United States Department of Labor
Employees' Compensation Appeals Board

RICARDO HALL, Appellant	)	
and	)	**Docket No. 01-1563**
	)	**Issued: August 25, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Ricardo Hall, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 15, 2001 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated October 27, 2000, which denied his request for a schedule award. He also filed a timely appeal of the Office's February 12, 2001 decision denying reconsideration on the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained any permanent impairment to his lower extremities; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 29, 1986 appellant, then a 32-year-old temporary general mechanic, filed a traumatic injury claim alleging that on September 26, 1986 he was injured in a motor vehicle

accident, while in the performance of duty. His claim was accepted for cervical strain, low back strain and a herniated nucleus pulpous at L5-S1.

Appellant received treatment from Dr. James G. Floyd, a Board-certified orthopedic surgeon. In a report dated February 8, 1995, he indicated that appellant's final diagnoses were persistent low back pain with symptoms consistent with failed back syndrome, bilateral carpal tunnel syndrome with recent surgical procedure done on the left side with some improvement and significant continued mental depression. Dr. Floyd indicated that, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 54 percent whole person impairment. On April 19, 1996 he responded to the Office's questions by indicating that appellant reached maximum medical improvement on September 11, 1995. Dr. Floyd noted that the specific nerve branch affected was L5 (left), that the degree of permanent impairment of the lower extremity due to loss of function from sensory deficit, pain or discomfort was 5 percent and that the degree of permanent impairment due to loss of function from decreased strength was 37 percent. In a March 12, 1998 report, Dr. Floyd indicated:

> "According to these examination findings, appellant's diagnosis is chronic back and leg pain of both right and left legs, with a presumptive diagnosis in the past of degenerative disc disease which has failed surgical treatment. Based on the objective and subjective findings and using the A.M.A., *Guides*, especially referring to the diagnostic-related estimates, he would be at the level of [diagnostic related estimate] Lumbosacral Category 2, which is described as a clinical history and examination of findings compatible with specific injury or illness. These findings may include significant or intermittent continuous muscle guarding that has been observed and documented by the physician, nonuniform loss of range of motion, and/or nonverifiable radicular complaints. There is no objective sign of radiculopathy and no loss of structural integrity. This category has a total impairment of five percent whole body impairment."

On April 14, 1999 appellant filed a claim for a schedule award.

By letter dated April 29, 1999, the Office asked Dr. Floyd to respond to various questions. In a medical report dated June 4, 1999, he stated that appellant had reached maximum medical improvement in 1995 and had not changed substantially over the years. Dr. Floyd concluded:

> "Percentage of Impairment: According to the [A.M.A., *Guides*], the patient remains stable at the previous level of disability and will remain at a five percent impairment, whole body, at this point. This disability of five percent includes only the problems with cervical strain and low back pain. Given the other diagnoses including knee pain, bilateral nerve involvement due to carpal tunnel syndrome or ulnar neuropathy, the rating would be higher, but since your letter refers only to the problems with cervical strain and low back, he remains at five percent.

On July 26, 1999 an Office medical adviser indicated that appellant's physical examination of June 4, 1999 revealed no permanent impairment due to the accepted cervical

strain, as the cervical strain on the right and left ulnar neuropathy were not due to the employment injury. He further noted that appellant experienced pain in both legs due to L5 nerve root compression on the right and left. The Office medical adviser indicated that this was a Grade 2 pain, forgotten with activity or 25 percent of the maximum. He noted that under Table 83, the maximum impairment for the L5 root was 5 percent and that 25 percent of 5 percent equals 1.25 percent, which is rounded to 1 percent. The medical adviser concluded that appellant had one percent permanent impairment of each lower extremity for pain. He indicated that the date of maximum medical improvement was 1995.

On July 1, 1999 Dr. Floyd indicated that appellant's date of maximum medical improvement was July 1, 1999. He noted that, with the average dorsiplantar flexion being 60 degrees, appellant could dorsiflex to 20 degrees and plantarflex to 10 degrees. With the average range of inversion-eversion being 50 degrees, he could invert from neutral to 0 degrees and evert from neutral to 5 degrees. Dr. Floyd noted an additional impairment of function due to weakness, atrophy, pain or anesthesia estimated at 75 percent. Based on these findings, he recommended an impairment rating of 50 percent of the left lower extremity. In a second report dated July 16, 2004, Dr. Floyd indicated that appellant had retained active flexion of 100 degrees and retained extension of 0 degrees. He noted that there was an additional impairment of function due to weakness, atrophy, pain or discomfort estimated at 30 percent of the lower extremity and he recommended an impairment rating of 35 percent of the left lower extremity.[1]

On August 23, 1999 the Office referred appellant to Dr. John Crompton, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict between Dr. Floyd and the Office medical adviser with regard to the degree of appellant's impairment to his lower extremities. In a medical report dated September 14, 1999, Dr. Crompton conducted a physical examination. He stated:

> "Physical examination reveals [appellant] to have basically a normal exam[ination]. He walks with a cane, but when specifically examined, it is not clear that he has any obvious neurologic deficit as far as weakness, deep tendon reflex loss or clear evidence of stretch signs in the lower extremity. The entire time testing anything about this left side, he would seem to insinuate that his left side is weaker than his right, but I do not believe that this is true from an objective point of view.
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> "The patient has x-rays obtained in the office today which show evidence of degenerative disc disease at the L4-5 and L5-S1 levels."

Dr. Crompton indicated that he believed that the low back strain would have reached maximum medical improvement within six weeks of the injury, but that, if appellant's lumbar degenerative disc herniation at L4-5 and L5-S1 was considered to be work related, then maximum medical

[1] The Board notes that Dr. Floyd's reports of July 1 and 16, 1999 purport to address the extent of impairment in appellant's left lower extremity. He did not clarify whether the impairment ratings offered were for both lower extremities or whether the left lower extremity had improved to a 35 percent as opposed to a 50 percent impairment.

improvement would have been within approximately 8 to 12 weeks of surgical treatment. He noted:

> "I do not believe that this patient has any impairment of his lower extremities based upon the A.M.A., *Guides* at least related to his previous[ly] accepted claims of cervical strain and low back strain. If one assumed that his disc herniations was related to his injury, then his impairment would be 11 percent of the whole person based upon the fourth edition of the A.M.A., *Guides* and this is related to his operated discs with residual symptoms.
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> "If there are any further questions, I will be happy to answer them. I am attempting though to answer the questions based upon the statement of accepted facts as the only factual framework for my opinion. He is, however, a bit confusing given the fact that the statement of accepted facts clearly states [that appellant] had a cervical strain and low back strain that was accepted. It then later states that he underwent a hemilaminectomy and an L5-S1 discectomy. It would help if it was stated that the mentioned medical treatment was obtained by the patient outside of the work[er's] compensation arena. If these were accepted as related to his work injury, then it certainly 'opens up a whole can of worms' given the fact that the patient does currently have degenerative disc disease and may even at some point require further surgical treatment because of the rather significant collapse that he is undergoing at L4-5 and L5-S1."

In a supplemental medical report dated October 8, 1999, Dr. Crompton opined that he did not believe that appellant continued to have cervical and low back strain that was work related. He opined that the strains were short lived and did not continue. Dr. Crompton further noted that the degenerative disc disease at L4-5 and L5-S1 was partially due to the hemilaminectomy and discectomy performed on August 20, 1987, but it certainly is in part, due to degenerative disc disease which would have to some extent occurred whether the patient had a hemilaminectomy or discectomy or not. He concluded: "I do not believe that this patient has any complications with his extremities due to degenerative disc disease at L4-5 and L5-S1 based upon the A.M.A., [*Guides*]."

By decision dated December 15, 1999, the Office denied appellant's claim for a schedule award for the reason that the medical evidence failed to establish any permanent impairment.

By letter dated January 11, 2000, appellant requested an oral hearing which was held on August 3, 2000.

By decision dated October 27, 2000, the Office hearing representative affirmed the December 15, 1999 decision, finding that appellant had not met his burden of establishing that he had any impairment as a result of his accepted back condition.

By letter dated December 22, 2000, appellant requested reconsideration and submitted a September 28, 2000 report by Dr. Floyd. He diagnosed "chronic lower back pain with radicular symptoms down left leg, chronic complaints of neck, shoulder and arm pain and chronic

problems with bilateral knee pain with left greater than right." Dr. Floyd discussed appellant's range of motion in his upper extremities. He stated:

> "Examination of the lower extremity reveals a positive straight leg raise test on the side with the positive exam[ination] noted at 90 degrees of hip flexion and full extension of knee. The patient is noted to have decreased sensation to palpation along the web between the great toe and 2nd toe, as well as over the anterolateral aspect of the dorsum of the foot. He does not have any decreased sensation under the heel or the medial side of the leg. Reflexes are normal. Evaluation of the calf diameter and mid-thigh diameter reveals them to be symmetrical bilaterally.
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> "Examination of the left knee reveals a mild effusion with pain to patella compression. The patient has some creptitus with range of motion, but otherwise has a stable normal knee with no ligamentous instability seen. On the right side, there is no effusion noted. No crepitus is seen. Range of motion appears to be full. The right lower extremity reveals no abnormalities on a neurological exam[ination]."

Dr. Floyd recommended further studies.

By decision dated February 12, 2001, the Office denied appellant's request for reconsideration, finding that the evidence submitted in support of the request for review was cumulative in nature.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulation,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, the Act does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[4] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5] Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (2002).

[4] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[5] *See Joseph Lawrence, supra* note 4; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] FECA Bulletin No. 01-05 (issued January 29, 2001).

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

In the instant case, the Office found there was a conflict between the opinion of appellant's physician, Dr. Floyd, and that of the Office medical adviser with regard to the extent of appellant's impairment. The Office referred appellant to an impartial medical examiner, Dr. Crompton, to resolve the conflict between Dr. Floyd, who recommended a schedule award of 35 percent and 50 percent impairment of the left lower extremities and the Office medical adviser, who found a 1 percent employment-related impairment to each lower extremity. Dr. Crompton noted that appellant had basically a normal physical examination and although appellant insinuated that his left side was weaker than his right, Dr. Crompton did not believe that this was true from an objective point of view. He concluded that appellant had no permanent impairment of his lower extremities related to his work injury. Dr. Crompton clearly stated that the objective findings did not reveal any impairment of the lower extremities pursuant to the A.M.A., *Guides* due to the accepted cervical and low back strains as they were resolved. He noted that appellant's degenerative disc disease at L4-5 and L5-S1 was partially due to the hemilaminectomy and an L5-S1 discectomy, but concluded that the degenerative disc disease would have occurred to some extent whether appellant had a hemilaminectomy or discectomy or not. Dr. Crompton also opined that appellant no longer had cervical and low back strains, noting that these types of strains are short lived. As he was appointed as the impartial medical examiner and as his opinion that appellant sustained no permanent impairment of his lower extremities related to his work injury is fully rationalized, it is entitled to special weight. Accordingly, appellant has not met his burden of proof to establish that he sustained an impairment of the lower extremities, thereby entitling him to a schedule award.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulation provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[8]

ANALYSIS

Appellant does not make any argument that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. Appellant does submit a further report by Dr. Floyd, dated September 28, 2000.

[7] *Solomon Polen*, 51 ECAB 341 (2000).

[8] 20 C.F.R. § 10.606(b)(2)(i-iii).

However, Dr. Floyd's opinion is not relevant or pertinent to the issue at hand as it does not address how appellant was entitled to a schedule award in accordance with the A.M.A., *Guides.* Accordingly, the Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not raise any substantive legal questions and failed to submit any relevant and pertinent new evidence not previously reviewed by the Office.

CONCLUSION

Appellant has failed to establish that he was entitled to a schedule award under the Act for an impairment to his lower extremities. Furthermore, he has not established that the Office erred in denying merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 12, 2001 and October 27, 2000 are affirmed.

Issued: August 25, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member