United States Department of Labor
Employees' Compensation Appeals Board

ROBERT R. BOVEE, JR., Appellant	)	
and	)	**Docket No. 05-1863**
	)	**Issued: December 20, 2005**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL TRANSFER CENTER, Oklahoma City, OK, Employer	)	

Appearances:
Robert R. Bovee, Jr., pro se
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 September 6, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated January 20, 2005, adjudicating a claim for a schedule award and an August 24, 2005 decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 20 and August 24, 2005 decisions.

ISSUES

The issues are: (1) whether appellant has more than a three percent permanent impairment of the right lower extremity, for which he received a schedule award and whether he has any impairment of the left lower extremity; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On March 24, 2003 appellant, then a 35-year-old senior correctional officer, filed a traumatic injury claim alleging that he injured his back, right shoulder and right leg on March 19, 2003 in the performance of duty when he fell on steps. On May 7, 2003 the Office accepted appellant's claim for lumbar radiculopathy. He was placed on the periodic compensation rolls effective May 18, 2003 in receipt of compensation for temporary total disability. The Office subsequently accepted a right herniated disc at L4-5. On September 16, 2003 appellant underwent surgery consisting of a hemilaminotomy at L4-5 on the right with discectomy and foraminotomy. On March 19, 2004 he filed a claim for a schedule award.

In a January 28, 2004 report, Dr. Robert E. Tibbs, Jr., an attending Board-certified neurosurgeon, stated that appellant had reached maximum medical improvement and was released to return to work without restrictions.

In a February 24, 2004 report, Dr. John W. Ellis, an attending Board-certified family practitioner, provided a history of appellant's condition and findings of physical examination. He diagnosed a lumbosacral spine strain, a disc protrusion at L3-4, a disc extrusion at L4-5 and related surgery and bilateral lumbosacral plexus compression and/or nerve root impingement. Dr. Ellis stated:

> "[Appellant] continues to complain of pain in the low back. The pain does radiate down both legs as well as into the left groin area. He does complain of numbness and tingling in the right buttock and upper thigh area as well as the left groin/inguinal area. He complains of weakness of the lower extremities. He complains of stiffness and tightness in his back."
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> "Deep tendon reflexes of the lower extremities reveals the right patella to be 1+, the left is 2+. The Achilles [tendons] are 1+ bilaterally. Sensation is decreased in the right lateral calf area.
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> "Sitting straight leg raising is negative bilaterally at 90 degrees for any radicular pain or sciatica. Toe extensions are 2+ and equal bilaterally.
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> "Examination of the back reveals decreased range of motion. [Appellant] moves about in a very stiff and slow fashion. [He] complains of increased pain and discomfort at extreme ranges of motion. There is tenderness to palpation of the bilateral middle and inferior lumbar paraspinal musculature. This extends into the right and left sacroiliac joints. Spasms are palpated in the bilateral lumbar paraspinal musculature. The musculature is tight and taut to palpation. Deep palpation of the right and left sciatic notches does not cause any voiced complaints.
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> "[Appellant] ambulates without favoring either lower extremity. He is able to toe gait but does favor the right lower extremity.

"Strength testing of the lower extremities reveals weakness of the right when compared with the left. I would grade the left at 4/5 and the right 3/5."

Dr. Ellis opined that appellant had a 14 percent combined permanent impairment of the right lower extremity, which included 3.5 percent for a Grade 2 sensory loss of the right L5 spinal nerve root (70 percent multiplied by 5 percent) and 11.1 percent for a Grade 3 motor loss (30 percent multiplied by 37 percent) and a 7 percent impairment of the left lower extremity, which included 1.25 percent for Grade 4 sensory loss of the L4 spinal nerve root (25 percent multiplied by 5 percent) and 6.80 percent for Grade 4 motor loss (20 percent multiplied by 34 percent), based on Tables 15-15 to 15-18 at page 424 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, the A.M.A., *Guides*) (5th ed. 2001). He indicated that appellant had reached maximum medical improvement on January 28, 2004 based on Dr. Tibbs' report of that date.

In an April 26, 2004 memorandum, an Office medical adviser, stated his opinion that appellant had not reached maximum medical improvement because there had been insufficient time for spinal nerve root recovery following surgery. He directed the Office to obtain an impairment evaluation from an appropriate Board-certified physician no earlier than September 16, 2004, one year after appellant's September 16, 2003 surgery.

In a report dated October 12, 2004, Dr. Michael Shawn Smith a Board-certified physiatrist and Office referral physician, provided a history of appellant's condition and findings on physical examination. He stated:

"[Appellant] has no tenderness to palpation in the lumbar segments…. There are no paraspinal spasms noted. He is obese with fair abdominal and lumbar muscle tone. He has flexion in the lumbar spine to 85 degrees, 35 degrees extension, 30 degrees right lateral bending and 35 degrees left lateral bending.

"There is no atrophy appreciated in either leg. He has 56 [centimeters (cm)] around both thighs, 15 [cm] above the upper pole of the patella, equal bilaterally. He has 46 [cm] girth, 10 [cm] below the tibial tuberosity on both sides. [Appellant] can squat and stand comfortably without assistance. He can do repetitive toe-ups onto his toes at least 15 [to] 20 times. He can walk on his heels short distances without difficulty.

"Straight leg raising is negative bilaterally. He has 5/5/ strength on the hip flexors and extensors, knee flexors and extensors, plantar flexion and dorsiflexion of the foot and EHL [extensor hallucis longus muscle]. He has 5/5/ strength in the hip adductors and abductors. [Appellant] does have decreased sensation in the right L4 distribution to light touch and point discrimination. Reflexes of the knees and ankles are 2+ and symmetric. The left lower extremity has no sensorimotor loss and normal reflexes.

"ASSESSMENT:

"[Appellant] appears to be suffering from a previous disc herniation with hemilaminotomy and discectomy with no residual radicular symptoms other than

some right leg sensory loss and some facet-type pain symptoms down the back of both legs. He also has some asymptomatic disc protrusions with central stenosis.

"The date of maximum medical improvement appears to be January 20, 2004, based on the records reviewed from Dr. Robert Tibbs.[1]

"RECOMMENDATIONS:

"In substantial accordance with the [A.M.A., *Guides*, fifth edition], [appellant] has the following impairment based on permanent loss of use of the specific members at the point of maximum medical improvement:

"According to Table 15-15, [appellant] has 60 percent impairment for level [3] sensory loss multiplied by 5 percent available for the right L4 nerve root specified. This is equal to 3 percent lower extremity impairment.

"There is no right leg motor grade loss based on the current exam[ination].

"With regards to the left lower extremity, there is no motor or sensory loss present, therefore, no impairment is assigned to the left L4 spinal nerve root.

"With regards to pain, [appellant's] pain level appears to be mild based on the visual analog scale. No additional impairment is assigned above over that provided for impairment of the nerve root level above.

"As a result of the above evaluation and computations based on the [A.M.A.,] *Guides* listed above, [appellant] has a total of 3 percent lower extremity impairment related to the lumbar injury and surgery."

In a December 20, 2004 memorandum, a district medical director stated that appellant had a three percent impairment of the right lower extremity based on the calculations of Dr. Smith as applied to the fifth edition of the A.M.A., *Guides*.

By decision dated January 20, 2005, the Office granted appellant a schedule award for 8.64 weeks based on a 3 percent permanent impairment of the right lower extremity.

In a separate decision dated January 20, 2005, the Office denied appellant's claim for a schedule award for impairment of the left lower extremity.

Appellant requested reconsideration and resubmitted the February 23, 2004 report of Dr. Ellis.

By decision dated August 24, 2005, the Office denied appellant's request for reconsideration on the grounds that he failed to submit evidence warranting further merit review.

[1] The report of Dr. Tibbs indicated that the date of maximum medical improvement was January 28, 2004, not January 20, 2004.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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. 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*[4] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[5]

ANALYSIS -- ISSUE 1

In a February 24, 2004 report, Dr. Ellis, an attending Board-certified family practitioner, provided findings on physical examination and opined that appellant had a 14 percent combined permanent impairment of the right lower extremity, according to Tables 15-15 to 15-18 of the fifth edition of the A.M.A., *Guides*, including 3.5 percent for the right lower extremity based on sensory and motor loss due to impairment of the right L5 spinal nerve root and a 7 percent impairment of the left lower extremity, based on sensory and motor loss of the left L4 spinal nerve root.

In a report dated October 12, 2004, Dr. Smith a Board-certified physiatrist and Office referral physician, provided findings on physical examination and opined that appellant had a 3 percent impairment of the right lower extremity for sensory loss due to right L4 nerve root impairment, based on Table 15-15 of the fifth edition of the A.M.A., *Guides,* with no impairment due to motor loss. Dr. Smith found no left lower extremity impairment.

The Board finds that there is a conflict in the medical opinion evidence between Dr. Ellis and Dr. Smith on the issue of appellant's work-related permanent impairment of his lower extremities. Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[6] Accordingly, the case must be remanded for further development.

On remand, the Office should refer appellant, together with the case record and statement of accepted facts, to an appropriate Board-certified specialist for an evaluation and calculation of his work-related permanent impairment based on correct application of the fifth edition of the

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[5] *See supra* note 3.

[6] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan* (*Henry Lusignan*), 45 ECAB 207 (1993).

A.M.A., *Guides*. After such further development as it deems necessary, the Office shall issue a *de novo* decision.[7]

CONCLUSION

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence and requires further development.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 24 and January 20, 2005 are set aside. The case is remanded for further development consistent with this decision.

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

[7] In light of the Board's resolution of the first issue, the second issue is moot.