United States Department of Labor
Employees' Compensation Appeals Board

W.R., Appellant	)	
and	)	**Docket No. 07-176**
	)	**Issued: April 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Asbury Park, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 25, 2006 appellant, through her attorney, filed a timely appeal from a May 8, 2006 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a five percent impairment of each lower extremity for which she received a schedule award.

FACTUAL HISTORY

On June 11, 2002 appellant, then a 38-year-old letter carrier, filed a claim for a traumatic injury to her back occurring on May 30, 2002 when she picked up a tray of mail. The Office accepted the claim for lumbar sprain, an aggravation of degenerative disc disease and left-sided radiculopathy. She received continuation of pay from June 3 to July 7, 2002 and compensation from July 17 to August 4, 2002, when she resumed limited-duty employment.

On September 16, 2003 Dr. Lambro Demetriades, an orthopedic surgeon and attending physician,[1] discussed appellant's history of back pain following heavy lifting at work. He listed findings of "normal strength and sensation in both lower extremities" and no radiculopathy. Dr. Demetriades diagnosed degenerative changes of the lumbar spine and recommended that she continue working with restrictions in "her present position on a permanent basis."

On October 20, 2003 appellant requested a schedule award. She submitted a report dated August 18, 2003 from Dr. David Weiss, an osteopath, who diagnosed chronic lumbosacral strain and sprain, discogenic disease at L4-5 and L5-S1, lumbar radiculopathy with a history of a positive electromyogram (EMG) on September 30, 2002, and a disc herniation at L5-S1 by discogram. On physical examination, he stated:

> "Manual muscle strength testing of the hip flexors reveals a grade of 4+5 bilaterally. The gastrocnemius reveal a grade of 5/5 bilaterally."
>
> "Sensory examination reveals a perceived sensory deficit over the L4, L5 and S1 dermatomes on the left and over the L5 dermatome on the right."
>
> "The gastrocnemius circumferential measurements reveal 46 [centimeters] on the right versus 45.5 [centimeters] on the left."

Citing to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), Dr. Weiss determined that appellant had a 5 percent impairment for loss of motor strength of the left hip flexors,[2] a 2 percent impairment for loss of motor strength of the left extensor hallucis longus,[3] and a 4 percent impairment due to sensory deficit of the left L4, L5 and S1 nerve root, respectively, for a combined left lower extremity impairment of 16 percent.[4] He added a 3 percent impairment due to pain to find a 19 percent total left lower extremity impairment.[5] For the right side, Dr. Weiss determined that appellant had a five percent impairment for loss of motor strength of the right hip flexor[6] and a four percent impairment of the L5 nerve root due to sensory deficit,[7] for a combined right lower extremity impairment of nine percent. He added 3 percent due to pain to find a 12 percent total impairment of the right lower extremity.[8]

[1] The Office approved appellant's request for an evaluation by Dr. Demetriades.

[2] A.M.A., *Guides* 532, Table 17-8.

[3] *Id*.

[4] *Id*. at 424, Tables 15-15, 15-18.

[5] *Id*. at 574, Figure 18-1.

[6] *Id*. at 532, Table 17-8.

[7] *Id*. at 424, Tables 15-15, 15-18.

[8] *Id*. at 574, Figure 18-1.

An Office medical adviser reviewed Dr. Weiss' report on June 17, 2004. He determined that a conflict existed between Dr. Demetriades and Dr. Weiss regarding whether appellant had sensory and motor deficits of the lower extremities.

By letter dated June 22, 2004, the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated July 8, 2004, Dr. Dennis discussed appellant's subjective complaints, reviewed the medical evidence of record and listed findings on physical examination. He found no weakness, atrophy or neurological deficit of the lower extremities. Dr. Dennis indicated that he had reviewed Dr. Weiss' August 18, 2003 report but was unable to reproduce the sensory and motor deficits described. He diagnosed resolved lumbar sprain, lumbar radiculopathy due to L4-5 and L5-S1 disc protrusions superimposed on degenerative changes, mostly resolved and L5 radiculopathy by EMG with no "ongoing present persistent neurological deficits." Dr. Dennis asserted:

> "If you turn to [p]age 532, Table 17.8 and tr[y] to find any atrophy of muscle groups or neurological loss as it relates to the lower extremities, one would come up with no more than a five percent functional loss of the right lower extremity and left lower extremity. That would be, in my opinion, an appropriate extrapolation of this Table, that tries to identify neurological deficits due to herniated discs. This five percent permanent functional loss of the right lower extremity and a five percent permanent functional loss of the left lower extremity is given in respect to the EMG findings, the MRI findings, some of the findings provided by other physicians, and giving [appellant] the maximal benefit of the doubt in regards to how much of these findings are due to the described work accident and how much was preexisting."

He noted that it would be more accurate to rate appellant's lower back impairment. Dr. Dennis opined that she reached maximum medical improvement on September 16, 2003.

On January 20, 2005 an Office medical adviser reviewed Dr. Dennis' report and concurred with his findings and application of Table 17-8 on page 532 of the A.M.A., *Guides*. By decision dated February 7, 2005, the Office granted appellant a schedule award for a five percent permanent impairment of the right lower extremity and a five percent permanent impairment of the left lower extremity. The period of the award ran for 28.80 weeks from September 16, 2003 to April 4, 2004.

Appellant, through her attorney, requested an oral hearing, which was held on February 28, 2006. At the hearing, counsel argued that as both Dr. Demetriades and Dr. Weiss were attending physicians, the record contained no conflict in medical opinion at the time of her referral to Dr. Dennis.

In a decision dated May 8, 2006, the Office hearing representative affirmed the February 7, 2005 decision. He determined that Dr. Dennis resolved a conflict between Dr. Weiss and the Office medical adviser, who found that Dr. Demetriades' findings were inconsistent with Dr. Weiss' report.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[9] and its implementing federal regulation,[10] 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[11]

Section 8123(a) provides that, 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.[12] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13]

ANALYSIS

The Office accepted that appellant sustained lumbar sprain, an aggravation of degenerative disc disease and left-sided radiculopathy due to a May 30, 2002 employment injury. In a report dated September 16, 2003, Dr. Demetriades, her attending physician, found that she had normal strength and sensation in the lower extremities and recommended permanent work restrictions. On October 20, 2003 appellant filed a claim for a schedule award. In support of her request, she submitted a report dated August 18, 2003 from Dr. Weiss, who found that appellant had a four percent impairment of the left L4, L5 and S1 dermatome, respectively, due to sensory deficits and a four percent impairment of the right L5 dermatome.[14] He further found that she had a five percent impairment for bilateral loss of hip flexor strength on the left and a two percent impairment for loss of strength of the left extensor hallucis longus.[15] Dr. Weiss combined these findings and determined that appellant had a 16 percent left lower extremity impairment and a 9 percent right lower extremity impairment. He then added an additional bilateral three percent impairment due to pain under Chapter 18 and concluded that appellant had a 19 percent left lower extremity impairment and a 12 percent right lower extremity impairment.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] 20 C.F.R. § 10.404(a).

[12] 5 U.S.C. § 8123(a).

[13] 20 C.F.R. § 10.321.

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

[15] *Id*. at 532, Table 17-8.

An Office medical adviser reviewed Dr. Weiss' report and determined that a conflict in medical opinion existed between Dr. Demetriades and Dr. Weiss on the issue of whether appellant had sensory and motor deficits of the lower extremities. The Office referred appellant to Dr. Dennis for resolution of the conflict. As Dr. Demetriades and Dr. Weiss were both attending physicians, however, no conflict in medical opinion existed under section 8123.[16] The hearing representative found that the conflict existed between the Office medical adviser and Dr. Weiss; however, the Office medical adviser merely identified the existence of a conflict and did not render his own opinion on the issue of whether appellant had lower extremity sensory and motor deficits. Dr. Dennis, consequently, is not an impartial medical examiner but instead provided a second opinion examination.

In a report dated July 8, 2004, Dr. Dennis found that appellant had no lower extremity weakness, atrophy or neurological deficit. He noted that an EMG revealed L5 radiculopathy but indicated that he could find no motor or sensory deficits on examination. Dr. Dennis determined that appellant had a five percent impairment of both the right and left lower extremity according to Table 17-8 on page 532 of the A.M.A., *Guides*.

The Board finds a conflict in medical opinion between appellant's physician, Dr. Weiss, and the Office referral physician, Dr. Dennis, on the extent of her permanent impairment of the lower extremities. Section 8123(a) of the Act provides that if there is a 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 the examination.[17] In accordance with section 8123, the case will be remanded for the Office to refer appellant to an impartial medical specialist for a determination of the extent of her right and left lower extremity impairment. After such further development as the Office deems necessary, it shall issue an appropriate decision regarding her entitlement to a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision due to a conflict in medical evidence.

[16] Section 8123(a) provides that if there is a 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. 5 U.S.C. § 8123.

[17] 5 U.S.C. § 8123.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 8, 2006 is set aside and the case is remanded for further proceeding consistent with this decision.

Issued: April 9, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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