United States Department of Labor
Employees' Compensation Appeals Board

ALDEN B. HOPKINS, Appellant	)	
and	)	**Docket No. 04-692** **Issued: July 30, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Jackson, MS, Employer	)	

Appearances:
Alden B. Hopkins, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 2, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' hearing representative dated October 17, 2003 which found that appellant was not entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award issue.

ISSUE

The issue on appeal is whether appellant has met his burden of proof to establish entitlement to a schedule award.

FACTUAL HISTORY

This is the third appeal in this case. On July 28, 1997 the Board affirmed a March 15, 1995 decision of the Office, which found that appellant failed to meet his burden of proof to establish that his accepted lumbar strain and herniated disc at L4-5 and L5-S1 caused disability on or after April 13, 1994.[1] On November 12, 2002 the Board set aside a February 12, 2002

[1] Docket No. 95-2078 (issued July 28, 1997).

nonmerit decision of the Office which denied appellant's January 9, 2002 request for reconsideration.[2] The Board found that appellant was not seeking reconsideration of the prior schedule award denial but was informing the Office of a change in his condition beginning December 2001 and was entitled to a merit decision regarding a permanent impairment on the medical evidence submitted. The Board remanded the case to the Office for review of a December 14, 2001 medical report. The law and the facts as set forth in the prior decision are hereby incorporated by reference.

In the December 14, 2001 report, Dr. L.C. Tennin, a Board-certified internist, discussed his examination of appellant on December 8, 2001 and concluded that appellant had not reached maximum medical improvement and was still totally disabled. On examination he stated:

> "Gait-antalgic -- Right [straight leg raising] 50-60 degrees -- Left SLR 30-45 degrees -- Left leg flexion 50-60 degrees -- Left Babinski is abnormal -- Left ankle reflex is absent -- Left ankle reflex 3+/4+.
>
> "Back-forward flexion -- 60 degrees with pain extension -- 0 degrees with pain extension -- 0 degrees with pain lateral bending -- 10 degrees with pain.
>
> "Based on the fourth edition of [American Medical Association, *Guides to the Evaluation of Permanent Impairment*] his impairment rating of his lower back is 25 percent of whole person per [C]hapter 3.3. Sensory deficit of left lower extremity is four percent and motor impairment of left extremity is five percent for a combined rating of nine percent. [Appellant] has a combined impairment rating of the whole person of 32 percent."

On remand the Office referred appellant's case record to Dr. Harry Collins, Jr., a Board-certified orthopedic surgeon and district medical adviser, for a schedule award evaluation.

In a memorandum dated December 17, 2002, Dr. Collins found that the medical report submitted by Dr. Tennin was insufficient to provide an impairment rating. He found that, while Dr. Tennin provided a permanent partial impairment of the whole body for the lower back and the left lower extremity, his examination did not reference the A.M.A., *Guides*. Dr. Collins attached an explanation of the specific tables in the A.M.A., *Guides* which pertained to schedule awards based on nerve impairment in spinal injuries with his report.

By decision dated December 20, 2002, the Office found that appellant was not entitled to a schedule award.[3] The Office determined that Dr. Tennin did not furnish accurate information for rating impairment to appellant's leg and that the weight of medical opinion was represented by Dr. Collins who applied the A.M.A., *Guides* to the medical report.

[2] Docket No. 02-913 (issued November 1, 2002).

[3] The Office did find however that appellant was still entitled to medical benefits for the effects of his injury.

On January 13, 2003 appellant requested an oral hearing and submitted a subsequent report from Dr. Tennin dated February 26, 2003. In the report, Dr. Tennin stated:

> "This is an impairment on [appellant's] left leg: Sensory deficit for L4-5 for nerve root L5 is 16 percent and motor impairment is 9 percent and a combined impairment of 24 percent. For L5-S1, the S1 nerve root sensory deficit is 16 percent and motor impairment is 5 percent for a combined impairment of 20 percent. A combined impairment of both sensory and motor loss for L4-5 and L5-S1 is 39 percent impairment of the whole person."

Dr. Tennin also found that appellant had reached maximum medical improvement as of February 23, 2003.

A hearing was held on August 21, 2003 and appellant appeared without representation. Following appellant's testimony regarding the evidence submitted in the case, the Office hearing representative advised appellant that, although Dr. Tennin provided an impairment rating in his February 26, 2003 report, the physician provided a whole person impairment and not of the left leg. He stated further that Dr. Tennin failed to calculate his impairment rating based on the appropriate tables of the fifth edition of the A.M.A., *Guides* or provide an explanation of how to calculate the percentage of impairment for the left leg. The Office hearing representative advised appellant to submit the additional information within 30 days after the hearing. No further evidence was submitted within the requisite time period.

By decision dated October 17, 2003, the Office hearing representative affirmed the December 20, 2002 decision, finding that Dr. Collins represented the weight of medical opinion.[4] The Office hearing representative noted that Dr. Tennin provided only a whole person impairment.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[6] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[7]

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[4] The Board notes that, following the October 17, 2003 hearing representative decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a).

[5] 5 U.S.C. §§ 8101-8193.

[6] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[7] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

The schedule award provision of the Act[8] and its implementing regulation[9] 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, the Act 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 regulation as the appropriate standard for evaluating schedule losses.[10]

ANALYSIS

In the present case, appellant has not demonstrated that he sustained a change in his condition such that he was entitled to a schedule award for ratable permanent impairment to his lower extremity beginning December 2001 as alleged in his request on January 9, 2002. The medical report submitted from Dr. Tennin dated December 14, 2001 indicated that appellant had not yet reached maximum medical improvement. It is well established that a schedule award is payable only if the employee reaches maximum medical improvement from the residuals of the employment injury.[11] The Board has explained that maximum medical improvement means that the physical condition of the injured member has been stabilized and will not improve further.[12] The determination of maximum medical improvement is factual in nature and depends primarily on the medical evidence. The date is usually the date of the medical examination that determined the extent of the permanent impairment.[13] As appellant had not yet reached maximum medical improvement at the time of this evaluation, this report does not substantiate any ratable permanent impairment.

Dr. Collins, the district medical adviser, reviewed the December 14, 2001 report of Dr. Tennin and determined that appellant was not entitled to a schedule award. Dr. Collins noted that future evaluations should incorporate information which pertained to schedule awards based upon nerve impairment in spinal injuries. Dr. Collins attached instructions for evaluating impairments of the lower extremities based upon nerve impairments.

Appellant thereafter submitted an additional report of Dr. Tennin dated February 26, 2003. In this report Dr. Tennin did note that appellant had reached maximum medical improvement as of February 23, 2003. This report however was still insufficient to establish a ratable permanent impairment of appellant's lower extremities. While Dr. Tennin's report identified nerve root deficits for L4-5 and L5-S1 as the source of impairment of

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

[10] *See id*.; *James Kennedy, Jr*., 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[11] *James E. Earle*, 51 ECAB 567 (2000).

[12] *Id.*

[13] *See James Lewis*, 35 ECAB 627 (1984).

appellant's left leg, his report did not provide any specific evaluation findings and did not refer to specific tables in the A.M.A., *Guides*. His report consisted of unsupported and unreviewable conclusions that appellant did have sensory and motor impairments due to nerve root injury. During the hearing held in this matter, the Office hearing representative specifically advised appellant of the deficiencies in Dr. Tennin's evaluation of the left leg and that whole person impairments were not compensable under the Act.[14] Appellant was requested to submit further evidence within 30 days, no evidence was received within the time allotted. The Board finds that appellant submitted no rationalized medical evidence that establishes any permanent impairment to his left lower extremity beginning December 2001 as alleged. Appellant is not entitled to a schedule award related to his accepted employment injury based on the medical evidence of record.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2003 is affirmed.

Issued: July 30, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Phyllis F. Cundiff*, 52 ECAB 439 (2001). A schedule award is not payable for an impairment of the whole person.