United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 10-1021**
	)	**Issued: June 2, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Reno, NV, Employer	)	

Appearances:
Appellant, pro se
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 April 9, 2009 appellant filed an appeal from a March 12, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the schedule award claim.

ISSUE

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

FACTUAL HISTORY

On April 17, 2004 appellant, then a 34-year-old letter carrier, pulled a hamper of magazines at work and injured his low back. The Office accepted lumbar strain, lumbar disc protrusion and retrograde ejaculation. Appellant returned to a light-duty position. He received compensation benefits for periods of disability.

Appellant was initially treated by Dr. Forrest Burke, a Board-certified orthopedic surgeon, who diagnosed discogenic low back pain which developed after lifting a mail hamper at work. Magnetic resonance imaging (MRI) scans of the lumbar spine dated May 26, 2004 and February 16, 2005 revealed left paracentral disc protrusion at L5-S1. Appellant came under the treatment of Dr. James R. Rappaport, a Board-certified orthopedic surgeon, for treatment of back pain and left leg weakness that occurred after the work-related lifting incident. Dr. Rappaport diagnosed L5-S1 disc herniation with left S1 radiculitis versus radiculopathy and L5-S1 spondylosis with mild discogenic low back pain. On March 14, 2005 he performed a microscopic laminotomy, foraminotomy and discectomy at left L5-S1 and diagnosed herniated lumbar disc, lumbar radiculitis and low back pain. Dr. Rappaport noted that appellant continued to have discogenic pain at L5-S1 and left lumbar radiculitis postoperatively and recommended a total disc replacement. On October 11, 2005 he performed a total disc replacement at L5-S1 and diagnosed internal disc derangement at L5-S1 and chronic low back pain. In reports dated December 21, 2005 and March 22, 2006, Dr. Rappaport noted appellant's complaints of symptoms consistent with retrograde ejaculation which was a possible side effect of the surgery. He returned appellant to work on December 26, 2006 and noted that he reached maximum medical improvement on March 22, 2006. On June 20, 2006 Dr. Rappaport performed an excisional biopsy of the skin lesion at the site of the surgery.

On October 27, 2006 the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a determination of whether he had residuals of his accepted conditions and a rating of any permanent impairment. Dr. Swartz was requested to use the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1]

In a November 10, 2006 report, Dr. Swartz reviewed a history of appellant's work-related condition and medical treatment. On physical examination, there was no tenderness or spasm in the lumbar spine, absent left Achilles reflex, intact sensation in both lower extremities and pain with straight leg raises. Dr. Swartz diagnosed status post two operations in the lumbar spine, microlumbar discectomy at L5-S1 and total disc prosthesis replacement at L5-S1. He opined that appellant had residuals of his work injury and his symptoms never completely improved following surgery. Dr. Swartz opined that appellant reached maximum medical improvement and could return to work full time with permanent restrictions on lifting, bending and sitting.

On January 18, 2007 appellant filed a claim for a schedule award.[2]

On February 12, 2007 the Office referred appellant back to Dr. Swartz for a determination of permanent impairment. In a March 8, 2007 report, Dr. Swartz noted findings on examinations of positive patellar reflexes, absent Achilles reflexes, intact sensation in both lower extremities and intact motor function. He advised maximum medical improvement occurred on October 11, 2006. Dr. Swartz found no neurological or nerve root involvement,

[1] A.M.A., *Guides* (5th ed. 2001).

[2] Appellant also claimed a schedule award for penis impairment. The Office developed this matter and, on March 12, 2009, granted him a schedule award for 18 percent permanent impairment of the penis. Appellant appealed this decision. The appeal of this matter is proceeding separately to adjudication.

some pain, no weakness, active movement against gravity with full resistance, atrophy of the left thigh and retrograde ejaculation.

On April 13, 2007 an Office medical adviser, recommended that Dr. Swartz clarify his opinion regarding whether appellant's lower extremity symptoms were bilateral and whether he had atrophy.

In a November 14, 2007 report, Dr. Swartz listed findings upon physical examination that included an absent left Achilles reflex, normal motor function in the bilateral extremities and intact sensation in both lower extremities. He noted sciatic radiculopathy on the left with neurological involvement in the left S1 nerve root, moderate pain and discomfort, no weakness and .5 centimeters of atrophy of the left thigh and left calf. Dr. Swartz recommended nerve conduction studies. On December 5, 2007 he advised that electrodiagnostic studies were obtained on November 30, 2007 and revealed no abnormalities of the lower extremities and no evidence of lumbar radiculopathy.

On November 28, 2008 the Office requested that he reevaluate appellant. In a February 2, 2009 report, Dr. Swartz advised that he examined appellant again on January 13, 2009. He noted sciatic radiculopathy on the left with neurological involvement in the left S1 nerve root, moderate pain and discomfort, no weakness and .5 centimeters of atrophy of the left thigh and left calf.

In a report dated February 16, 2009, an Office medical adviser found that appellant sustained a three percent impairment of the left lower extremity. The medical adviser explained that the impairment involved the S1 nerve root and that appellant had a Grade 3 sensory deficit.[3] The medical adviser noted that there was no involvement of the right leg. The medical adviser noted maximum medical improvement occurred on March 8, 2007.

On March 12, 2009 the Office granted appellant a schedule award for three percent permanent impairment of the left lower extremity. The period of the award impairment was from March 8 to May 7, 2007.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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

[3] *See* A.M.A., *Guides* 424, Table 15-15 and 15-18.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

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.[6]

ANALYSIS

The Office accepted that appellant sustained a lumbar strain, lumbar disc protrusion and later expanded the claim to include retrograde ejaculation due to his April 17, 2004 employment injury. He underwent an L5-S1 microdiscectomy on March 14, 2005, and an anterior total disc replacement of L5-S1 on October 11, 2005. He filed a claim for a schedule award. The Office determined that appellant was entitled to a schedule award for three percent permanent impairment of the left lower extremity.

The Board finds that appellant has no more than three percent permanent impairment of the left lower extremity.

The Office referred appellant to Dr. Swartz for on opinion as to the extent of any impairment of the lower extremities causally related to the accepted injury. In a report dated March 8, 2007, Dr. Swartz noted examination findings of positive patellar reflexes, absent Achilles reflexes, intact sensation in both lower extremities and intact motor function and no tenderness or spasm in the lumbar spine. He diagnosed status post two operations in the lumbar spine, microlumbar discectomy at L5-S1 and total disc prosthesis replacement at L5-S1. Dr. Swartz noted no neurological or nerve root involvement, some pain, no weakness, active movement against gravity with full resistance, atrophy of the left thigh and retrograde ejaculation. The Office requested clarification from Dr. Swartz regarding whether appellant's lower extremity symptoms were bilateral and whether there was atrophy present. In reports dated November 14, 2007 and February 2, 2009, Dr. Swartz noted findings of an absent left Achilles reflex, normal motor function in the bilateral extremities and intact sensation in both lower extremities. He noted sciatic radiculopathy on the left with neurological involvement in the left S1 nerve root, with moderate pain and discomfort, no weakness and .5 centimeters of atrophy of the left thigh and left calf.

On February 6, 2009 an Office medical adviser reviewed Dr. Swartz's report. He found that, under the A.M.A., *Guides,* appellant had a three percent impairment of the left leg. Dr. Swartz identified sensory impairment of the S1 nerve root. The medical adviser determined that appellant had three percent impairment for sensory deficit or pain in the distribution of the S1 nerve root, under Tables 15-15 and 15-18 of the A.M.A., *Guides*.[7] He noted the records revealed moderate pain radiating down the left leg. Under Table 15-18, the maximum loss for sensory deficit or pain involving the S1 nerve root is five percent.[8] Under Table 15-15, appellant was classified as Grade 3, for pain or altered sensation that may interfere with activity, or a 60 percent sensory deficit.[9] The procedure set forth in Table 15-15 directs that the sensory nerve

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[6] *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[7] A.M.A., *Guides* 424.

[8] *Id.* at 424, Figure 15-18.

[9] *Id.* at 424, Figure 15-15.

deficit 60 percent, be multiplied by the maximum impairment value for the S1 nerve, 5 percent. This yielded three percent impairment for sensory deficit in the S1 nerve distribution. The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to find three percent impairment of the left leg due to sensory impairment in the S1 nerve root distribution. The medical adviser noted that there was no documented involvement or symptomology of the right lower extremity that warranted an impairment rating. The record revealed no left lower extremity weakness or strength loss. Moreover, a finding of atrophy of .5 centimeters for the left thigh and .5 centimeters for the left calf did not yield a ratable impairment.[10] The medical adviser noted maximum medical improvement occurred on March 8, 2007. This evaluation conforms to the A.M.A., *Guides* and establishes three percent impairment of the left leg.

On appeal, appellant asserts that he has more than three percent impairment. He noted that he experienced pain and numbness in the left foot, was unable to participate in physical activities that he enjoyed prior to his injury and his quality of life had been diminished. While appellant has an accepted lumbar strain, lumbar disc protrusion with retrograde ejaculation, he may be rated for impairment only as it affects his lower extremities.[11] There is no additional evidence which establishes greater impairment than that granted by the Office. With regard to appellant's assertion that he is unable to participate in activities he enjoyed prior to his injury and that his quality of life has been diminished, the Board notes that the amount payable pursuant to a schedule award does not take into account the effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.[12] Under the schedule award provisions, Congress has specified a maximum number of weeks of compensation payable for permanent impairment of the leg. Since appellant was rated as having three percent impairment to his left leg, he is entitled to three percent of 288 weeks or 8.64 weeks of compensation, the amount paid by the Office.

CONCLUSION

The Board finds that appellant has no more than three percent permanent impairment of the left lower extremity.

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[10] *Id.* at 530, Table 17-6. This table provides that atrophy of 0.9 centimeters or less yields no permanent impairment.

[11] *See Guiseppe Aversa,* 55 ECAB 164 (2003).

[12] *Ruben Franco*, 54 ECAB 496 (2003).

ORDER

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

Issued: June 2, 2010
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