United States Department of Labor
Employees' Compensation Appeals Board

W.D., Appellant	)	
and	)	**Docket No. 10-274**
	)	**Issued: September 3, 2010**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 9, 2009 appellant filed a timely appeal from the August 12, 2009 merit decision of the Office of Workers' Compensation Programs, which granted an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant has more than a four percent increased impairment of his left lower limb or any increased impairment of his right lower limb.

FACTUAL HISTORY

On September 18, 1997 appellant, then a 46-year-old distribution clerk, sustained a back injury in the performance of duty while jerking on the lower gate of a postal container to open it. The Office accepted his claim for lumbosacral strain, herniated disc at L5-S1 and spondylosis.

On July 8, 1999 appellant filed a claim alleging that he sustained a bilateral knee injury in the performance of duty beginning in November 1991 from pushing full all-purpose containers

with bad wheels. He added that his daily routine of sweeping mail, dispatching mail and walking to find equipment or retrieve mail downstairs aggravated both knees. The Office accepted his claim for degenerative osteoarthrosis of bilateral knees.[1]

On May 14, 1999 the Office issued a schedule award for a nine percent impairment of the right lower limb. On March 9, 2000 it issued a schedule award for an additional 18 percent impairment of the right lower limb (total 27 percent) and a 20 percent impairment of the left lower limb. On May 26, 2005 the Office issued a schedule award for an additional four percent impairment of the right lower limb. On May 21, 2007 it issued a schedule award for an additional three percent impairment of the right lower limb. Appellant therefore received schedule awards totaling 34 percent for the right lower limb and 20 percent for the left.

On the prior appeal,[2] the Board found that neither the May 26, 2005 nor the May 21, 2007 schedule awards accounted for lower limb impairment attributable to the accepted bilateral knee condition. The Board remanded the case for a proper review of the evidence.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Christopher E. Cenac, a Board-certified orthopedic surgeon, who examined appellant on June 15, 2009 and reported his findings. Dr. Cenac determined that appellant had a 30 percent impairment of the right lower limb and a 20 percent impairment of the left lower limb based on the accepted osteoarthrosis. He also found a 12 percent impairment of the whole person based on spondylolisthesis in the lumbar spine.

On July 16, 2009 an Office medical adviser reviewed Dr. Cenac's findings and concluded that appellant had a 31 percent impairment of the right lower limb based on severe osteoarthritis of the knee and a mild S1 spinal nerve injury. He also determined that appellant had a 24 percent impairment of the left lower limb based on moderate osteoarthritis of the knee.

On August 12, 2009 the Office issued a schedule award for an additional four percent impairment of the left lower limb. Because appellant had already received schedule awards totaling 34 percent for the right lower limb, he was entitled to no further award on the right. However, because the impairment for his left lower limb had increased from 20 to 24 percent, the Office paid compensation for the increase.

On appeal, appellant argues that the Office blatantly circumvented the process by delaying long enough to require use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2008), "which everybody knew would change impairment calculations." He also argues that Dr. Cenac's report was fraudulently written.

[1] OWCP File No. xxxxxx470 (subsidiary file).

[2] Docket No. 08-802 (issued December 8, 2008).

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[3] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[4]

The Act does not authorize the payment of schedule awards for the permanent impairment of "the whole person."[5] Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[6] Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,[7] no claimant is entitled to such an award.[8]

Amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[9]

ANALYSIS

Diagnosis-based impairment is the primary method of evaluation for the lower limb.[10] Dr. Cenac, a Board-certified orthopedic surgeon and Office referral physician, reviewed the statement of accepted facts and noted that the Office had accepted osteoarthritis of both knees. He completed x-ray studies and indicated that appellant had severe arthritis on the right characterized by a one-millimeter cartilage interval. Table 16-3, page 511 of the A.M.A., *Guides* gives a default impairment value of 30 percent for severe primary knee joint arthritis. Following

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

[5] *Ernest P. Govednick*, 27 ECAB 77 (1975).

[6] *William Edwin Muir*, 27 ECAB 579 (1976).

[7] The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[8] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

[9] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[10] A.M.A., *Guides* 497.

the adjustment formula on page 521, the Office medical adviser decreased the default value to 28 percent for a moderate problem by functional history characterized by routine use of a single cane for ambulation.[11] No further modification was warranted for physical examination or clinical studies.

Dr. Cenac reported a 12 percent impairment of the whole person based on spondylolisthesis in the lumbar spine, but the Act does not authorize schedule awards for permanent impairment of "the whole person." The Act does permit an award for impairment to a lower limb that originates in the spine. Dr. Cenac reported sensory deficits in the S1 distribution on the right. The Office medical adviser characterized the deficits as mild, but even if they could be characterized as severe, they would represent no more than a four percent impairment of the right lower limb.[12]

Multiple lower limb impairments are combined using the Combined Values Chart on page 604 of the A.M.A., *Guides*.[13] Appellant's 28 percent impairment for severe osteoarthritis in the right knee combines with a maximum 4 percent impairment for sensory deficits in the S1 nerve root to give a 31 percent total impairment of the right lower limb, which is what the Office medical adviser reported. Because he previously received schedule awards totaling 34 percent, he has no increased impairment on the right. The Board will therefore affirm the Office's August 12, 2009 decision on the issue of right lower limb impairment.

On the left Dr. Cenac indicated that appellant had moderate arthritis in the knee characterized by a two-millimeter cartilage interval. Table 16-3, page 511 gives a default impairment value of 20 percent for moderate primary knee joint arthritis. Following the adjustment formula on page 521, the Office medical adviser increased the default value to 24 for a severe problem on physical examination and a severe problem on clinical studies. Because Dr. Cenac used x-ray studies as the key factor to identify a Class 2 impairment, they may not be used again as a nonkey factor to modify the grade within that class.[14] The default impairment rating should be increased to 22 percent, assuming appellant's physical examination can be regarded as having shown a "severe" problem.

Because appellant previously received a schedule award for a 20 percent impairment of the left lower limb, he has an increased impairment of 2 percent, which is less than the Office awarded. The Board will nonetheless affirm the Office's August 12, 2009 decision on the issue of left lower limb impairment on the grounds that the evidence does not support more than a four percent increased impairment.

Appellant argues that the Office was blatant in circumventing the process and delaying matters until the sixth edition of the A.M.A., *Guides* became effective. The implication is that

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[11] *Id*. at 516 (Table 16-6).

[12] Christopher R. Brigham, M.D., *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition*, The Guides Newsletter (A.M.A., Chicago, Ill.), Jul./Aug. 2009 (Proposed Table 2).

[13] *Id*. at 529.

[14] *Id*. at 521 (Method, 2.b).

the Office knew impairment calculations would be significantly lower in the sixth edition. First, appellant offered no proof that the Office acted with nefarious intent in adjudicating his claim and second, with the exception of spine fusion cases, impairment values overall in the sixth edition are similar to the values assigned in the fourth and fifth editions. The full impact of changes in ratings will not be available until a large number of cases have been rated or comparative studies are performed where cases are rated by both the fifth and sixth editions.[15]

As for the charge that Dr. Cenac committed fraud, appellant again submitted no proof. Because diagnosis-based impairment is the method of choice for calculating impairment, appellant should not assume fraudulent intent because Dr. Cenac did not use a goniometer to measure range of motion or spent less time with him than other physicians. Because diagnosis-based sections are applicable, the Office may not use range of motion to determine appellant's lower limb impairment.[16] Range of motion is only one of a number of findings on physical examination that can be used to determine whether appellant's problem can be generally characterized as mild, moderate or severe. The Office medical adviser characterized Dr. Cenac's findings as severe, which was to appellant's benefit because it prevented a slight reduction of his rating for right knee arthritis and at the same time increased his rating slightly for left knee arthritis.

CONCLUSION

The Board finds that appellant has no increased impairment of his right lower limb and no more than a four percent increased impairment of his left lower limb.

[15] "Rerating examples provided in the [s]ixth [e]dition for diagnosis-based impairments by criteria provided in the [f]ifth [e]dition reveals there is minimal change in impairment values, with the exception of spine fusion cases." Brigham et al., A.M.A., *Guides sixth edition: Perceptions, Myths and Insights* (Brigham and Associates, 2008).

[16] A.M.A., *Guides* at 543.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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