United States Department of Labor
Employees' Compensation Appeals Board

DEL W. ZIEMKE, Appellant	)	
and	)	**Docket No. 04-65**
	)	**Issued: February 6, 2004**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Waseca, MN, Employer	)	

Appearances:
Del W. Ziemke, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 7, 2003 appellant filed a timely appeal from a September 18, 2003 decision of the Office of Workers' Compensation Programs, which granted a schedule award for a one percent impairment of the right lower extremity and a one percent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has greater than a one percent impairment of the right lower extremity and greater than a one percent impairment of the left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On June 14, 2000 appellant, then a 33-year-old maintenance supervisor, filed a traumatic injury claim alleging that he hurt his lower back that day when he tried to catch a jackhammer as it fell through the floor. Appellant was treated at a local emergency room for a lumbar strain.

The Office accepted the claim for lumbar strain. A subsequent magnetic resonance imaging (MRI) scan showed a mild broad base disc protrusion at L5-S1, while a computerized tomography (CT) scan showed spondylolysis of the pars interarticularis at L5, which the radiologist described as more acute in etiology rather than a long-term congenital type of spondylolysis. The Office approved medical treatment for appellant's back condition, which included a series of left L5 pars injections. On April 1, 2002 appellant filed a Form CA-7 claim for a schedule award.

By letter dated April 11, 2002, the Office requested that appellant's treating physician provide a comprehensive medical report based on a recent examination addressing the nature of appellant's pain, sensory deficit and motor impairment of the lower extremities due to his work-related back injury.[1] Appellant subsequently submitted a September 12, 2002 chart note from Dr. Salib, who diagnosed a unilateral pars fracture at L5 on the left side, with degeneration of the L5-S1 disc and predominately right-sided low back pain. He recommended that appellant undergo additional epidural injections to relieve his pain symptoms. Dr. Salib noted, however, that appellant's back condition would not fully improve without surgery to fuse the disc. He stated that appellant had not reached maximum medical improvement with respect to his back condition. There was no information provided with respect to appellant's lower extremities.

On March 11, 2003 the Office forwarded a copy of the medical record to an Office medical adviser for calculation of whether appellant had any permanent impairment of the lower extremities due to his work injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), fifth edition. In a March 22, 2003 report, an Office medical adviser noted that appellant was not entitled to a schedule award for his back condition, and that he had no subjective complaints or abnormal physical examination findings with respect to his legs. He calculated that appellant had zero percent impairment to the left leg. The date of maximum medical improvement was listed as September 12, 2002.

In a decision dated April 4, 2003, the Office denied appellant's claim for a schedule award, finding that he had no ratable permanent impairment of the left lower extremity. On April 28, 2003 the Office received a copy of an office note from Dr. Salib dated April 21, 2003. He stated that appellant was seeking additional epidural injections for ongoing low back pain and bilateral leg pain due to his work injury. Appellant subsequently requested reconsideration on August 11, 2003 and submitted a May 1, 2003 report from Dr. Salib, who opined that, while the A.M.A., *Guides* did not specifically cover a nonunion fracture of the pars interarticularis, appellant's back condition appeared to fall under the "D.R.E. Category Lumbar II," which allowed for five percent whole person disability.

[1] On April 30, 2002 the Office approved appellant's request for a change of treating physician to Dr. Richard M. Salib, a Board-certified orthopedist. Appellant was told to have Dr. Salib prepare a report as requested in the Office's April 11, 2002 letter.

On August 29, 2003 the Office forwarded a statement of accepted facts[2] and a copy of the medical record to an Office medical adviser, Dr. James Bicos, for his opinion as to the extent of appellant's permanent impairment and recalculation of a schedule award. In a report dated September 3, 2003, Dr. Bicos noted that appellant did not appear to have any significant changes in his condition since the prior Office medical adviser's opinion. Insofar as Dr. Salib did not provide any physical findings with respect to range of motion, he determined that appellant's impairment rating would have to be based on the finding of bilateral leg pain. He calculated that appellant had a one percent impairment of each leg for Grade 4 pain in the distribution of the S1 spinal nerve root in accordance with Tables 15-15, 15-18, page 424 of the A.M.A., *Guides*, fifth edition. The date of maximum medical improvement was listed as May 1, 2003, corresponding to Dr. Salib's evaluation report.

In a decision dated September 18, 2003, the Office determined that the weight of the medical evidence regarding the extent of appellant's permanent impairment resided with the opinion of Dr. Salib. The Office vacated its prior decision of April 4, 2003 and issued a schedule award for a one percent impairment of the right lower extremity and a one percent impairment of the left lower extremity.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act 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.[3] The Act, 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guide* as the appropriate standard for evaluating schedule losses.[7] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides*, fifth edition.[8]

No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the implementing regulations.[9] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a

[2] The Office indicated that the claim had been expanded to include traumatic spondylolysis.

[3] The Act provides that for a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[7] 20 C.F.R. § 10.404 (1999).

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

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

whole, no claimant is entitled to such a schedule award.[10] The Board notes that section 8109(19) specifically excludes the back from the definition of "organ."[11] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[12]

ANALYSIS

In this case, appellant alleges that he is entitled to greater than a two percent bilateral permanent impairment of the lower extremities for which he received his schedule award. He relies on a medical report from Dr. Salib dated May 1, 2002 finding that he has five percent whole person disability for his back injury. As previously stated, however, the Act does not permit a schedule award based on either whole person impairment or injuries to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper or lower extremities due to his accepted work injury.

The Board has carefully reviewed the record and finds that appellant has no greater than a one percent bilateral permanent impairment of his lower extremities. An Office medical adviser properly reviewed the medical record and extrapolated from Dr. Salib's office note that appellant has bilateral leg pain. The Office medical adviser compared the finding of bilateral leg pain to Tables 15-15, 15-18, page 424 of the A.M.A., *Guides* and determined that appellant was entitled to a one percent impairment of the right leg and a one percent impairment of the left leg based on Grade 4 pain in the distribution of the S1 spinal nerve root.[13] Because there are no other physical findings of record, except the report of bilateral leg pain, from which to calculate permanent impairment under the A.M.A., *Guides*, the Board concludes that appellant has not shown that he is entitled to greater than the award issued by the Office.[14] Appellant has provided no relevant medical evidence to establish that he has greater than a one percent impairment of the right lower extremity and greater than a one percent impairment of the left lower extremity.

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[10] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[11] 5 U.S.C. § 8109(c).

[12] *Thomas J. Engelhart, supra* note 9.

[13] The A.M.A., *Guides* were prepared to establish reference tables and evaluation protocols which, if followed, may allow the clinical findings of the physician to be compared directly with the impairment criteria and related to impairment percentages. While the medical opinion of the treating physician may be accorded some weight, his or her clinical data can be readily extrapolated and evaluated within the tables and guidelines as presented. *Michael D. Nielsen*, 49 ECAB 453 (1996).

[14] A specific change in the fifth edition of the A.M.A., *Guides* is that it allows for an impairment percentage to be increased by up to three percent for pain by using the pain chapter. A qualitative method for evaluating impairment due to chronic pain is included in Chapter 18. If an individual appears to have pain-related impairment that has increased the burden of his or her condition slightly, the examiner may increase the percentage up to three percent. If the examiner performs a formal pain-related impairment rating, he or she may increase the percent by up to three percent and classify the individual's pain-related impairment into one of four categories: mild, moderate, moderately severe or severe. The Office, however, has stated that a separate pain calculation under Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain as outlined in Chapters 13, 16 and 17 of the fifth edition of the A.M.A., *Guides*. FECA Bulletin No. 01-05 (issued January 29, 2001).

CONCLUSION

The Board finds that appellant is not entitled to greater than a one percent impairment of the right and left lower extremities.

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member