United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	**Docket No. 08-349**
	)	**Issued: August 14, 2008**
U. S. POSTAL SERVICE, SOUTHEASTERN PLANT & DISTRIBUTION CENTER, Southeastern, PA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2007 appellant filed a timely appeal from the June 19, 2007 decision of the Office of Workers' Compensation Programs' hearing representative decision, which affirmed the Office's November 22, 2006 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained more than a six percent permanent impairment of her right lower extremity and more than a six percent permanent impairment of her left lower extremity, for which she received a schedule award.

FACTUAL HISTORY

This case was previously on appeal before the Board. In a decision dated January 25, 2002, the Board found that the Office did not meet its burden of proof to terminate appellant's

compensation benefits as the record contained an unresolved conflict regarding the extent of her work-related injury and the aggravation of her underlying degenerative condition. The Board reversed the Office's November 2, 2000 and May 2, 2001 decisions, which terminated appellant's compensation benefits.[1] The facts of the case, as set forth in the prior decision, are incorporated by reference. The relevant facts have been reiterated and include that on September 25, 1999 appellant, then a 55-year-old flat sorting machine operator, injured her lower back while pushing tubs of mail at work. The Office accepted appellant's claim for lumbar strain and later expanded the claim to include temporary aggravation of lumbar degenerative disc disease.[2]

In a November 18, 2003 report, Dr. David Weiss, an osteopath, noted appellant's history of injury and treatment. He examined the lumbosacral spine and indicated that appellant had a well-healed laminectomy scar and marked paravertebral muscular spasm and tenderness noted over the posterior midline, with posterior superior iliac spine tenderness and iliolumbar ligamentous tenderness. Regarding range of motion, Dr. Weiss advised that appellant had forward flexion of 70/80 degrees; backward extension of 20/30 degrees and right lateral flexion of 20/30 degrees. He advised that all ranges of motion were carried through with pain at the extreme reached. Dr. Weiss utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*) (5th ed. 2001). He determined that manual strength testing revealed that the hip flexor were a 4/5 on the left. Dr. Weiss advised that appellant was allotted five percent for her motor strength deficit in the left hip flexors and referred to Table 17-8.[3] He also indicated that appellant had complaints of back pain and stiffness which were daily and constant in nature and which radiated to her left lower extremity. Furthermore, Dr. Weiss noted that her activities of daily living were restricted and indicated that appellant warranted a rating of three percent for her pain according to Figure 18-1.[4] He added these values and opined that appellant was entitled to an eight percent left lower extremity impairment. Furthermore, Dr. Weiss determined that appellant had a circumference of 37 centimeters (cm) on the left versus 36 cm on the right gastrocnemius and opined that she was entitled to an impairment of eight percent for right calf atrophy according to Table 17-6.[5] He allotted appellant an additional three percent for pain on the right lower extremity according to Figure 18-1.[6] Dr. Weiss added the values and advised that appellant was entitled to an impairment of 11 percent for the right lower extremity. He opined that appellant reached maximum medical improvement on November 18, 2003.

Appellant completed a Form CA-7 claim for a schedule award on February 23, 2004. On August 31, 2006 her representative repeated his request for a schedule award.

---

[1] Docket No. 01-1939 (issued January 25, 2002).

[2] The Office, however, did not accept that appellant's May 7, 2001 L5-S1 laminectomy was medically necessary due to the effects of her employment injury.

[3] A.M.A., *Guides* 532.

[4] *Id*. at 574.

[5] *Id*. at 530.

[6] *See supra* note 4.

In a November 3, 2006 report, an Office medical adviser noted that appellant's history included preexisting degenerative disease, involving left-sided disc protrusions at L4-5 and L5-S1 and her May 7, 2001 lumbar laminectomy at L5-S1, which was not authorized. For the left leg, he applied Table 15-18, page 424, of the A.M.A., *Guides*, which provides maximum values for unilateral nerve root impairment affecting the lower extremity. Table 15-18 provides a maximum of five percent impairment for sensory loss (pain) of the L5 nerve root. For the S1 nerve root, the Office medical adviser noted that the maximum for sensory loss was also five percent. He rated impairment for sensory loss utilizing Table 15-15, page 424, to rate appellant's pain as Grade 4, which allows up to a 25 percent deficit. The Office medical adviser multiplied the 25 percent deficit by the 5 percent maximum allowed for L5 nerve root pain to find 1.25 percent impairment, which he rounded to 1 percent. He did the same calculation for the S1 nerve root, which also resulted in a one percent sensory loss. The Office medical adviser determined that appellant was entitled to two percent sensory loss for the left leg. He applied the same tables and procedures to rate sensory impairment of the right leg. However, when performing the calculations for pain and strength in Table 15-15, the Office medical adviser rounded up instead of down and arrived at a value of 1.25 percent impairment for each nerve root. He added these values for pain and strength which were equal to 2.5 percent and rounded them up to 3 percent for the right leg. For weakness in appellant's hip flexors, the Office medical adviser noted that Dr. Weiss referred to Table 17-8.[7] However, he advised that there was no basis for this rating as hip flexors were innervated by L2 and L3 and appellant's disc abnormalities were at L4-5 and L5-S1. The Office medical adviser added that appellant had a resolved lumbar strain with no weakness or atrophy. He noted that, under the A.M.A., *Guides,* section 17.2E, *Manual Muscle Testing*,[8] was best used for pathology that did not have a primary neurologic basis. The Office medical adviser explained that weakness caused by an identifiable motor deficit or a specific peripheral nerve, should be addressed under to section 17.2l[9] and that it was not proper to use this methodology in appellant's case. He opined that appellant had three percent impairment for pain in each leg under Chapter 18.1 of the A.M.A., *Guides*. The Office medical adviser also explained that appellant was not entitled to an award for atrophy on the right. He referred to section 17.20, *Muscle Atrophy Unilateral*,[10] and explained that an atrophy rating should not be combined with any of the other three possible ratings of diminished muscle function, gate derangement, muscle weakness and peripheral nerve injury. Furthermore, the Office medical adviser opined that no other physicians have validated this atrophy measurement. He combined the impairments and determined that appellant was entitled to six percent impairment to the right leg and six percent to the left leg.[11] The medical adviser indicated that appellant reached maximum medical improvement on November 18, 2003.

[7] *Id.*

[8] *Id.* at 531.

[9] *Id*. at 550.

[10] *See supra* note 5.

[11] *See supra* note 4.

On November 22, 2006 the Office granted appellant a schedule award for six percent permanent impairment of the left leg and six percent permanent impairment of the right leg. The award covered November 18, 2003 to July 16, 2004.

On December 1, 2006 appellant's representative requested a hearing, which was held on April 2, 2007.

By decision dated June 19, 2007, the Office hearing representative affirmed the Office's November 22, 2006 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[12] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[13] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[14] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[15]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment of the upper and lower extremities due to sensory and motor loss from a spinal nerve or spinal cord impairment. The nerves involved are first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[16]

ANALYSIS

The Office accepted appellant's claim for a lumbar strain and temporary aggravation of lumbar degenerative disc disease. Appellant claimed a schedule award and submitted a November 18, 2003 report from Dr. Weiss.

Dr. Weiss noted appellant's history provided findings for muscle strength testing, that revealed a hip flexor with a 4/5 on the left and determined that she should be allotted five percent for her motor strength deficit in the left hip flexors according to Table 17-8.[17] Regarding the

[12] 5 U.S.C. §§ 8101-8193.

[13] 5 U.S.C. § 8107.

[14] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[15] 20 C.F.R. § 10.404.

[16] A.M.A., *Guides* 423; *see also B.C.*, 58 ECAB ___ (Docket No. 06-925, issued October 13, 2006).

[17] *See supra* note 3.

right leg he also found that her gastrocnemius circumference was 36 cm on the right and 37 cm on the left, which he found yielded eight percent impairment on the right due to calf atrophy.[18] Dr. Weiss also found that appellant had an additional three percent impairment for each leg due to pain under Figure 18-1 on page 574 of the A.M.A., *Guides.* The Board notes, however, that examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[19] Dr. Weiss did not explain why appellant's condition could not be adequately rated under Chapter 15 relevant to section 15.12 of the fifth edition of the A.M.A., *Guides*. Consequently, his report is of diminished probative value on the extent of appellant's impairment as he did not sufficiently explain his calculations pursuant to the A.M.A., *Guides*.[20]

The Office medical adviser reviewed Dr. Weiss' findings and utilized the A.M.A., *Guides*. He applied Table 15-18,[21] which provides maximum percentages for impairment of unilateral spinal nerves affecting the lower extremities. Regarding both the right and left legs, the Office medical adviser referred to Table 15-18 and multiplied the five percent maximum impairment for loss of function due to sensory deficit or pain for the L5 nerve root and S1 nerve roots by the Grade 4 sensory deficit found in Table 15-15[22] to find impairments of 1.25[23] percent sensory loss and did the same for S1, which also resulted in a 1.25 percent sensory loss. He added the L5 and S1 sensory losses, explaining they were from the same table.[24] Although the Office medical adviser appeared to round up on one instance and down on another, the Board finds that the values he arrived at in his conclusion are the same. The Board notes that the 1.25 value for sensory loss for the L5 nerve root and 1.25 value for sensory loss at the S1 nerve root added together would equate to an impairment of 2.5. The Board notes that this value was rounded up.[25] Thus, the Board finds that the Office medical adviser properly determined that

[18] *See supra* note 5, Table 17-6.

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

[20] *See Vanessa Young*, 55 ECAB 575, 578 (2004) (the evaluation made by the attending physician must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations).

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

[22] *Id.*

[23] He actually indicated 1 percent in one instance and 1.25 percent in another instance; however, this appears to be a calculation error, which is harmless, as the actual schedule award that appellant should have received is less than she was awarded.

[24] The A.M.A., *Guides*, at page 423, actually indicate that such impairments are to be combined. However, this is harmless error as the same result is reached regardless of whether the amounts are combined or added.

[25] *See Marco A. Padilla*, 51 ECAB 202 (1999); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter, 3.700.3b (October 1990) (the policy of the Office is to round the calculated percentage of impairment to the nearest whole point).

appellant was entitled to a three percent sensory loss for the right lower extremity and a three percent sensory loss for the left lower extremity.[26]

The Office medical adviser also addressed the award provided by Dr. Weiss for weakness in appellant's hip flexors, pursuant to Table 17-8.[27] He explained that there was no basis for this award as the hip flexors were innervated by L2 and L3 and appellant's disc abnormalities were at L4-5 and L5-S1. The Office medical adviser further added that the medical evidence did not indicate any weakness in these areas and in fact revealed a resolved lumbar strain with no weakness or atrophy. He referred to section 17.2E, *Manual Muscle Testing,*[28] which indicates that manual muscle testing was best used for pathology that did not have a primary neurologic basis such as a direct muscle trauma. Section 17.2E also indicated that weaknesses caused by an identifiable motor deficit or a specific peripheral nerve, should be accessed according to section 17.21.[29] Thus, it was not appropriate to utilize this methodology in this particular case.

The Office medical adviser also, referring to section 17.20, *Muscle Atrophy Unilateral*, explained that appellant would not be entitled to impairment for atrophy on the right.[30] He explained that an atrophy rating should not be combined with any of the other three possible ratings of diminished muscle function, gate derangement, muscle weakness and peripheral nerve injury. The Office medical adviser also indicated that no other physicians have validated this measurement of atrophy.

The Office medical adviser also found three percent impairment of each leg for pain under Chapter 18 of the A.M.A., *Guides*.[31] However, like Dr. Weiss, he did not address why appellant's pain could not be adequately rated elsewhere in the A.M.A., *Guides.*

The Board thus finds that the evidence supports that appellant has three percent permanent impairment of the right lower extremity and three percent permanent impairment of the left lower extremity. Consequently, she has not established entitlement to a schedule award greater than six percent awarded for each lower extremity by the Office.

On appeal, appellant contends that a conflict exits between the Office medical adviser and Dr. Weiss, appellant's physician. However, as noted above, Dr. Weiss' report was not in accordance with the A.M.A., *Guides*. Consequently, since his opinion did not conform to standards under which the Office rates permanent impairment, it is insufficient to create a conflict.

[26] As noted above, the Office medical adviser made a mistake when adding the values for sensory loss.

[27] *See supra* note 3.

[28] *See supra* note 8.

[29] *See supra* note 9.

[30] *See supra* note 5.

[31] *See supra* note 11.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained more than a six percent impairment of her right lower extremity and more than a six percent permanent impairment of her left lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated June 19, 2007 is affirmed, as modified.

Issued: August 14, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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