United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 08-944**
	)	**Issued: October 9, 2008**
DEPARTMENT OF THE ARMY, U.S. ARMY MATERIAL COMMAND, Fort Monmouth, 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:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 21, 2007 appellant filed a timely appeal of the February 21, 2007 decision of the Office of Workers' Compensation Programs which denied a schedule award for impairment to his lower extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has established that he is entitled to a schedule award for impairment to his lower extremities.

FACTUAL HISTORY

On March 6, 2001 appellant, then a 47-year-old logistic management specialist, sustained injury when he slipped on ice while getting out of his car in the parking lot. On August 25, 2001 the Office accepted his claim for lower back contusion and right shoulder impingement. On October 6, 2004 appellant had a right shoulder arthroscopy. On November 15, 2004 he claimed

a recurrence of disability. Appellant noted that the recurrence occurred after his October 6, 2004 surgery as the metal staples from a previous surgery had to be repaired.

In a medical report dated February 7, 2005, Dr. David Weiss, an osteopath, reviewed the medical reports at the request of his attorney and made the following diagnoses: (1) chronic post-traumatic lumbosacral strain and sprain; (2) herniated nucleus pulposus L3-4 and L5-S1; (3) bulging lumbar disc L4-5; (4) lumbar radiculitis; (5) aggravation of preexisting right shoulder pathology from service-related injury in August 1983 with resultant open repair of glenoid labral tear and correction of impingement syndrome; (6) status post unstable type II superior labral tear and recurrent impingement syndrome, right shoulder; (7) status post diagnostic arthroscopy with debridement/repair of superior labral tear; (8) status post arthroscopic subacromial decompression and acromioplasty; (9) status post arthroscopic debridement of metallic foreign body; and (10) status post distal clavicular resection. After listing his findings on examination of appellant, he applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.) (A.M.A., *Guides*) and concluded that he had a 17 percent impairment of the right upper extremity.[1] Dr. Weiss also determined that appellant had a work-related impairment to his left lower extremity of seven percent based on a sensory deficit of the left L4 nerve root and pain-related impairment of three percent.[2] Finally, he indicated that appellant had a 26 percent of his right lower extremity based on a sensory deficit of the right L4 nerve root of 4 percent,[3] a sensory deficit right L5 nerve root of 4 percent,[4] 4/5 motor strength deficit right gastrocenemius (ankle plantar-flexion) of 17 percent,[5] and pain-related impairment of 3 percent[6] to equal a 26 percent impairment of the right lower extremity of 26 percent. Dr. Weiss concluded that appellant reached maximum medical improvement on February 7, 2005.

On September 20, 2005 appellant filed a claim for a schedule award.

In a memorandum dated January 17, 2006, the Office requested an Office medical adviser to review the medical evidence with regard to appellant's right upper extremity. The Office medical adviser responded on February 7, 2005 and agreed with Dr. Weiss that appellant had 17 percent impairment to his right upper extremity.

[1] Dr. Weiss based this rating on right shoulder range of motion deficit flexion of 2 percent (A.M.A., *Guides* 476, Figure 16-40), right shoulder range of motion deficit abduction of 1 percent (*Id.* at 477, Figure 16-43), right shoulder range of motion deficit internal rotation of 1 percent (*Id.* at 479, Figure 16-46) and a 10 percent rating for right shoulder arthroplasty (*Id.* at 506, Table 16-27) for a combined right upper extremity impairment of 14 percent. To this figure, he added 3 percent for pain-related impairment (A.M.A., *Guides* 574, Table 18-1) to arrive at a total right upper extremity impairment of 17 percent.

[2] A.M.A., *Guides* 574, Table 18-1.

[3] *Id.* at 424, Table 15-15 and 15-18.

[4] *Id.*

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

[6] *Id.* at 574, Table 18-1.

On March 30, 2006 the Office granted a schedule award for 17 percent impairment of the right upper extremity. By letter dated April 6, 2006, appellant requested reconsideration. Appellant, through his attorney, asked for a schedule award determination as to the lower extremities.

On August 24, 2006 the Office requested that the Office medical adviser address appellant's impairment to his lower extremities. The Office medical adviser responded on September 4, 2006, noting that the magnetic resonance imaging (MRI) scan reports did not support Dr. Weiss' findings. He requested appellant's physician's notes to compare to the report of Dr. Weiss.

By letter dated September 6, 2006, the Office informed appellant that additional information was needed prior to determining his entitlement to a schedule award for his lower extremity. It noted that diagnostic studies of the lumbar spine did not support any root compression. The Office asked for progress notes from his treating physician so that a comparison could be made to the findings of Dr. Weiss. By letter dated September 22, 2006, appellant's attorney responded by submitting copies "all medical notes in our possession...."

By memorandum dated October 4, 2006, the Office referred this information to the Office medical adviser. On October 5, 2006 the Office medical adviser noted that the additional medical evidence pertained to the shoulder and not the low back. He noted that the January 12, MRI scan indicated "very small crescentsic area of T2 hyperintensity is present within the left neuroforamen." The Office medical adviser indicated that he needed the actual MRI scan film for clarification.

By decision dated February 21, 2007, the Office found that appellant established a recurrence of disability on October 6, 2004. It also found that the medical evidence failed to establish that appellant sustained any permanent impairment with respect to his lower extremities.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[7] provides for compensation to employees sustaining permanent loss, or loss of use, of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (5th ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[8]

[7] 5 U.S.C. §§ 8101-8193.

[8] *See* 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

No schedule award is payable for a member, function or organ of the body not specified under the Act or the implementing regulation.[9] Neither the Act nor the regulations provide for a schedule award for loss of use of the back or to the body as a whole.[10] However, the schedule award provisions of the Act include the extremities and a claimant must be entitled to a schedule award for permanent impairment to a lower extremity event though the cause of such impairment originates in the spine.[11]

Section 8123 of the Act 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]

ANALYSIS

The Office accepted appellant's claim for lower back contusion and right shoulder impingement. In its decision dated March 30, 2006, it issued a schedule award for a 17 percent impairment of appellant's right upper extremity. Appellant, through his attorney, does not appeal this determination. However, counsel disputes the Office's denial of a schedule award for impairment to appellant's lower extremities.

Dr. Weiss, who examined appellant at the request of his attorney, applied the A.M.A., *Guides* and determined that appellant had a 26 percent impairment of the right lower extremity and a 7 percent impairment of his left lower extremity. The Office referred this case to the Office medical adviser who determined that appellant was not entitled to a schedule award to his lower extremities. The Office medical adviser opined that the diagnostic studies of record did not establish that appellant had an impairment to his lower extremities. Accordingly, there is an unresolved conflict between appellant's physician, Dr. Weiss and the Office medical adviser with regard to whether appellant has any impairment to his lower extremities. The case will be remanded to the Office for referral to an impartial medial examiner for resolution of the conflict.

CONCLUSION

The case is not in posture for decision.

[9] *See J.Q.*, 59 ECAB __ (Docket No. 06-2152, issued March 5, 2008).

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

[11] *See J.Q., supra* note 9; *Vanessa Young*, 55 ECAB 575 (2004).

[12] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 21, 2007 is vacated in part and the case is remanded for further consideration consistent with this opinion.

Issued: October 9, 2008
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