United States Department of Labor
Employees' Compensation Appeals Board

F.A., Appellant	)	
and	)	**Docket No. 07-1157**
	)	**Issued: December 14, 2007**
DEPARTMENT OF THE ARMY, MATERIAL DEVELOPMENT & READINESS COMMAND, Tobyhanna, 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:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 25, 29 and March 5, 2007 merit decisions regarding his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg, for which he received a schedule award; and (2) whether he met his burden of proof to establish that he has a permanent impairment of his penis which entitles him to a schedule award.

FACTUAL HISTORY

On February 3, 1989 appellant, then a 32-year-old industrial electronic control mechanic, sustained a lumbar strain and herniated nucleus pulposus at L5-S1 due to lifting steel plates at work. He began to work in limited-duty positions for the employing establishment and the Office paid compensation for periods of disability. On March 11, 1989 appellant underwent a laminotomy and discectomy at L5-S1 and on April 6, 1992 he underwent a repeat laminotomy and discectomy at L5-S1.[1] Both procedures were authorized by the Office.

Appellant reported that he experienced pain in his low back and pain and weakness in his left leg. On March 17, 1992 Dr. Shripathi Holla, an attending Board-certified neurosurgeon, indicated that appellant continued to have some paravertebral spasms in his left leg, positive results upon left leg raising and weakness upon dorsiflexion of his left foot.

On December 28, 2005 appellant filed a claim for a schedule award due to his accepted injuries.[2] In a May 15, 2006 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to show that he had any permanent impairment which entitled him to a schedule award.

On May 16, 2006 Dr. Christopher Metzger, an attending Board-certified orthopedic surgeon, stated that appellant's chief complaint was stiffness and discomfort in his left knee. He indicated that on examination of the right knee appellant had full active range of motion with some intraarticular crepitus, but no effusion, joint line tenderness or abnormal laxity. Appellant's left knee exhibited full extension and flexion to 110 degrees and there was tenderness over the medial joint line and a small effusion without abnormal laxity. Dr. Metzger indicated that the patellar inhibition test was weakly positive on both sides.

On June 26, 2006 Dr. Emmanuel E. Jacob, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant complained of left knee pain, low back pain with radiating left leg pain and numbness, and "difficulty of his sexual function." He indicated that on examination appellant exhibited "tenderness of the L4-5/S1 segment," diminished sensation of both legs at the "L4-5 dermatome," and 4/5 muscle strength upon left ankle dorsiflexion. Appellant's right thigh circumference was four centimeters greater than that of his left thigh and his right calf circumference was one centimeter greater than that of his left calf. Dr. Jacob diagnosed chronic low back pain with lower limb radiculopathy, status post two lumbar disc surgeries at L5-S1, chronic left knee pain and degenerative joint disease and "erectile/sexual dysfunction secondary to L5-S1 disc herniation."

Dr. Jacob determined that, under Table 16-10 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), appellant had a Grade 3 or 40

[1] The findings of a March 19, 1992 magnetic resonance imaging (MRI) scan suggested a recurrent herniation at L5-S1. It also showed bulging at L4-5 and mild to moderate central herniation at L3-4 which appeared similar to the findings of an unidentified 1989 study.

[2] Appellant later asserted that he was entitled to schedule award compensation for impairment of his legs and penis.

percent rating for sensory loss associated with the L4-5 nerve roots in each leg and concluded that multiplying this figure times the 8 percent maximum value for such sensory loss yielded a 3.2 percent impairment in each leg. With respect to appellant's left leg weakness, Dr. Jacob stated, "left ankle dorsiflexion is 4/5 which is equivalent to 20 percent motor deficit and 35 percent maximum impairment equals 7 percent impairment of the lower extremity." He indicated that appellant had a 13 percent impairment of his left leg due to thigh atrophy and a 3 percent impairment of his left leg due to calf atrophy.[3] Dr. Jacob stated that as a result of appellant's employment-related lumbar disc herniation with chronic back pain he had developed erectile/sexual dysfunction and concluded that under Table 13-21 of the A.M.A., *Guides* he had "sexual dysfunction and lack of awareness and excitement" which was equivalent to a Class I or nine percent impairment of the whole person.[4]

On December 18, 2006 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an Office medical adviser, reviewed the medical record. He concluded that appellant had a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg. Dr. Berman indicated that Dr. Jacob had evaluated appellant's sensory loss associated with the L4 and L5 nerves in both legs but posited that it was appropriate to evaluate his sensory loss associated with the L5 and S1 nerves in both legs as his surgeries were at L5 and S1. He concluded that appellant had a 3 percent impairment in each leg for sensory loss associated with the L5 nerve by multiplying a Grade 3 or 60 percent rating for sensory loss associated with the L5 nerve times the 5 percent maximum value for such sensory loss.[5] Dr. Berman concluded that appellant had a three percent impairment in each leg for sensory loss associated with the S1 nerve by performing a similar calculation for this nerve distribution. Therefore, appellant had a six percent permanent impairment to each leg for sensory loss associated with the L5 and S1 nerves.

Dr. Berman further indicated that appellant had 4/5 strength on dorsiflexion of the left foot "indicating L5 nerve root weakness" and noted that this represented a 25 percent rating under Grade 4 of Table 15-16. He multiplied this value times the 37 percent maximum value for weakness associated with the L5 nerve to conclude that appellant had a 9 percent impairment of his left leg due to weakness (after rounding down from 9.2 percent). Dr. Berman concluded that appellant had a 14 percent permanent impairment of his left leg by using the Combined Values Chart of the A.M.A., *Guides* to combine the 9 percent rating for weakness with the 6 percent rating for sensory loss. As appellant had no other impairments on the right, he concluded that he had a six percent permanent impairment of his right leg due to sensory loss. Dr. Berman determined that appellant had not submitted medical evidence showing that he had permanent impairment of his penis. He stated that a schedule award for permanent impairment of the penis

[3] In an August 2, 2006 addendum to his June 26, 2006 report, Dr. Jacob stated that appellant had a 20 percent impairment of his left leg due to a 2.4 centimeter cartilage interval in his left knee.

[4] The record also contains a November 16, 2006 report in which Dr. Jacob provided impairment ratings that are the same as those found in his June 26, 2006 report.

[5] Dr. Jacob indicated that appellant had a 40 percent rating for sensory loss associated with the L4 and L5 nerves, a figure selected from the middle of the range of Grade 3 values found in Table 16-10. Dr. Berman stated that the medical evidence warranted a finding that appellant had a 60 percent rating for sensory loss associated with the L5 and S1 nerves, a figure selected from the top of the range of Grade 3 values found in Table 16-10.

could not be granted "unless there is clear documentation by a Board-certified urologist that such an award would be appropriate."

In a January 25, 2007 decision, the Office vacated its May 15, 2006 decision and determined that Dr. Berman's opinion established that appellant had a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg. In a January 29, 2007 decision, the Office granted appellant a schedule award for a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg. The awards ran for 57.6 weeks from November 16, 2006 to December 24, 2007.

Appellant requested reconsideration of his claim indicating that the Office had not ruled on his claim for a schedule award for permanent impairment of his penis. On February 13, 2007 Dr. Berman reiterated that appellant was not entitled to a schedule award for permanent impairment of his penis. He stated:

> "However, most specifically, Dr. Jacob recommends a schedule award for impairment of the penis. In my report of December 18, 2006, I stated that because of the nature of erectile dysfunction complaints and possible awards, we cannot accept recommendations for such awards unless there is clear documentation by a Board-certified urologist that such an award would be appropriate."[6]

On March 5, 2007 the Office modified its January 25, 2007 decision to reflect that appellant was not entitled to a schedule award for permanent impairment of his penis. The Office found that there was no opinion from a Board-certified urologist supporting such an award.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulations[8] 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9] It is well-

[6] Dr. Berman also indicated that he did not include Dr. Jacob's rating for left knee arthritis because this was not an accepted condition. He also indicated that Dr. Jacob's ratings for atrophy were not included because, according to Table 17-2, such ratings are not to be combined with ratings for peripheral nerve disorders (such as sensory loss in the present case).

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*.

established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain and herniated nucleus pulposus at L5-S1 due to lifting steel plates at work. On March 11, 1989 appellant underwent a laminotomy and discectomy at L5-S1 and on April 6, 1992 he underwent a repeat laminotomy and discectomy at L5-S1. Both procedures were authorized by the Office. Appellant claimed that he was entitled to schedule award compensation for permanent impairment of his legs and penis. The Office granted appellant a schedule award for a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg based on the opinion of Dr. Berman, a Board-certified orthopedic surgeon serving as an Office medical adviser. The Office further found that appellant was not entitled to a schedule award for permanent impairment of his penis.

The Board finds that Dr. Berman properly concluded that appellant had a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg. On December 18, 2006 Dr. Berman, reviewed the medical record, including the opinion of Dr. Jacob, an attending Board-certified physical medicine and rehabilitation physician. Dr. Berman indicated that Dr. Jacob had evaluated appellant's sensory loss associated with the L4 and L5 nerves in both legs but properly determined that it was appropriate to evaluate his sensory loss associated with the L5 and S1 nerves in both legs as his surgeries were at L5 and S1. The medical record clearly indicates that appellant's March 11, 1989 employment injury affected his L5 and S1 nerves and there is no indication that the March 11, 1989 injury affected the L4 nerve in either leg or that appellant had a preexisting impairment related to his L4 nerves.[11]

Dr. Berman calculated that appellant had a 3 percent impairment in each leg for sensory loss associated with the L5 nerve by multiplying a Grade 3 or 60 percent rating for sensory loss associated with the L5 nerve (derived from Table 16-10 of the A.M.A., *Guides*) times the 5 percent maximum value for such sensory loss (derived from Table 15-18).[12] He concluded that appellant had a three percent impairment in each leg for sensory loss associated with the S1

[10] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

[11] *See supra* note 11 and accompanying text regarding the inclusion of preexisting impairments in impairment calculations. Moreover, it was inappropriate for Dr. Jacob to evaluate sensory loss impairment for the L4 and L5 nerves collectively as all nerves should be evaluated separately. It is unclear why he used a maximum value of eight percent for the L4 and L5 nerves collectively. *See* A.M.A., *Guides* 424, 482, Tables 15-18, 16-10.

[12] *See id*. Dr. Berman provided a Grade 3 rating of 60 percent for sensory loss associated with the L5 and S1 nerves, whereas Dr. Jacob provided a Grade 3 rating of 40 percent for sensory loss associated with the L4 and L5 nerves. The Board notes that Dr. Berman's grading of sensory loss associated with the L5 and S1 nerves is supported by the medical evidence of record.

nerve by performing a similar calculation for this nerve distribution[13] and determined that he had a six percent permanent impairment of his left leg and a six percent permanent impairment of his right leg for sensory loss associated with the L5 and S1 nerves.

Dr. Berman further indicated that appellant had 4/5 strength on dorsiflexion of the left foot associated with the L5 nerve noted that this represented a 25 percent rating under Grade 4 of Table 15-16. He multiplied this value times the 37 percent maximum value for weakness associated with the L5 nerve to conclude that appellant had a nine percent impairment of his left leg due to weakness.[14] Dr. Berman concluded that appellant had a 14 percent permanent impairment of his left leg by using the Combined Values Chart of the A.M.A., *Guides* to combine the 9 percent rating for weakness with the 6 percent rating for sensory loss.[15] As appellant had no other impairments on the right, he concluded that he had a six percent permanent impairment of his right leg due to sensory loss.[16]

For these reasons, Dr. Berman provided the only evaluation which conforms to the standards of the A.M.A., *Guides* and his opinion constitutes the weight of the medical evidence regarding the permanent impairment of appellant's legs.[17] Appellant has not shown that he has more than a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg.

LEGAL PRECEDENT -- ISSUE 2

The Act provides schedule award compensation for employment-related permanent impairment of the sexual and urinary functions of the penis, but it must be shown that a claimant's sexual or urinary difficulties are related to employment factors through the submission of rationalized medical evidence establishing such a causal relationship.[18] Permanent impairment must be based on a direct physiological connection between the employment injury and the part of the body for which a schedule award is claimed.[19]

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[13] The maximum value for sensory loss associated with the S1 nerve is five percent. *See* A.M.A., *Guides* 424, Table 15-18.

[14] Dr. Berman properly rounded down the resultant 9.2 percent figure to 9 percent. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (June 2003).

[15] *See* A.M.A., *Guides* 604, Combined Values Chart.

[16] Dr. Berman properly did not include Dr. Jacob's rating for appellant's left knee condition (based on the cartilage interval) because there is no indication in the medical record that the March 11, 1989 employment injury caused a left knee condition or that appellant had a preexisting impairment related to a left knee condition. Dr. Berman also correctly did not include Dr. Jacob's ratings for atrophy because, according to Table 17-2, such ratings are not to be combined with ratings for peripheral nerve disorders (such as sensory loss in the L5 and S1 nerves in the present case). *See* A.M.A., *Guides* 526, Table 17-2.

[17] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[18] *See* 20 C.F.R. § 10.404(a); *Gordon G. McNeill*, 40 ECAB 790, 795 (1989); *William T. Trull*, 36 ECAB 659, 663-64 (1985).

[19] *Gregory C. Esparza*, 42 ECAB 911, 915 (1991).

ANALYSIS -- ISSUE 2

The Board finds that appellant did not meet his burden of proof to establish that he has a permanent impairment of his penis which entitles him to a schedule award and the Office properly denied his claim.[20] In a June 26, 2006 report, Dr. Jacob stated that appellant complained of "difficulty of his sexual function" and posited that his employment-related lumbar disc herniation at L5-S1 with chronic back pain caused erectile/sexual dysfunction. He concluded that appellant fell under Class I of Table 13-21 of the A.M.A., *Guides* (sexual dysfunction and lack of awareness and excitement) such that he had a nine percent impairment of the whole person.[21]

The Board finds that Dr. Jacob's opinion is of limited probative value on the claimed permanent impairment of appellant's penis in that Dr. Jacob did not provide adequate medical rationale in support of his conclusion on causal relationship.[22] While there is no absolute requirement that an opinion on permanent impairment of the penis can only be provided by a Board-certified urologist, such an opinion must be adequately supported by medical rationale. Dr. Jacob did not describe appellant's clinical condition with respect to the alleged impairment in any detail. He merely indicated that appellant had reported "difficulty of his sexual function" without further elaboration, nor did he provide any explanation of the medical process which might have caused appellant to experience permanent impairment of his penis. Dr. Jacob did not explain how the particular type and severity of appellant's employment-related medical condition associated with his L5 and S1 nerves could have been competent to cause permanent impairment of his penis. For these reasons, appellant did not meet his burden of proof to show that he has a permanent impairment of his penis which entitles him to a schedule award.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 14 percent permanent impairment of his left leg and a 6 percent permanent impairment of his right leg, for which he received a schedule award. The Board further finds that appellant did not meet his burden of proof to establish that he has a permanent impairment of his penis which entitles him to a schedule award.

[20] The Office noted that Dr. Berman determined that appellant had not submitted medical evidence showing that he had permanent impairment of his penis and that there was no opinion from a Board-certified urologist justifying a schedule award for permanent impairment of his penis.

[21] *See* A.M.A., *Guides* 342, Table 13-21.

[22] *See Leon Harris Ford,* 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 5, January 29 and 25, 2007 decisions are affirmed.

Issued: December 14, 2007
Washington, DC

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

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

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