United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 11-421**
	)	**Issued: September 30, 2011**
DEPARTMENT OF VETERANS AFFAIRS, SOUTHEAST LOUISIANA VETERANS HEATLH CARE SYSTEM, 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, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 14, 2010 appellant filed a timely appeal from the November 8, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which awarded schedule compensation for his lower extremities. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 an 11 percent impairment of his left lower extremity or 10 percent impairment of his right lower extremity as a result of his July 20, 2004 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 20, 2004 appellant, a 49-year-old painter, sustained a low back injury in the performance of duty when he tried to move a desk that was stuck to the floor. OWCP accepted his claim for lumbar strain.

Appellant's orthopedic surgeon, Dr. J. Lee Moss, diagnosed lumbar disc syndrome and lumbar radiculitis right. He reviewed an October 8, 2004 magnetic resonance imaging (MRI) scan and noted a far lateral herniated disc at L3-4 on the right with a broad-based L4-5 disc bulge with bilateral foraminal stenosis and a midline disc protrusion at L5-S1. Dr. Moss indicated that appellant had injured his lumbar spine on July 20, 2004.

OWCP accepted appellant's claim for a herniated lumbar disc, or lumbar disc displacement.

Appellant filed a claim for a schedule award. A conflict in medical opinion arose between his pain specialist, Dr. Patrick H. Waring, and an OWCP referral orthopedic surgeon, Dr. Christopher E. Cenac, Sr. Dr. Waring found a three percent impairment of each lower extremity due to sensory loss and pain. Dr. Cenac found no impairment.

To resolve this conflict, OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, who related appellant's history and complaints. Dr. Nutik described his findings on physical examination. He reviewed an MRI scan obtained on February 16, 2006, as well as current x-rays. Dr. Nutik noted that appellant had underlying spinal stenosis at multiple levels and bulging discs at the L4-5 and L5-S levels; however, the disc displacement previously seen on the October 8, 2004 MRI scan did not appear to be present on the February 16, 2006 MRI scan. It was possible, he explained, that the disc displacement had now resolved.

Dr. Nutik found that appellant's underlying spinal stenosis was likely aggravated by the initial back strain. He felt that appellant had significant pain related to the spinal stenosis "which causes referred symptoms into the lower extremities." On the clinical examination, however, Dr. Nutik saw no significant sensory deficit or motor impairment, though neurologic changes could be variable, related to the off-and-on compression related to the spinal stenosis.

Dr. Nutik proceeded to evaluate the impairment of appellant's lumbar spine using Table 17-4, page 571 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). He assessed the spinal impairment as class 1. There were multiple levels of spinal stenosis, but Dr. Nutik could not identify specific levels of radicular complaints. Because of the multiple levels, he felt that this represented an eight or nine percent impairment of the whole person.

As for his evaluation of the lower extremities, Dr. Nutik stated the following:

> "Neurologic assessment of the lower extremities was somewhat difficult to assess but there were some nonspecific changes which included absence of the patellar tendon reflexes, weakness in dorsiflexion and plantar flexion of the feet and some decreased sensation in the lateral aspect of the right and left thighs. This could

> represent an L4 nerve root involvement which I would relate back to the spinal stenosis and would characterize as a radicular component of the spinal stenosis."

OWCP asked Dr. Nutik for clarification of the percentage impairment of the lower extremities with an explanation of how he calculated the percentage using applicable tables in the sixth edition of the A.M.A., *Guides*. Dr. Nutik responded that there was no impairment specifically relating to the lower extremities from spinal stenosis:

> "Lower extremities are affected by the referred complaints which derives from the spinal stenosis and the inability for the patient to walk for any distance and the symptoms which occur which are activity related. Therefore, I could not give a specific impairment rating to the lower extremities but the lower extremities determine the [g]rade modified adjustment in the functional history as well as some of the physical findings obtained at the time of this exam[ination]."

In a decision dated December 19, 2009, OWCP denied appellant's claim for a schedule award. It explained that appellant was not entitled to a schedule award for impairment to his back, and there was no measurable impairment to a scheduled member or function of the body. An OWCP hearing representative affirmed, finding that Dr. Nutik reported no impairment to the lower extremities.

Appellant requested reconsideration. He argued that Dr. Nutik was simply stating that spinal stenosis caused his lower extremities to have debilitating symptoms, but he could not answer the specific questions posed to him.

In a September 24, 2010 report, Dr. John R. Montz, a Board-certified orthopedic surgeon, reviewed Dr. Nutik's evaluation. He explained that the assumption that a whole-body impairment is unrelated to lower extremity impairment was incorrect. Dr. Montz referred to Table 16-10, page 530 of the sixth edition of the A.M.A., *Guides*, showing impairment values calculated from lower extremity impairment. He observed that a lower extremity impairment of 19 to 23 percent converted to an 8 to 9 percent whole person impairment, which Dr. Nutik had reported. Using Table 16-12, page 535, Dr. Montz also observed that a moderate peripheral nerve injury represented a 14 to 25 percent lower extremity impairment, so both methods gave similar results. "Using the average," he concluded, "[appellant] has a 20 percent lower extremity impairment as a result of his lumbar spinal stenosis aggravated by injury."

An OWCP medical adviser expressed reservations about Dr. Montz' method of working backwards from a whole person impairment to a lower extremity impairment: "While in many instances this is not feasible, given a significant component of back pain that can render this technique faulty for the purposes of the OWCP/FECA, I believe that in this specific instance (and considering the multiple opinions already obtained), Dr. Montz' calculation may have approximated the claimant's probative impairment."

On November 8, 2010 OWCP issued a schedule award for an 11 percent impairment of the left lower extremity and a 10 percent impairment of the right lower extremity.

On appeal, appellant disagreed with the amount of the award and that he was unable to perform the duties of the position he held. He also stated that he reported his award to the social

security office only to have an offset of his benefits. Appellant stated that he never received a penny for travel, doctor bills and lost wages, not to mention past and future pain and suffering.

LEGAL PRECEDENT

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.[2] Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[3]

A schedule award is not payable for a member, function or organ of the body not specified in FECA or the regulations.[4] Neither FECA nor the implementing federal regulations provide for the payment of a schedule award for the permanent loss of use of the back.[5] A claimant is not entitled to such an award.[6]

Amendments to FECA 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 FECA 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]

FECA does not authorize the payment of schedule awards for the permanent impairment of the whole person.[8] Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

If there is 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.[9] When OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP 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 2.808.6.a (January 2010).

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

[5] FECA expressly excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

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

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

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

[9] 5 U.S.C. § 8123(a).

impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, OWCP must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[10] Unless this procedure is carried out by OWCP, the intent of FECA section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[11]

ANALYSIS

To resolve the conflict between appellant's pain specialist, Dr. Waring, and OWCP's second opinion orthopedic surgeon, Dr. Cenac, OWCP properly referred appellant to Dr. Nutik, a Board-certified orthopedic surgeon and impartial medical specialist. OWCP provided Dr. Nutik with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper medical and factual history.

Dr. Nutik advised that appellant's underlying spinal stenosis was likely aggravated by the initial back strain. He felt that significant pain related to the underlying spinal stenosis caused referred symptoms into the lower extremities. Dr. Nutik did not see significant sensory deficit or motor involvement on his examination of appellant, but there were some nonspecific findings -- the absence of patellar tendon reflexes, weakness in dorsiflexion and plantar flexion of the feet and some decreased sensation in the lateral aspect of the thighs -- that he believed could represent an L4 nerve root involvement. He characterized these findings as a radicular component of the spinal stenosis. Dr. Nutik declined to evaluate lower extremity impairment as the lower extremities were affected by the referred complaints derived from appellant's spinal stenosis. As noted, 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, as Dr. Nutik believed was the case.

OWCP referred appellant to Dr. Nutik to resolve the conflict on the extent of lower extremity impairment caused by the July 20, 2004 employment injury. Dr. Nutik offered a whole-person estimate of spinal impairment, which is not permitted under FECA. He did not resolve the conflict in his supplemental report. The Board will therefore set aside OWCP's November 8, 2010 decision and remand the case for further development of the medical opinion evidence. Appellant should be referred to a second impartial medical specialist to resolve the conflict between Drs. Waring and Cenac. After such further development of the medical opinion evidence as may become necessary, OWCP shall issue a *de novo* final decision on appellant's entitlement to a schedule award.

It is important to note that OWCP has not accepted appellant's case for aggravation of spinal stenosis. It has accepted lumbar strain and a herniated lumbar disc, which it later termed lumbar disc displacement. On remand, OWCP should consider appellant's claim for a temporary or permanent aggravation of his spinal stenosis. It may then proceed to refer appellant, together

[10] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[11] *Harold Travis*, 30 ECAB 1071 (1979).

with the medical record and a proper statement of accepted facts, to a second impartial medical specialist for an evaluation of any lower extremity impairment caused by the July 20, 2004 employment injury.

CONCLUSION

The Board finds that this case is not in posture for decision. There remains a conflict in medical opinion evidence on the extent of lower extremity impairment caused by the July 20, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: September 30, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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