United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer	)	**Docket No. 12-1334** **Issued: January 2, 2013**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 6, 2012 appellant, through his attorney, filed a timely appeal from the May 11, 2012 Office of Workers' Compensation Programs (OWCP) schedule award decision. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 has met his burden of proof in establishing permanent impairment of his left leg.

FACTUAL HISTORY

On or before July 19, 1994 appellant, then a 32-year-old maintenance mechanic, sustained an occupational disease due to repetitive bending at work. OWCP accepted his claim

[1] 5 U.S.C. § 8101 *et seq.*

for left trochanteric bursitis and left leg sciatica. Appellant received compensation benefits effective June 27, 1994. He did not stop work.

On February 5, 2007 appellant filed a claim for a schedule award. On March 1, 2007 OWCP informed him of the medical evidence needed to support his claim. In an April 20, 2007 decision, it denied appellant's claim for a schedule award. OWCP found that there was no medical evidence to establish that he had reached maximum medical improvement or that his left leg sustained permanent impairment.

In an April 17, 2008 report, Dr. Janalee Rissover, a Board-certified internist, diagnosed left greater trochanteric bursitis and left sciatica. Dr. Rissover opined that appellant had 19 percent permanent impairment of the left leg under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On December 1, 2008 OWCP referred appellant for a second opinion examination by Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon. In a January 2, 2009 report, Dr. Fisher opined that appellant had 12 percent left leg impairment under the fifth edition of the A.M.A., *Guides* (5th ed. 2001). On February 27, 2009 an OWCP medical adviser determined that appellant had 15 percent left leg impairment under the fifth edition of the A.M.A., *Guides*.

On July 14, 2009 appellant contacted his representative regarding his claim. In an August 11, 2009 letter, OWCP explained that a conflict in medical opinion was created between Drs. Fisher and Rissover and that an impartial medical examination would be scheduled.

In a September 1, 2009 report, Dr. Fisher provided an updated impairment rating under the sixth edition of the A.M.A., *Guides* (6th ed. 2009). He stated that the left trochanteric bursitis of the hip region would have resolved within two months. Regarding left leg sciatica, Dr. Fisher explained that appellant reached maximum medical improvement by November 1, 1994. He provided findings for range of motion involving the back which included full back motion with 60 degrees of flexion, 20 degrees of lateral bending to the right and left and normal range of motion of the left hip. Dr. Fisher explained that there were no other positive physical findings over the lower extremities. He found subjective findings of numbness, tingling, pins and needles over the left buttock, left side of the left hip and over the left thigh area with no positive neurological findings. Dr. Fisher referred to Table 16-4 of the A.M.A., *Guides* for the left trochanteric bursitis of the left hip and found that appellant had no impairment of the leg. For left leg sciatica, he referred to Table 16-12, for sciatic nerve and determined that appellant had four percent impairment of the left leg. On September 30, 2009 an OWCP medical adviser concurred with Dr. Fisher's rating.[2]

[2] While the record contains some references to Dr. Fisher as an impartial specialist, the record indicates that appellant was referred to him for a second opinion examination. In a November 17, 2009 memorandum, OWCP determined that it could not use Dr. Fisher's report as that of an impartial medical examiner.

On January 7, 2010 OWCP referred appellant together with a statement of accepted facts and the medical record to Dr. Arthur Lee, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Rissover and Fisher.[3]

In a January 21, 2010 report, Dr. Lee reviewed appellant's history of injury. He noted that he would provide two reports, the present report pertaining to appellant's physical examination and a second report pertaining to his review of appellant's medical records. For the lumbosacral spine, there were no signs of muscle wasting or atrophy involving musculature of the low back or the lower extremities on palpation or visual examination. There was no tenderness on palpation of the lumbar spine musculature and no spasm. Straight leg raising was negative and the Patrick's test was negative bilaterally with the sensory motor examination being normal in both lower extremities. Regarding the left hip, Dr. Lee explained that there was no tenderness, no incision, no deformity, a negative log roll examination and no crepitus with range of motion or instability involving the hip. He evaluated appellant's range of motion and reviewed x-rays, which he indicated were normal. Appellant ambulated with a normal gait and did not posture himself in a fashion consistent with ongoing lumbar spine pathology. Sensory and motor examination was normal, there was no tenderness or spasm in the lumbar spine, deep tendon reflexes were normal at the ankles and knees.

Dr. Lee explained that there were no signs of muscle wasting or atrophy consistent with either disuse or neurologic abnormality and explained that active range of motion evaluation was normal in all six directions of motion. He opined that he could "not demonstrate any objective pathologic process involving [appellant's] lumbar spine that could be related to his occupation. In actuality, there is no finding whatsoever irrespective of any potential causation." Dr. Lee indicated that appellant reported "radiating leg pain subjectively involving the left lower extremity." He explained that "on examination there is absolutely no indication of any sort of sciatica or neurologic compromise. This takes into consideration his completely normal deep tendon reflex evaluation, the negative straight leg raise examination, no atrophy on circumference measurements and a normal sensory motor examination. Therefore, this man's subjective complaints of low back and left lower extremity pain are not substantiated by any objective finding." Under the A.M.A., *Guides,* Dr. Lee opined that appellant had no whole person impairment. Regarding the left hip, he explained that there was no tenderness indicating no inflammatory process in the musculature around the hip, there was no instability of the hip and active range of motion of the left hip versus the right was normal and opined that there were "no signs of any left hip pathology irrespective of any potential causation. This would specifically take into consideration appellant's occupation and preventive maintenance." Dr. Lee indicated that appellant had no impairment due to the left hip.

In a March 24, 2010 report, Dr. Lee reviewed the medical record and opined that appellant did not have residuals of the accepted conditions. He stated that appellant did "not demonstrate any findings consistent with the diagnosis of left greater trochanteric bursitis or left sciatica. The only examination findings that [appellant] has are subjective complaints of dysesthesias. However, this is not an objective condition in that [his] historical complaints of

[3] OWCP also asked Dr. Lee to address if residuals of the accepted conditions had ceased. This matter is not presently before the Board.

this nature are completely and totally subjective." Regarding sciatic dysesthesia, Dr. Lee opined that there were no objective findings on evaluation. He explained that, if appellant had sciatic dysesthesias, then he would have five percent lower extremity impairment pursuant to Table 17-7.[4] However, Dr. Lee explained that appellant's conditions of left greater trochanteric bursitis and left sciatica had resolved with no permanent residuals. He opined that appellant had no restrictions or limitations. Dr. Lee explained that regarding the "assumption" of sciatic dysesthesias, the five percent lower extremity impairment applied by Dr. Rissover would be reasonable and appropriate and "if the assumption is made that these are indeed present despite the lack of objective findings, [appellant] would have a five percent left lower extremity impairment rating." However, he explained that he would not place any restrictions on appellant as there was "no indication that the natural history of this man's left hip or low back was, in any way, altered or changed due to his reported work injury." Dr. Lee noted that appellant did not need any ongoing treatment of his resolved diagnoses.

In a May 20, 2010 report, an OWCP medical adviser opined that appellant had five percent impairment of the left lower extremity.

On June 16, 2010 OWCP requested clarification from Dr. Lee. It explained that his opinion could not be based upon an assumption. In an August 19, 2010 addendum, Dr. Lee opined:

> "To make myself perfectly clear, it is my professional opinion, within a reasonable degree of medical probability utilizing the [A.M.A., *Guides*], that [appellant] did NOT sustain any permanent injury at the time of the reported work-related event. In other words, [appellant] has a zero percent whole person impairment in application of the [A.M.A., *Guides*] in consideration of the findings during my independent medical examination of January 21, 2010 and the medical records reviewed in my report of March 24, 2010."

In a March 28, 2011 report, an OWCP medical adviser noted appellant's history and utilized the A.M.A., *Guides.*[5] Regarding permanent functional impairment of the bilateral lower extremities, the medical adviser noted that Dr. Lee found no impairment for either leg. He explained that this was proper as there were no objective findings of any impairment. The medical adviser explained that the spine pathology influence on lower extremity impairment could be determined by referring to the July/August 2009 issue of *The Guides Newsletter* which provided tables for calculating impairment based upon spinal diagnoses that cause impairment based upon nerve root levels. He explained that, because there was a lack of objective findings, there was no impairment. The medical adviser also referred to Table 16-12 for the sciatic nerve and determined that there was no impairment.[6]

[4] A.M.A., *Guides* 576.

[5] OWCP medical adviser was initially unable to provide an accurate opinion in an October 4, 2010 report, as he did not have all of Dr. Lee's reports. OWCP was able to obtain his updated reports and provided them to the medical adviser.

[6] A.M.A., *Guides* 512.

By decision dated June 29, 2011, OWCP denied appellant's claim for a schedule award. It found that the evidence was insufficient to establish a permanent impairment.

On July 5, 2011 appellant's representative requested a telephonic hearing, which was held on October 5, 2011. Appellant's representative submitted additional evidence.

In a September 14, 2011 report, Dr. Martin Fritzhand, a Board-certified urologist, diagnosed left enthesopathy of hip, left hip trochanteric bursitis and left sciatica. He examined appellant and advised that he did not have either bursitis or sciatica but had an injury to the lateral femoral cutaneous nerve since his first complaints in 1994. Dr. Fritzhand opined that there was a causal relationship between his diagnosis and the activities performed by appellant over the years as a mechanic. He indicated that appellant's claim should have been allowed for meralgia paresthetica. Dr. Fritzhand opined that it would be "medically incorrect for me to assess [appellant's] paresthesias/dysesthesias involving the left thigh using any diagnosis other than meralgia paresthetica." He indicated that appellant reached maximum medical improvement by January 1997. Dr. Fritzhand referred to the A.M.A., *Guides* the chapter pertaining to the left lateral femoral cutaneous nerve resulting in meralgia paresthetica, Figure 16-3, Table 16-11 and Table 16-12.[7] He opined that appellant had one percent left leg impairment.

In a December 29, 2011 decision, an OWCP hearing representative affirmed the June 29, 2011 decision.

On February 7, 2012 appellant's representative requested reconsideration and submitted additional evidence. In a December 6, 2011 report, Dr. Rissover noted that appellant presented that day for an opinion on his work injury after she previously evaluated him in 2008. She advised that no further diagnostic testing had occurred since 2008. Dr. Rissover stated that he continued to have numbness and tingling in his left thigh and lower back, on the posterior and lateral aspect of the thigh and across the left lower back. She related that appellant "does n[o]t describe pain or burning but just in deep numb tingling sensation. This seems to be worse at night, when he is not distracted." Appellant had poor lumbar range of motion, scoliosis, subjective numbness and a straight leg raise which was positive on the left side. Dr. Rissover diagnosed greater trochanter bursitis and left sciatica. She stated that he did not have meralgia parasthetica. Dr. Rissover noted that appellant seemed to be functioning fairly well with his current symptoms and continued to work. She stated that she stood by her original evaluation and that he had 19 percent permanent impairment.

By decision dated May 11, 2012, OWCP denied modification of the December 29, 2011 decision.

[7] *Id*. at 533, 537.

LEGAL PRECEDENT

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[8]

Section 8107 of FECA 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.[9] FECA, 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.[10] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[11] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides.*[12]

Although the A.M.A., *Guide*s includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[13] In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[14]

The A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.[15] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[16]

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[8] *Veronica Williams*, 56 ECAB 367 (2005).

[9] 5 U.S.C. § 8107.

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

[11] 20 C.F.R. § 10.404.

[12] *J.B.*, Docket No. 09-2191 (issued May 14, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

[13] *Pamela J. Darling*, 49 ECAB 286 (1998).

[14] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[15] *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

[16] Federal (FECA) Procedure Manual *supra* note 12 at Chapter 3.700, Exhibit 4 (January 2010).

ANALYSIS

The Board finds that appellant did not sustain a ratable impairment of his left leg.

OWCP accepted appellant's claim for left trochanteric bursitis and left leg sciatica. Appellant claimed a schedule award on February 5, 2007. On January 7, 2010 OWCP referred him along with a statement of accepted facts and the medical record to Dr. Lee for an impartial medical evaluation to resolve the conflict in opinion between Drs. Rissover and Fisher regarding whether he had a work-related impairment. FECA provides that if there is disagreement between Dr. Lee making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[17] In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[18]

Dr. Lee examined appellant and provided findings in reports dated January 21 and March 24, 2010. In the January 21, 2010 report, he determined that there were no physical findings present that would warrant rating permanent impairment. Dr. Lee explained that there were no signs of muscle wasting or atrophy involving musculature of the low back or the lower extremities on palpation or visual examination. Sensory and motor examination was normal as well as straight-leg raising and range of motion. There was no lumbar tenderness or spasm. Dr. Lee opined that there was no "objective pathologic process involving [appellant's] lumbar spine that could be related to his occupation." Regarding the left hip, he also advised that there were "no signs of any left hip pathology irrespective of any potential causation." While appellant had subjective complaints of radiating leg pain, examination revealed "absolutely no indication of any sort of sciatica or neurologic compromise." Dr. Lee opined that appellant's "subjective complaints of low back and left lower extremity pain are not substantiated by any objective finding." He advised that appellant did not have any impairment under the A.M.A., *Guides*. In his March 24, 2010 report, Dr. Lee opined that appellant had no current "findings consistent with the diagnosis of left greater trochanteric bursitis or left sciatica." Appellant's only findings on examination were subjective complaints of dysesthesias. Dr. Lee opined that appellant's accepted conditions had completely resolved and there was no pathologic process based upon the 1994 work injury. Although there were no objective findings of sciatic dysesthesias, Dr. Lee explained that, assuming that appellant had sciatic dysesthesias, he would have five percent leg impairment under Chapter 17 of the A.M.A., *Guides*.

On June 16, 2010 OWCP requested clarification[19] from Dr. Lee, noting that his opinion could not be based upon an assumption. In an August 19, 2010 addendum, Dr. Lee opined that

[17] 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

[18] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[19] *Roger W. Griffith*, 51 ECAB 491(2000) (when OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report).

appellant had no permanent impairment under the A.M.A., *Guides* based on his examination findings and his review of the medical records.

In a March 28, 2011 report, an OWCP medical adviser concurred with Dr. Lee. He opined that there was no impairment of either leg as there were no objective findings to support impairment. The medical adviser explained that the spine pathology influence on lower extremity impairment could be determined by referring to the July/August 2009 issue of *The Guides Newsletter,* which provided tables for calculating impairment based upon spinal diagnoses that cause impairment based upon nerve root levels. He explained that because there was a lack of objective findings, no impairment was warranted. The medical adviser also referred to Table 16-12 for the sciatic nerve and found that no impairment was warranted.[20] The Board find that Dr. Lee's opinion was based on an accurate factual background and was sufficiently rationalized to be entitled to special weight.

Subsequent to Dr. Lee's report, appellant submitted additional evidence. Dr. Fritzhand's September 14, 2011 report found one percent impairment due to meralgia paresthetica. However, this condition that was not accepted by OWCP and Dr. Fritzhand did not sufficiently explain how this condition was employment related.[21] Thus, this report is of limited probative value. In a December 6, 2011 report, Dr. Rissover reiterated her 2008 opinion that appellant had 19 percent left leg impairment. However, as she had been on one side of the conflict in the medical opinion that the impartial specialist resolved, her opinion would generally be insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.[22] Dr. Rissover did not provide any rationale to explain how she applied the A.M.A., *Guides*, to any new findings in support of her opinion on impairment.

Appellant did not submit any other medical evidence to support that he was entitled to a schedule award, under the sixth edition of the A.M.A., *Guides*, for a scheduled member of the body under FECA. Accordingly, the Board finds that she has not established entitlement to a schedule award.

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly denied appellant's claim for a schedule award.

[20] A.M.A., *Guides* 512.

[21] *See supra* note 8 (a schedule award can be paid only for a condition related to an employment injury; the claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment).

[22] *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000).

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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