United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 09-820**
	)	**Issued: November 12, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brick, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 5, 2009 appellant filed a timely appeal from March 28 and September 30, 2008 decisions of the Office of Workers' Compensation Programs adjudicating his claim for a schedule award. Pursuant to 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 more than three percent permanent impairment of the left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On October 4, 2002 appellant, then a 49-year-old housekeeping aide, filed a claim for a traumatic injury on February 1, 2002 when he experienced back spasms after lifting 11 to 12 bags of laundry. In an October 24, 2002 report, Dr. David A. Yazdan, an attending Board-certified neurosurgeon, stated that appellant had a history of back injuries, the most recent

occurring in February 2002 when he aggravated his lumbar region and developed radiculopathy while lifting laundry bags at work. The Office accepted appellant's claim for an aggravation of a lumbar sprain. On October 16, 2002 appellant underwent surgery, performed by Dr. Yazdan, for left-sided lumbar stenosis at L4-5 and L5-S1 with radiculopathy. On January 22, 2008 he filed a claim for a schedule award.

In a report dated August 22, 2007, Dr. David Weiss, an osteopath, specializing in orthopedic medicine, reviewed the medical history and provided findings on physical examination. He noted that appellant had a history of lumbar spine injuries dating back to 1981 when he had a slip and fall injury. Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain and sprain,[1] spinal stenosis at L4-5 and L5-S1, left lumbar radiculopathy, post-traumatic facet joint syndrome with facet joint arthropathy at L4-5 and L5-S1, status post lumbar decompression with medial facetectomy, foraminotomy and hemilaminectomy at L4-5 and L5-S1 on October 16, 2002 and herniated discs at L1-2, L2-3, L4-5 and L5-S1. Appellant described intermittent low back pain and stiffness and radicular pain with numbness and tingling into the left leg. He had difficulty with prolonged sitting and standing, rising from a seated to standing position, lifting weights greater than 25 pounds and repetitive bending, twisting and lifting. Appellant described his pain as a 5 on a scale of 0 to 10. Findings on physical examination included lumbar spine range of motion of 65 degrees forward flexion, 10 degrees extension, left lateral flexion of 15 degrees and right lateral flexion of 20 degrees. Range of motion was restricted and painful on forward flexion, backward extension and left and right lateral flexion. The sitting root sign was positive on the left at 35 degrees and produced midline low back pain. Straight leg raising was positive on the left at 45 degrees above the horizontal and produced midline low back pain. The extensor hallucis longus muscle was graded at 5/5 bilaterally. Manual muscle strength testing of the lower extremities revealed the hip flexor, gastrocnemius and quadriceps muscles graded at 5/5 bilaterally. Sensory examination failed to reveal any perceived dermatomal abnormalities in either the right or left lower extremity. The gastrocnemius circumferential measurements were 42.5 centimeters (cm) on the right and 42 cm on the left. Dr. Weiss found that appellant had three percent impairment of the left lower extremity for pain based on Figure 18-1 at page 574 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a report dated November 15, 2007, Dr. Yazdan disagreed with the three percent impairment rating of Dr. Weiss, but he did not indicate that he had personally examined appellant and did not provide any findings on physical examination. He opined that appellant had at least 30 percent impairment based on the A.M.A., *Guides*. On December 10, 2007 Dr. Yazdan clarified that he had used the fourth edition of the A.M.A., *Guides* in finding that appellant had at least 30 percent impairment. He stated that appellant favored his left lower extremity and had an antalgic gait rated at 15 percent impairment. Dr. Yazdan had minimal left lower extremity atrophy which equaled four percent impairment. Appellant had 10 percent impairment of the whole person based on slight weakness of the dorsiflexors of the left foot. He had eight percent impairment due to limited back flexion and extension.

[1] As noted, only an aggravation of a lumbar sprain is accepted in this case.

On February 22, 2008 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an Office medical adviser, noted deficiencies in Dr. Yazdan's impairment rating. He applied the fourth edition of the A.M.A., *Guides* rather than the applicable edition at that time, the fifth edition, did not indicate that he had examined appellant and included 10 percent impairment of the whole person which is not accepted under Office procedures for determining impairment. Dr. Yazdan also found four percent impairment for minimal muscle atrophy but did not specify the amount of atrophy or the exact location of atrophy. Dr. Berman indicated that the three percent left lower extremity impairment for pain based on Chapter 18 of the A.M.A., *Guides* found by Dr. Weiss was reasonable. He noted that appellant underwent surgery on the left L5 and left S1 nerve roots and a magnetic resonance imaging (MRI) scan was positive. Dr. Berman stated that Tables 15-18 and 15-15 at page 424 provide for impairment due to spinal nerve root impairment affecting a lower extremity. He estimated a Grade 4 impairment which resulted in 1.25 percent impairment for each nerve root (5 percent maximum for a nerve root from Table 15-18 multiplied by 25 percent for Grade 4 from Table 15-15 equals 1.25 percent), or 2.50 percent total impairment, rounded to 3 percent, which was the same percentage of impairment found by Dr. Weiss by applying Chapter 18. Dr. Berman noted that impairment based on Table 15-15 and Figure 18-1 could not be combined because both impairment rating methods involved sensory loss or pain. He recommended a schedule award for three percent left lower extremity impairment.

By decision dated March 28, 2008, the Office granted appellant a schedule award based on three percent impairment of the left lower extremity for 8.64 weeks, from August 22 to October 21, 2007.[2] Appellant requested a hearing before an Office hearing representative that was held on July 16, 2008.

On April 18, 2008 Dr. Yazdan stated that he did not accept the A.M.A., *Guides* as a basis for determining impairment because it dehumanized the patient. He indicated that he based appellant's impairment at 30 percent on his personal evaluation of how he functioned and other criteria. On May 16, 2008 Dr. Yazdan stated that appellant had approximately 25 percent of the whole person based on the fifth edition of the A.M.A., *Guides*, including 7 percent for antalgic gait from Table 17-5, 2 percent for mild atrophy based on Table 17-6, 10 percent for slight weakness of the dorsiflexes of the left foot based on Table 17-8 and 8 percent for decreased flexion and extension range of motion of the lumbar spine.

By decision dated September 30, 2008, an Office hearing representative affirmed the March 28, 2008 decision on the grounds that the evidence established that appellant has no more than three percent impairment to his left lower extremity.

LEGAL PRECEDENT

Section 8107 of the Act[3] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as

[2] The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss of use of the lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by three percent for the left lower extremity equals 8.64 weeks of compensation.

[3] 5 U.S.C. § 8107.

permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[4]

The A.M.A., *Guides* provides for three separate methods for calculating the lower extremity permanent impairment of an individual: anatomic, functional and diagnosis based.[5] The anatomic method involves noting changes, including muscle atrophy, nerve impairment and vascular derangement, as found during physical examination.[6] The diagnosis-based method may be used to evaluate impairments caused by specific fractures and deformities, as well as ligamentous instability, bursitis and various surgical procedures, including joint replacements and meniscectomies.[7] The functional method is used for conditions when anatomic changes are difficult to categorize, or when functional implications have been documented, and includes range of motion, gait derangement and muscle strength.[8] The evaluating physician must determine which method best describes the impairment of a specific individual based on patient history and physical examination.[9] When uncertain about which method to use, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating.[10] If more than one method can be used, the method that provides the higher impairment rating should be adopted.[11]

ANALYSIS

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is required.

In reports dated November 15 and December 10, 2007, Dr. Yazdan opined that appellant had at least 30 percent total impairment based on the A.M.A., *Guides*. There are several deficiencies in his impairment rating. Dr. Yazdan did not indicate that he had personally examined appellant and did not provide any findings on physical examination. Initially, he did not apply the applicable edition of the A.M.A., *Guides*, the fifth edition. Dr. Yazdan stated that appellant favored his left lower extremity and had an antalgic gait rated at 15 percent impairment, minimal left lower extremity atrophy which equaled 4 percent impairment, 10 percent impairment of the whole person based on slight weakness of the dorsiflexors of the left foot and 8 percent impairment due to limited back flexion and extension. He did not reference

[4] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[5] A.M.A., *Guides* 525.

[6] *Id.*

[7] *Id.*

[8] *Id*. at 525, Table 17-1.

[9] *Id*. at 548, 555.

[10] *Id*. at 526.

[11] *Id*. at 527, 555.

any specific sections of the A.M.A., *Guides* to explain how he made his impairment determination. Additionally, Dr. Yazdan found impairment of the whole person. Although Chapter 15 provides for determination of impairment based on the whole person, the Act does not provide for a schedule award based on permanent impairment of the whole person.[12] Dr. Yazdan found four percent impairment for muscle atrophy but did not specify the amount of atrophy or the exact location of atrophy or the section of the A.M.A., *Guides* that he applied. In an April 18, 2008 report, he stated that he did not accept the A.M.A., *Guides* as a basis for determining impairment because it dehumanized the patient; however, Office procedures require use of the A.M.A., *Guides* in determining impairment. On May 16, 2008 Dr. Yazdan stated that appellant had approximately 25 percent of the whole person based on the fifth edition of the A.M.A., *Guides*, including 7 percent whole person for antalgic gait from Table 17-5 at page 529 of the A.M.A., *Guides*, 2 percent for mild atrophy based on Table 17-6 at page 530, 10 percent for slight weakness of the dorsiflexes of the left foot based on Table 17-8 at page 532 and 8 percent for decreased flexion and extension range of motion of the lumbar spine. However, as noted, Office procedures do not include impairment based on the whole person. Due to these deficiencies, Dr. Yazdan's impairment rating is not sufficient to determine the extent of appellant's left lower extremity impairment.

Dr. Weiss noted that appellant had intermittent low back pain and stiffness and radicular pain with numbness and tingling into the left leg. He had difficulty with prolonged sitting and standing, rising from a seated to standing position, lifting weights greater than 25 pounds and repetitive bending, twisting and lifting. Appellant described his pain as a 5 on a scale of 0 to 10. Straight leg raising was positive on the left and produced midline low back pain. Motor strength of the left lower extremity was normal. Dr. Weiss found that appellant had three percent impairment of the left lower extremity for pain based on Figure 18-1 at page 574 of the fifth edition of the A.M.A., *Guides*.[13] The A.M.A., *Guides* warns, however, that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters.[14] Moreover, as the A.M.A., *Guides* explains: "The impairment ratings in the body organ system chapters make allowance for expected accompanying pain."[15] Dr. Weiss did not adequately explain why appellant's condition could not be rated in other chapters of the A.M.A., *Guides* or how his condition falls within one of the several situations identified under section 18.3a (when this chapter should be used to evaluate pain-related impairment).[16] He did not explain why appellant's left lower extremity pain could not be evaluated using the chapter on lower extremity impairment, Chapter 17. The Board finds that the impairment rating of Dr. Weiss is not sufficient to determine the extent of appellant's left lower extremity impairment.

[12] *Tania R. Keka*, 55 ECAB 354 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

[13] The A.M.A., *Guides* provides for a maximum of three percent impairment for pain in Chapter 18 at page 573.

[14] A.M.A., *Guides* 571.

[15] *Id*. at 20.

[16] *Id*. at 570-71.

Dr. Berman indicated that Dr. Weiss' finding of three percent left lower extremity impairment for pain based on Chapter 18 of the A.M.A., *Guides* was reasonable. He indicated that there was an alternative method for rating appellant's left lower extremity impairment. Dr. Berman noted that appellant underwent surgery on the left L5 and left S1 nerve roots and an MRI scan was positive. He noted that Tables 15-18 and 15-15 at page 424 of the A.M.A., *Guides* provide for impairment due to spinal nerve root impairment affecting a lower extremity. Dr. Berman estimated a Grade 4 impairment which resulted in 1.25 percent impairment for each nerve root or 2.50 percent total impairment, rounded to 3 percent, which was the same percentage of impairment found by Dr. Weiss by applying Figure 18-1 from Chapter 18. However, he did not provide any medical rationale for applying Grade 4 from Table 15-15 for sensory loss. Additionally, Dr. Berman did not explain why Chapter 17 of the A.M.A., *Guides,* the chapter for evaluating impairment of the lower extremities, could not be used in making an impairment determination of appellant's left lower extremity.

The Board finds that this case is not in posture for a decision. The case will be remanded to the Office for further development of the medical opinion evidence on the issue of appellant's left lower extremity impairment. After such further development as the Office deems necessary, it should issue an appropriate decision.

On appeal, appellant, through his attorney, argues that there is a conflict in the medical opinion evidence between Dr. Yazdan and Dr. Berman. However, as noted, there were several deficiencies in the report of Dr. Yazdan. Consequently, Dr. Yazdan's impairment rating was not sufficient to create a conflict with the opinion of Dr. Berman. In any event, Dr. Berman's opinion is not sufficient to establish the extent of appellant's left lower extremity impairment. Because there is no medical report sufficient to establish his left lower extremity impairment, the case will be remanded for further development.

CONCLUSION

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is required.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 30 and March 28, 2008 are set aside and the case is remanded for further action consistent with this decision.

Issued: November 12, 2009
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