United States Department of Labor
Employees' Compensation Appeals Board

MARIO MUNIZ, Appellant	)	
and	)	**Docket No. 04-1581**
	)	**Issued: November 18, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Bakersfield, CA, Employer	)	

Appearances:
Mario Muniz, pro se
Office of Solicitor, for the Director,

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs schedule award decision dated March 12, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.[1]

[1] Subsequent to appellant's appeal to the Board, the Office issued a decision dated June 7, 2004, denying reconsideration without a merit review, with regard to the same underlying schedule award issue. Under *Douglas E. Billings*, 41 ECAB 880 (1990), the Board and the Office may not have simultaneous jurisdiction over the same issue in a case. As the Office, in its June 7, 2004 decision, had to consider the merit schedule award issue in determining whether to reopen the case for a merit decision, the Office may not issue a decision denying or granting a request for reconsideration regarding the same issue on appeal before the Board. Consequently, the June 7, 2004 decision is null and void. *See Arlonia Taylor,* 44 ECAB 591, 597 (1993). *See also Russell E. Lerman*, 43 ECAB 770 (1992).

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an impairment of his right lower extremity and more than a three percent permanent impairment of his left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On April 5, 1989 appellant, then a 40-year-old letter carrier, filed an occupational disease claim alleging that he sustained a lumbar herniated disc on the left at L5-S1 which required surgery and therapy, in the performance of duty. He stopped work on December 28, 1988.

In a July 21, 1989 report, Dr. Clement O. Alade, a Board-certified orthopedic surgeon, opined that appellant had recently completed static strength testing which showed no impairment.

On July 27, 1989 the Office accepted appellant's claim for herniated disc at the L5-S1 level and approved a micro lumbar discectomy that he underwent on January 13, 1989. He received compensation benefits.

In a September 14, 1989 report, Dr. James S. Johnston, a Board-certified neurological surgeon and appellant's treating physician, opined that appellant could return to full duty with no restrictions as of July 3, 1989.

On August 8, 2003 appellant filed a claim for a schedule award.

By letter dated August 21, 2003, the Office advised appellant that he needed to obtain a report from his physician describing whether he was entitled to an impairment rating and if so, the percentage of impairment with an explanation of how the calculation was derived.

Appellant subsequently submitted a November 7, 2003 report from Dr. Gharavi Bahman Ha'Eri, a Board-certified orthopedic surgeon, who noted his history of injury and treatment and utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001). He noted that appellant had normal range of motion in the hip, knee, ankle and the foot in the left lower extremity. The straight leg raising bilaterally was 90 degrees and range of movement of the lumbar spine was limited with flexion from the fingertips to the floor at 65 degrees, extension to the midline at 20 degrees, lateral bending of 30 degrees on both the right and left sides and rotation of 35 degrees on the right and left sides. Dr. Ha'Eri indicated that the circumferential measurement of the lower extremities was 16½ inches on the right thigh as opposed to 17 inches on the left and 14 inches on the right calf as opposed to 14½ inches on the left. He noted sensory reduction in the sole of the left foot, advised that skin color and circulation in the lower extremities was normal and the motor examination of the left lower extremity was 5/5 and two point discrimination was within normal limits. The physician noted objective factors were comprised of appellant's scar from a prior lumbar laminectomy/ discectomy and subjective complaints of constant slight left lower extremity pain, with numbness in the sole of the left foot and limited walking distance because of the left foot pain.

He referred to Table 17-37 of the A.M.A., *Guides*, page 552[2] and explained that this was equal to four percent of the body and explained that this was derived from a seven percent impairment for sensory deficit in the medial and lateral plantar nerve of the sole of the left foot and, which would equate to a five percent impairment of the left lower extremity and four percent to the whole person. Dr. Ha'Eri diagnosed left lower extremity radiculopathy and left sciatica. He opined that appellant reached maximum medical improvement beginning in 1990.

In a February 27, 2004 report, an Office medical adviser noted appellant's history of injury and treatment, which included a static strength testing report dated July 21, 1989 from Dr. Alade, which revealed no degree of impairment and the November 7, 2003 report of Dr. Ha"Eri. The Office medical adviser noted his measurements and calculations and explained that the physician calculated the award based on utilizing branches of the medial and lateral plantar nerves and assessing an impairment of seven percent of the left foot. He noted that, if these nerves were to be utilized properly, they would have to be graded as per the grading scheme in the A.M.A., *Guides*. The Office medical adviser recommended utilizing branches of S1 as appellant had demonstrated pathology at the L5-S1 level with left-sided S1 compression. He explained that according to Table 15-18, page 424 of the A.M.A., *Guides*,[3] unilateral spinal root impairment affecting the lower extremity was equivalent to a maximal 5 percent impairment for branches of S1, thus, the slight pain and numbness would warrant a maximal Grade 3, pursuant to Table 15-15 at page 424.[4] Regarding impairment due to sensory loss, this would equate to a maximum 60 percent deficit of the 5 percent or 3 percent impairment of the left lower extremity or leg. The Office medical adviser indicated that there was no loss of range of motion of the hip, knee, ankle or foot thus, warranting a zero percent impairment. He also advised that there was no documentation to show weakness or atrophy in the right leg. The Office medical adviser determined that appellant would be entitled to a three percent impairment of the left lower extremity and a zero percent impairment in the right lower extremity with no symptomatology and no positive clinical findings noted and opined that the date of maximum medical improvement would have been reached by January 13, 1990.

On March 12, 2004 the Office granted appellant a schedule award for three percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity. The award covered a period of 8.64 weeks from January 13 to March 14, 1990.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[5] 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.[6] The Act, however, does not specify the manner by which the

[2] A.M.A., *Guides* 552 Table 17-37.

[3] A.M.A., *Guides* 424, Table 15-18.

[4] A.M.A., *Guides* 424, Table 15-15.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8107.

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.[7] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[8]

ANALYSIS

In the instant case, Dr. Ha'Eri noted that appellant had normal range of motion in the hip, knee, ankle and the foot in the left lower extremity and conducted a physical examination. He also noted subjective complaints of constant slight left lower extremity pain and numbness in the sole of the left foot. Dr. Ha'Eri referred to Table 17-37 of the A.M.A., *Guides*, page 552 and provided an impairment rating of 5 percent of the lower extremity. He explained that this was derived from a 7 percent impairment for sensory deficit in the medial and lateral plantar nerve of the sole of the left foot. The Board notes, however, that Dr. Ha'Eri did not utilize the proper procedure when making his calculations, as he apparently used numbers from Table 17-37, but did not explain the details of his calculations. Furthermore, the figures appear to be in error as a four percent whole person impairment would convert to nine percent lower extremity impairment pursuant to Table 17-3 at page 527 of the A.M.A., *Guides*.[9] Consequently, Dr. Ha'Eri's report is of diminished probative value on the extent of appellant's impairment as he did not sufficiently explain his calculations pursuant to the A.M.A., *Guides*.[10]

The Office medical adviser, in a February 27, 2004 report, utilized Dr. Ha'Eri's findings and advised that his measurements and calculations were based on utilizing branches of the medial and lateral plantar nerves. He explained that if these nerves were to be utilized properly, they would have to be graded as per the grading scheme. As noted above, the rating, when calculated as per the grading scheme in Table 15-15 would equate to a three percent impairment of the left lower extremity.[11] The Office medical adviser recommended utilizing branches of S1 as appellant had a demonstrated pathology at the L5-S1 level with left-sided S1 compression. He explained that according to Table 15-18, page 424 of the A.M.A., *Guides*,[12] unilateral spinal root impairment affecting the lower extremity, would entitle appellant to a maximum of 5 percent impairment for branches of S1 and the slight pain and numbness would warrant a maximal Grade

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

[8] 20 C.F.R. § 10.404.

[9] Neither the Act, nor its implementing regulations provides for a schedule award for impairment to the back itself or the body as a whole. *Guiseppe Aversa*, 55 ECAB __ (Docket No. 03-2042, issued December 12, 2003). However, as the schedule award provisions of Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originates in the spine. *Vanessa Young*, 55 ECAB __ (Docket No. 04-562, issued June 22, 2004).

[10] *See Vanessa Young, supra* note 9, (the evaluation made by the attending physician must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations).

[11] *See supra* note 5.

[12] A.M.A., *Guides*, 424, Table 15-18.

3, pursuant to Table 15-15 at page 424 or up to a 60 percent sensory deficit.[13] The Office medical adviser multiplied the impairment due to sensory loss, by the 5 percent impairment and derived at a 3 percent impairment of the left lower extremity. He indicated that there was no loss of range of motion of the hip, knee, ankle or foot thus, warranting a zero percent impairment. The Office medical adviser also advised that there was no documentation to show weakness or atrophy in the right leg and determined that appellant would be entitled to a three percent impairment of the left lower extremity and a zero percent impairment in the right lower extremity with no symptomatology and no positive clinical findings noted. The Board finds that the Office medical adviser properly calculated the left leg impairment pursuant to the A.M.A., *Guides* and properly found that there was no ratable impairment in the right leg.

There is no other medical evidence documenting a ratable impairment in a schedule member of the body pursuant to the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an impairment of his right lower extremity and more than a three percent permanent impairment of his left lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 12, 2004 is affirmed.

Issued: November 18, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[13] A.M.A., *Guides*, 424, Table 15-15.