United States Department of Labor
Employees' Compensation Appeals Board

RICHARD R. LEMAY, Appellant	)	
and	)	**Docket No. 05-1382**
	)	**Issued: December 20, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Manchester, NH, Employer	)	

Appearances:
James G. Noucas, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 14, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' March 29, 2005 merit decision which granted an additional schedule award of 8 percent, for a total of 38 percent impairment to the lower extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award in this case.

ISSUE

The issue is whether appellant has greater than a 38 percent impairment of his lower extremities for which he received schedule awards. On appeal, appellant argues that the Office failed to follow the Board's directive, existing Board case law and regulations.

FACTUAL HISTORY

This case is on appeal to the Board for the fourth time. On October 9, 1987 appellant, then a 40-year-old distribution clerk, filed a claim alleging that he was struck that day by a heavy cart. Appellant stopped work that day. He returned on December 4, 1987 for four hours a day with restrictions and stopped work again on December 16, 1987. Appellant later returned to a

four-hour-a-day position on July 29, 1991 and left work in December 1993 due to a carpal tunnel release. He has not returned to work. The Office accepted the claim for a lumbar strain and the subsequent conditions of sciatica and myofascial pain syndrome.

On the first appeal, the Board found that the Office did not abuse its discretion in denying authorization for the purchase of orthopedic work boots.[1] In a second appeal, the Board dismissed appellant's appeal for lack of jurisdiction.[2] The record reflects that appellant filed a claim for a schedule award on January 24, 2001. On the third appeal, the Board found that the case was not in posture for decision with respect to whether appellant had greater impairment than the 16 percent right and 14 percent left lower extremity impairments allowed and remanded the case for further development.[3] The Board found that Dr. Cohen, an Office medical adviser, had improperly reviewed the March 7, 2002 report of Dr. Graf, the impartial medical specialist, as he was part of the original conflict in medical opinion. The Board also noted that Dr. Cohen went outside the confines of Dr. Graf's March 7, 2002 report and allowed previously reviewed medical evidence to factor into the impairment rating determination. The Board remanded the case to the Office to have another Office medical adviser review Dr. Graf's March 7, 2002 report. The facts and the history surrounding the prior appeals are set forth in the initial decisions and are hereby incorporated by reference.

In his March 7, 2002 report, Dr. Graf advised that his examination of appellant did not confirm a complete motor deficit in the right lower extremity or the presence of any sensory deficit in the lower extremities. Dr. Graf utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and stated:

> "In rating [appellant's] permanency, reference is made to Table 15-18, Unilateral Spinal Nerve Root Impairments affecting the lower extremities with loss of function due to alteration in strength in the anterior tibial tendon and posterior tibial tendon with further reference to Table 13-15, Criteria for Rating Impairments Due to Station and Gait Disorders. This patient has an abnormality in station and gait. Examination confirms his ability to rise to a standing position but walking some distance is performed with difficulty and is limited to essentially level surfaces. At times the patient requires the aid of a cane and at times rises and maintains standing positions with difficulty. The patient is judged to meet the criteria between Class 2 and Class 3 of Table 13-15 with a 25 percent whole person impairment. A 25 percent whole person impairment is converted to a 62 percent lower extremity impairment by referencing page 527, Table 17-3, which includes whole person impairment values calculated from lower extremity impairment."

Dr. Graf advised that his impairment rating under Table 13-15 could be cross-referenced with Table 15-18. He stated, however, that the permanencies assigned through consideration of the gait pattern changes through station and gait disorder caused by the patient's spinal condition

[1] Docket No. 93-205 (issued December 23, 1993).

[2] Docket No. 94-1140 (issued June 3, 1996).

[3] 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005).

and motor deficits which were documented in the examination could not be combined since they were both manifestations of the same condition.

Upon remand, the Office referred the case file to Dr. David I. Krohn, an Office medical adviser. In a March 20, 2005 report, Dr. Krohn reviewed Dr. Graf's March 7, 2002 report and agreed with his characterization of appellant's gait disturbance as "walking some distance is performed with difficulty and is limited to essentially level surfaces."[4] He opined that, under Table 13-15 page 336 of the A.M.A., *Guides*, Dr. Graf's characterization would correspond to a Class 2 gait disorder which would equate to a 15 percent whole person impairment. Utilizing Table 17-3 page 527, Dr. Krohn converted a 15 percent whole person impairment to a 38 percent impairment of the lower extremities.

By decision dated March 29, 2005, the Office granted appellant schedule awards for additional impairment for both lower extremities for the period October 26, 2000 to April 5, 2001; or a total impairment of 38 percent to both lower extremities.

LEGAL PRECEDENT

A claimant seeking compensation under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence. Section 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[6] The schedule award provision of the Act[7] and its implementing federal regulation[8] sets 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, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[9]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[10] 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

[4] Dr. Krohn appeared to take issue with regard to whether appellant's sciatica was work related. However, the Office had accepted sciatica as a work-related condition.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Id*. at § 8107(a).

[7] *Id*. at § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*.

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

whole, no claimant is entitled to such a schedule award.[11] The Board notes that section 8109(19) specifically excludes the back from the definition of "organ."[12] 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.[13]

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.[14] Furthermore, Office procedures provide that, after obtaining all necessary medical evidence, the file should be reviewed by an Office medical adviser for an opinion concerning the nature and percentage of any impairment.[15]

ANALYSIS

The Office accepted appellant's claim for a lumbar, sciatica and myofascial pain syndrome. In a March 20, 2005 report, Dr. Krohn, the Office medical adviser, compared the findings of Dr. Graf, the impartial medical specialist, with the provisions of the A.M.A., *Guides* pertaining to impairments due to station and gait disorders under Table 13-15.[16]

Table 13-15 of the A.M.A., *Guides* sets forth criteria for rating impairments due to station and gait disorders arising from a central nervous system or peripheral neurologic impairment. The Table is divided into four classes, in which a higher class rating represents a greater impairment to the whole person. In interpretation of Table 13-15, individuals in a Class 2 category are able to rise to standing position; walk some distance with difficulty and without assistance, but are limited to level surfaces. Class 2 individuals are assigned a 10 to 19 percent impairment of the whole person. Individuals in a Class 3 category are able to rise and maintain standing position with difficulty, but cannot walk without assistance. Those individuals are assigned a 20 to 39 percent impairment of the whole person. The Board has recognized that the selection of a percentage from the range of values allowed by the A.M.A., *Guides* involves a subjective judgment.[17] The application of Table 13-15 of the A.M.A., *Guides* requires a

[11] 5 U.S.C. § 8107; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[12] 5 U.S.C. § 8109(c).

[13] *Thomas J. Engelhart, supra* note 10.

[14] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002).

[16] A.M.A., *Guides* (5th ed.), Table 13-15, Criteria for Rating Impairments Due to Station and Gait Disorders, p. 336. The Board notes Table 17-1, p. 525 of the A.M.A., *Guides* contains thirteen methods which can be used to assess the lower extremities. However, section 17.2c, Gait Derangement, and Table 17-5, Lower Limb Impairment Due to Gait Derangement on p. 529 are not applicable in this case as a more specific method was available, appellant was not dependent on an assistive device and appellant's abnormalities were based on subjective factors only.

[17] *John Keller*, 39 ECAB 543, 547 (1988).

subjective judgment as it allows for selection of a value between a range of percentages between classes of impairment when an impairment rating is assigned due to station and gait disorders.

Dr. Krohn, the Office medical adviser, advised that he agreed with Dr. Graf's characterization of appellant's gait and disturbance of "walking some distance is performed with difficulty and is limited to essentially level surfaces" and advised that such characterization would correspond to a Class 2 gait disorder. Accordingly, the Office medical adviser assigned appellant a 15 percent whole person impairment, which is somewhat in the midpoint of the range of a Class 2 impairment.[18] Dr. Graf, the impartial medical specialist, stated that appellant met the criteria of a Class 2 impairment and "at times" met the criteria of a Class 3 impairment as "the patient requires the aid of a cane … and rises and maintains standing positions with difficulty." Accordingly, Dr. Graf assigned appellant 25 percent whole person impairment, which is on the lower end of a Class 3 impairment.[19]

The Board has recognized that an attending physician, who has an opportunity to examine appellant, is often in a better position to make certain judgments regarding schedule awards.[20] The Board has also held that, with respect to schedule awards, the opinion of an examining specialist in the appropriate field of medicine takes precedence over the opinion of an Office medical adviser when considering subjective factors.[21]

The Board finds that Dr. Graf, selected as the impartial medical specialist, selected a value of 25 percent or Class 3 impairment. This rating of impairment takes precedence over the opinion of Dr. Krohn, the Office medical adviser, who selected a value of 15 percent or Class 2 impairment. Dr. Graf noted that appellant exhibited Class 3 impairment symptoms "at times," and supported his opinion that appellant was at the low end of a Class 3 impairment with sound rationale. His opinion is consistent with a proper application of the A.M.A., *Guides.* The Board finds that appellant is entitled to a greater schedule award for his lower extremities than the 38 percent impairment awarded. The Office medical adviser did not find that Dr. Graf improperly applied the A.M.A., *Guides* or otherwise provided rationale for his determination that appellant's impairment was at the midpoint of a Class 2 impairment.[22] He did not acknowledge or comment on Dr. Graf's observation that appellant exhibited classic Class 3 symptoms by "at times" requiring the aid of a cane and rise and maintains standing positions with difficulty.

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[18] The Board notes that this corresponds to a 38 percent impairment of both lower extremities under the A.M.A., *Guides*, Table 17-3, page 527.

[19] The Board notes that this corresponds to a 62 percent impairment of both lower extremities under the A.M.A., *Guides*, Table 17-3, page 527.

[20] *See Richard Giordano,* 36 ECAB 134, 139 (1984); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.6(c) (August 2002). The procedure manual notes that, when the A.M.A., *Guides* ask for a percentage within a range, the physician may be asked why he assigned a particular percentage of impairment.

[21] *Michelle L. Collins*, 56 ECAB ___ (Docket No. 05-443, May 18, 2005); *Richard Giordano, supra* note 15.

[22] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (March 1994) (an Office medical adviser reviewing a report of an impartial specialist should note any medical errors found, such as improper application of the A.M.A., *Guides*, but should not attempt to clarify or expand the opinion of the medical referee).

The Board will set aside the Office's March 29, 2005 decision and remand the case to the Office to compensate appellant for the 62 percent total impairment to his lower extremities as determined by Dr. Graf, the impartial medical specialist.

CONCLUSION

The Board finds that appellant has greater than a 38 percent lower extremity impairment for which he received a schedule award. The well-reasoned opinion of Dr. Graf, the examining physician in this case, takes precedence over the Office medical adviser and establishes a 62 percent total lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2005 decision of the Office of Workers' Compensation Programs is set aside as to the determination of the total schedule award for the lower extremities and the case is remanded for further action consistent with this opinion.

Issued: December 20, 2005
Washington, DC

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

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board