United States Department of Labor
Employees' Compensation Appeals Board

JOHN S. CRAIG, Appellant	)	
and	)	**Docket No. 05-753**
	)	**Issued: July 15, 2005**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Chicago, IL, Employer	)	

Appearances:
Annettia Davita, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 11, 2005 appellant filed a timely appeal of a January 7, 2005 decision of the Office of Workers' Compensation Programs, denying merit review of a June 2, 2004 merit decision with respect to an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue and the January 7, 2005 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has more than a three percent permanent impairment to his right leg, for which he received a schedule award on March 11, 2003; and (2) whether the Office properly denied appellant's request for reconsideration without further merit review of the claim.

FACTUAL HISTORY

On June 28, 2001 appellant, then a 35-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury while working mail on that date. The Office accepted

the claim for lumbosacral strain and protruding discs at L4-5 and L5-S1. Appellant underwent lumbar surgery in October 2001 and returned to work in December 2001.

In a report dated August 26, 2002, Dr. Francisco Espinosa, a neurosurgeon, provided a history and results on examination. He noted that appellant was seen on July 19, 2002 with sensory and motor testing normal and he was again examined on August 23, 2002. Dr. Espinosa reported that appellant had normal sensation and appeared to have normal motor strength, although appellant had to give way at maximum resistance because of pain. He stated that appellant continued to have an L5 radiculopathy and he was no longer able to carry out any sports activities. Dr. Espinosa concluded, "It is therefore estimated that his permanent impairment from the injury that he sustained in June 2001 is 7 to 10 percent."

By report dated February 3, 2003, an Office medical adviser opined that appellant had a three percent permanent impairment to his right leg. The medical adviser identified Table 15-18 for the L5 nerve root and graded the impairment at 60 percent of the maximum 5 percent, for a 3 percent leg impairment. He found that the date of maximum medical improvement was July 19, 2002, when Dr. Espinosa reported a normal examination.

By decision dated March 11, 2003, the Office issued a schedule award for a three percent permanent impairment to the right leg. The period of the award was 8.64 weeks from July 19, 2002.

Appellant requested a hearing before an Office hearing representative, which was held on November 19, 2003. Appellant submitted a report dated December 2, 2003 from Dr. Espinosa, who provided results on examination and found normal strength and reflexes. He stated that appellant continued to have L5 radiculopathy symptoms, although there was no objective neurological abnormality. Dr. Espinosa stated that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) "it is estimated that he is at least [three] percent impaired from carrying out daily living activities and performing his work. He is, however, incapacitated for any sports activities that he may wish to do. That is why the impairment would be at least [seven] percent from the guidelines used by the A.M.A., [*Guides*]."

In a decision dated February 3, 2004, an Office hearing representative affirmed the March 11, 2003 decision. The hearing representative found that the reports of Dr. Espinosa did not cite to any tables of figures under the A.M.A., *Guides* and that the weight of the evidence was represented by the Office medical adviser.

Appellant requested reconsideration and submitted an April 12, 2004 report from Dr. Espinosa, who referred to Table 15-3 of the A.M.A., *Guides*. According to Dr. Espinosa, appellant's spinal impairment fit the definition of the DRE (diagnosis related estimate) Lumbar Category III, which has a 10 to 13 whole person impairment. He concluded that appellant had at least a 10 percent whole person impairment.

An Office medical adviser reviewed Dr. Espinosa's report and, in a report dated May 3, 2004, he opined that appellant did not have more than a three percent right leg impairment. The medical adviser noted that the Federal Employees' Compensation Act did not provide for impairments to the spine.

In a decision dated June 2, 2004, the Office determined the medical evidence did not establish a right leg impairment greater than three percent. Appellant again requested reconsideration and submitted a September 17, 2004 report from Dr. Espinosa, who again opined that under Table 15-3 appellant had at least a 10 percent permanent impairment. By decision dated January 7, 2005, the Office found that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[2] As of February 1, 2001, the fifth edition of the A.M.A., *Guides* was to be used to calculate schedule awards.[3]

ANALYSIS -- ISSUE 1

The Office issued a schedule award on March 11, 2003 for a three percent permanent impairment to the right leg. The percentage of permanent impairment was determined by an Office medical adviser, who reviewed the reports of attending physician Dr. Espinosa and found that appellant had a Grade 3 impairment for pain in the L5 nerve root. Table 15-18 provides that an L5 nerve root impairment affecting the lower extremity has a maximum leg impairment of 5 percent for loss of function due to sensory deficit or pain.[4] Under Table 15-15, a Grade 3 impairment for slight pain that interferes with some activities results in up to 60 percent of the maximum impairment.[5] The medical adviser indicated that 60 percent of the maximum 5 percent results in a 3 percent leg impairment. This is in accord with the A.M.A., *Guides* and the findings of Dr. Espinosa, who described a mild L5 radiculopathy.

Appellant argues that Dr. Espinosa found a greater impairment that three percent and that he should be entitled to a greater award. However, the physician did not provide a reasoned opinion with respect to the percentage of permanent impairment under the Act. In reports August 26, 2002 and December 2, 2003, he referred to a 7 to 10 percent impairment, without citing to any specific tables in the A.M.A., *Guides* or explaining how the percentage was

[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[2] *A. George Lampo*, 45 ECAB 441 (1994).

[3] FECA Bulletin No. 01-05 (issued January 29, 2001).

[4] A.M.A., *Guides* 424, Table 15-18.

[5] *Id.* at 424, Table 15-15.

calculated. In an April 12, 2004 report, Dr. Espinosa identified Table 15-3, which provides criteria for rating impairments to the whole person due to lumbar spine injuries.[6] This table is not appropriate for schedule award determinations under the Act. Although an injury to the spine may result in an impairment to a scheduled member, neither the Act nor its regulations provide for a schedule award for impairment to the back itself or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.[7] It is not appropriate to use Table 15-3 because it pertains to a back impairment alone and refers to a whole person impairment.[8]

Accordingly, the Board finds that the reports of Dr. Espinosa do not establish an impairment greater than the three percent leg impairment previously issued. The probative medical evidence with respect to a leg impairment under the A.M.A., *Guides* is the Office medical adviser's opinion that appellant has a three percent impairment due to L5 radicular pain.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that [the Office] erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by [the Office]; or (3) constitutes relevant and pertinent evidence not previously considered by [the Office]."[10] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[11]

ANALYSIS -- ISSUE 2

On reconsideration appellant submitted a September 17, 2004 report from Dr. Espinosa. This report does not constitute relevant and pertinent evidence not previously considered, as Dr. Espinosa did not provide new and relevant evidence on the issue presented. He indicated again that appellant had a 10 to 13 person whole person impairment under Table 15-3, without providing any new and relevant information on the schedule award issue.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and

[6] *Id.* at 384, Table 15-3.

[7] *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

[8] *See Guiseppe Aversa*, 55 ECAB ___ (Docket No. 03-2042, issued December 12, 2003).

[9] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

[10] 20 C.F.R. § 10.606(b)(2).

[11] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

pertinent evidence not previously considered by the Office. Since he did not meet the requirements of section 606(b)(2), the Office properly declined to review the merits of the claim.

CONCLUSION

The Board finds that appellant did not establish more than a three percent permanent impairment to his right leg, for which he received a schedule award on March 11, 2003. The Board further finds that the Office properly refused to reopen the claim for review of the merits in its January 7, 2005 decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 7, 2005 and June 2, 2004 are affirmed.

Issued: July 15, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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