United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 13-28**
	)	**Issued: May 1, 2013**
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:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 3, 2012 appellant, through his attorney, filed a timely appeal from the June 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment of his legs in addition to the three percent permanent impairment of his left leg for which he had received a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

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 laundry bags at work. 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. OWCP accepted his 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 attending osteopath, provided an opinion that appellant had 30 percent permanent impairment of his left leg under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). In reports dated November 15 and December 10, 2007, Dr. Yazdan opined that appellant had at least 30 percent total impairment (which included a whole person impairment rating) based on the fifth edition of the A.M.A., *Guides*. On February 22, 2008 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, found that appellant had three percent permanent impairment of his left leg under the fourth edition of the A.M.A., *Guides.*

In a March 28, 2008 decision, OWCP granted appellant a schedule award for three percent permanent impairment of his right leg. The award ran for 8.64 weeks from August 23 to October 21, 2007. In a decision dated September 30, 2008, an OWCP hearing representative affirmed OWCP's March 28, 2008 decision.

In a November 12, 2009 decision,[2] the Board set aside OWCP's March 28 and September 30, 2008 decisions, finding that the reports of Dr. Weiss, Dr. Yazdan or Dr. Berman did not adequately evaluate the permanent impairment of appellant's left leg. The Board remanded the case to OWCP for further development of the medical evidence with respect to appellant's leg impairment.

On remand, OWCP referred appellant to Dr. Aldo Iulo, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on his leg impairment.

In a September 8, 2010 report, Dr. Iulo discussed appellant's medical history and the findings upon physical examination conducted on that date.[3] He noted that appellant's chief complaints concerned back pain and spasm in the back of his left leg, which he attributed to his February 1, 2002 work injury. Dr. Iulo indicated that, on physical examination of the lumbar spine, appellant complained of tenderness in the left lumbar region but did not complain of sciatic notch tenderness or trochanteric tenderness. When asked to flex, appellant stopped at the 70 degree range and, upon extending, he stopped at the 5 degree range. Right lateral bending

[2] Docket No. 09-820 (issued November 12, 2009).

[3] Dr. Iulo indicated that appellant was treated for a herniated disc and underwent surgery in October 2002.

was to the 10 degree range and left lateral bending was to the 15 degree range. Dr. Iulo indicated that during straight leg raising (while seated) appellant could be brought to 80 degrees of straight leg raising without complaints of pain. Upon examination of the knees (using a distraction technique), appellant did not complain upon hip and knee flexion or upon extension while seated. While reclining, however, he complained of pain in the low back and posterior thigh with straight leg raising at 40 degrees on the left side. Dr. Iulo stated that sensation was intact in the peripheral nerve and dermatome distribution to touch and pinprick. No motor atrophy was noted in the legs and motor strength was 5/5 in the nerve root and peripheral nerve distribution including quadriceps, flexors and extensors of the toes and ankles. Dr. Iulo indicated that hip, knee and ankle flexion and extension were within the normal range with complaints of low back pain.

Dr. Iulo further stated that, after taking a history, examining the patient and reviewing the medical records and the statement of accepted facts, he had determined that appellant reached maximum medical improvement as of February 2003, after which point his condition stabilized. There was no change in appellant's condition, but he still had subjective complaints and did not return to work. Dr. Iulo stated that he did not find any neurologic deficit, no decrease in strength, atrophy or ankylosis or sensory deficit. Appellant had subjective complaints of low back and left leg pain. Dr. Iulo indicated that appellant had a preexisting injury to the low back and noted that he reviewed magnetic resonance imaging (MRI) scans that were brought in with appellant. An August 2, 2002 MRI scan showed degenerative disc disease at L4-5 and L5-S1 resulting in spinal stenosis as well as a mild central protrusion at the midline with degenerative disc disease and secondary stenosis indicating a preexisting condition. Regarding appellant's leg impairment, Dr. Iulo stated:

> "According to the sixth edition of the [A.M.A., *Guides*], page 533, Table 16-11, the claimant has normal sensibility and sensation. [Appellant] has normal motor severity. This is a class 0.
>
> "Page 535, Table 16-12, under the diagnosis of 'mixed nerves – sciatic,' [appellant] is a class 0, no objective sensory or motor deficits.
>
> "This equals a 0 percent residual peripheral nerve lower extremity impairment.
>
> "In summary, the accepted facts were reviewed. [Appellant] had a diagnosis of lumbar sprain and subsequently [was] diagnosed with spinal stenosis and a herniated disc. He underwent surgery. There is no neurologic deficit noted. [Appellant] has subjective complaints and restricted motion in the lumbar spine as described in my report."

In an October 27, 2011 report, Dr. Henry Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that appellant underwent back surgery for a herniated disc in October 2002 and indicated that the postoperative diagnosis after the surgery was radiculopathy secondary to significant spinal stenosis at L4-5 and L5-S1. He stated that, on September 8, 2010, Dr. Iulo found that appellant had no permanent impairment of his legs noting that his examination found no neurological defects in the lower extremities. Dr. Magliato found that Dr. Iulo used the proper table of the sixth edition of the A.M.A., *Guides.* He indicated that

Dr. Iulo found that the sciatic nerve had no motor or sensory loss and no atrophy. Dr. Iulo also correctly determined the date of maximum medical improvement.

In a January 23, 2012 decision, OWCP denied appellant's claim for additional schedule award compensation due to leg impairment. It found that the September 8, 2010 report of Dr. Iulo, as confirmed by the opinion of Dr. Magliato, showed that appellant was not entitled to such additional compensation.

Appellant requested a hearing with an OWCP hearing representative. At the hearing held on April 12, 2012, counsel argued that Dr. Iulo's evaluation did not adequately consider appellant's preexisting conditions and that Dr. Iulo did not provide adequate medical rationale in support of his rating.

In a June 26, 2012 decision, the hearing representative affirmed OWCP's January 23, 2012 decision finding no additional permanent impairment of appellant's legs.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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, FECA 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[8]

An employee seeking compensation under FECA has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

[8] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

schedule award compensation is alleged.[9] The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

ANALYSIS

OWCP accepted that on February 1, 2002 appellant sustained an aggravation of a lumbar sprain. On October 16, 2002 appellant underwent surgery for left-sided lumbar stenosis at L4-5 and L5-S1 with radiculopathy. In a March 28, 2008 decision, OWCP granted him a schedule award for a three percent permanent impairment of his right leg. In a November 12, 2009 decision,[11] the Board set aside OWCP's prior schedule award decision and remanded the case to OWCP for further development of the medical evidence with respect to appellant's leg impairment.

On remand, OWCP referred appellant to Dr. Iulo, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on his leg impairment. The Board finds that OWCP properly relied on the September 8, 2010 report of Dr. Iulo, as confirmed by the opinion of an OWCP medical adviser, to determine that appellant did not have permanent impairment of his legs in addition to the three percent permanent impairment of his left leg for which he received a schedule award.

In his September 8, 2010 report, Dr. Iulo discussed appellant's medical history and the findings upon physical examination conducted on that date.[12] He indicated that during straight leg raising (while seated) appellant could be brought to 80 degrees of straight leg raising without complaints of pain. Upon examination of the knees (using a distraction technique), appellant did not complain upon hip and knee flexion or upon extension while seated. Dr. Iulo stated that sensation was intact in the peripheral nerve and dermatome distribution to touch and pinprick. No motor atrophy was noted in the legs and motor strength was 5/5 in the nerve root and peripheral nerve distribution including quadriceps, flexors and extensors of the toes and ankles. Dr. Iulo indicated that hip, knee and ankle flexion and extension were within the normal range with complaints of low back pain. He stated that he did not find any neurologic deficit, no decrease in strength, atrophy or ankylosis or sensory deficit.

[9] *See Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

[10] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[11] Docket No. 09-820 (issued November 12, 2009).

[12] Dr. Iulo indicated that appellant was treated for a herniated disc and underwent surgery in October 2002.

On appeal, counsel argued that Dr. Iulo did not conduct an adequate neurological examination of appellant, but a review of Dr. Iulo's report shows that he performed a comprehensive neurological evaluation of appellant's back and legs. Dr. Iulo also performed a review of the relevant medical records and considered both preexisting conditions and conditions related to work injuries in assessing whether appellant had permanent impairment of his legs. He properly applied the standards of the sixth edition of the A.M.A., *Guides* to find that appellant had no such impairment. Appellant had subjective complaints of low back and left leg pain. Dr. Iulo referenced Table 16-11 on page 533 and noted that appellant fell under class 0 as he had normal sensibility/sensation and he had normal motor severity. Under the diagnosis of "mixed nerves -- sciatic," appellant fell under class 0 due to no objective sensory or motor deficits. Dr. Iulo properly concluded, "This equals a 0 percent residual peripheral nerve lower extremity impairment." Moreover, in an October 27, 2011 report, Dr. Magliato, a Board-certified orthopedic surgeon, serving as an OWCP medical adviser, indicated that he agreed with Dr. Iulo's assessment.

For these reasons, OWCP properly denied appellant's claim for additional schedule award compensation. Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has permanent impairment of his legs in addition to the three percent permanent impairment of his left leg for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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