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 condition slightly, the examiner may increase the percentage up to three percent. However,

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

[6] *George E. Williams*, 44 ECAB 530, 533 (1993).

[7] *Id.*

[8] 5 U.S.C. §§ 8101-8193, 8123.

[9] 20 C.F.R. § 10.321.

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*.[10] Dr. Weiss did not provide any medical reasoning explaining why he felt that the additional three percent impairment awarded through Chapter 18 of the A.M.A., *Guides* was applicable particularly as he had already rated impairment due to sensory loss (pain) under Chapter 17. The district medical adviser properly discounted this aspect of his impairment rating. It is well established that when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides* his opinion is of diminished probative value in establishing the degree of permanent impairment and the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[11] Therefore, as Dr. Weiss and the district medical adviser differed only on application of the A.M.A., *Guides*, there was no conflict and Dr. Head cannot be considered an impartial medical examiner.

The Board finds that Dr. Head's reports should be considered as those of a second opinion physician. Dr. Head provided detailed reports based on a proper history of injury which included physical findings in direct conflict with those reported by Dr. Weiss. Due to the various physical findings regarding muscle weakness, sensory deficits and the presence of objective findings, the Board finds that there exists a conflict of medical opinion between Dr. Weiss and Dr. Head regarding the nature and extent of the permanent impairment of appellant's lower extremities due to his accepted back injuries. On remand, the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate a Board-certified specialist to determine whether and the extent of any permanent impairment of his lower extremities. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict of medical opinion evidence.

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides*, 571, 18.3(b); *P.C.*, 58 ECAB ___ (Docket No. 07-410, issued May 31, 2007); *Frantz Ghassan*, 57 ECAB 349 (2006).

[11] *Linda Beale*, 57 ECAB 429, 434 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: July 7, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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