United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 06-1330**
	)	**Issued: December 29, 2006**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 25, 2006 appellant filed a timely appeal of the May 9, 2006 merit decision of the Office of Workers' Compensation Programs which affirmed a schedule award for bilateral lower extremity impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim for a schedule award.

ISSUES

The issues are: (1) whether appellant's erectile dysfunction is causally related to his October 17, 1986 employment injury; and (2) whether he has greater than 20 percent impairment of the lower extremities for which he received a schedule award.

FACTUAL HISTORY

On October 17, 1986 appellant, then a 45-year-old police officer, sustained an employment-related back injury when he fell while attempting to get up from a chair. The Office accepted the claim for herniated disc at L2-3. Appellant underwent an Office-approved

laminectomy on October 31, 1986 and returned to work on February 5, 1987. Effective October 12, 1988 Dr. Vincent L. Ferrara, appellant's neurosurgeon, discharged him from further treatment of the lower back injury.

On September 11, 2002 appellant filed a claim for a schedule award. Dr. George L. Rodriguez, a Board-certified physiatrist, examined him, reviewed various medical records and provided a July 6, 2004 impairment rating. He diagnosed disc protrusion at L4-5, lumbosacral radiculopathy and mild erectile dysfunction, all of which he attributed to appellant's October 17, 1986 employment injury. Dr. Rodriguez assigned 21 percent impairment to each of appellant's lower extremities for motor deficits involving the femoral nerve, sciatic nerve and superior and inferior gluteal nerves. With respect to appellant's erectile (penile) dysfunction, Dr. Rodriguez categorized it as a Class 1 impairment, which represented a whole person impairment of 10 percent. He also indicated that appellant reached maximum medical improvement on or about October 17, 1998.

The Office medical adviser reviewed the file, including Dr. Rodriguez's findings and in a report dated September 29, 2004, found 10 percent impairment for each lower extremity due to sensory and motor deficits involving the L3 nerve root and pain. He identified July 6, 2004 as the date appellant reached maximum medical improvement. The Office medical adviser did not recommend a schedule award for erectile dysfunction, noting that this condition had not been approved by the Office.[1]

By decision dated December 1, 2004, the Office granted a schedule award for 20 percent impairment of the lower extremities. The award covered a period of 57.6 weeks from July 6, 2004 to August 13, 2005.

On December 3, 2004 appellant requested further review of his claim by the Office's Branch of Hearings and Review. The Office reviewed the written record and issued a May 9, 2006 decision. The hearing representative found that appellant's impairment did not exceed 10 percent of each lower extremity. As to his reported erectile dysfunction, the hearing representative noted that the claim had not previously been accepted for this condition and there was currently no medical evidence establishing that appellant sustained erectile (penile) dysfunction causally related to the accepted work injury and the resultant surgery. The hearing representative, therefore, affirmed the Office's December 1, 2004 schedule award decision.

LEGAL PRECEDENT -- ISSUE 1

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.[2]

[1] The Office medical adviser also noted that a March 16, 2004 report from Dr. Alon Davis that Dr. Rodriguez referenced in his July 6, 2004 report was not made available for review by the Office. According to Dr. Rodriguez, Dr. Davis had similarly rated appellant's erectile dysfunction as "Class 1 10 percent deficit."

[2] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for herniated disc at L2-3 and approved an October 31, 1986 lumbar laminectomy. More than 15 years after his injury, appellant now claims that his erectile dysfunction is causally related to his October 17, 1986 employment injury. His erectile dysfunction was reportedly first diagnosed around 1999 and Dr. Rodriguez who examined appellant in July 2004, attributed this condition to the October 17, 1986 employment injury. However, he did not explain how he was able to link the two. Furthermore, Dr. Rodriguez noted that appellant had been "diagnosed with impotence of *unclear etiology* over the past four to five years." This notation clearly undercuts Dr. Rodriguez conclusion that appellant's erectile dysfunction is related to the accepted employment injury. Additionally, he did not conduct a urological examination, but merely referred to another physician's March 16, 2004 diagnosis of erectile dysfunction. This latter physician's report is not included in the record and, therefore, his findings cannot be independently scrutinized.[3] Because Dr. Rodriguez did not provide a verifiable basis for his diagnosis and opinion on causal relationship, we find that appellant has not established that his claimed erectile dysfunction is causally related to his October 17, 1986 employment injury.

LEGAL PRECEDENT -- ISSUE 2

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.[4] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[5] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[6]

ANALYSIS -- ISSUE 2

Appellant argues that the Office should have based the schedule award on Dr. Rodriguez's July 6, 2004 impairment rating instead of the Office medical adviser's report, which according to appellant is illegible. As a preliminary matter, the Board finds that the Office medical adviser's September 29, 2004 report is legible. This handwritten report may require some effort to decipher, but it is in fact legible as noted by the hearing representative. Accordingly, the hearing representative properly exercised his discretion in denying appellant's

[3] *See supra* note 1.

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

[5] 20 C.F.R. § 10.404 (1999).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (issued January 29, 2001).

request to subpoena the Office medical adviser to either testify or provide a legible copy of his report.[7]

Whereas Dr. Rodriguez found 21 percent impairment of each lower extremity, the Office medical adviser only found 10 percent impairment for each extremity. The Office medical adviser noted that Dr. Rodriguez's 21 percent impairment rating was inconsistent with his own neurological and physical examination findings. When Dr. Rodriguez examined appellant on July 6, 2004 he noted the extremities were within normal limits. His neurological examination revealed that appellant's "sensation [was] normal throughout all dermatomes and nerve distributions." Given appellant's normal physical and neurological findings, it is unclear from Dr. Rodriguez report how he arrived at his conclusion that appellant had motor deficits involving the femoral nerve, sciatic nerve and superior and inferior gluteal nerves. As the hearing representative correctly noted, Dr. Rodriguez does not identify any objective clinical or diagnostic findings to support impairment to the above-mentioned nerves.

In contrast, the Office medical adviser clearly explained that appellant's bilateral lower extremity impairment involved the L3 nerve root and represented a Grade 4 (25 percent) sensory and motor deficit in accordance with Tables 15-15 and 15-16, A.M.A., *Guides* 424.[8] According to Table 15-18, A.M.A., *Guides* 424, an L3 nerve root impairment affecting the lower extremity represents a maximum 5 percent loss due to sensory deficit or pain and a maximum 20 percent loss of function due to strength. To determine the lower extremity impairment one multiplies appellant's Grade 4 classification (25 percent) by the maximum percentage loss due to sensory deficit or pain (5 percent) and the maximum percentage loss of function due to strength (20 percent). Applying this formula, appellant had 1.25 percent impairment for sensory deficit (25 percent x 5 percent) and 5 percent impairment due to loss of strength (25 percent x 20 percent), for a combined 6.25 percent impairment in each lower extremity. The Office medical adviser also determined that appellant warranted two percent additional impairment for pain in both lower extremities citing Figure 18-1, A.M.A., *Guides* 574.[9] There is also an unexplained additional 2 percent impairment that he added to both lower extremities, for a total of 10 percent impairment. While the hearing representative noted that the Office medical adviser added another two percent after already awarding two percent for pain, no attempt was made to explain

[7] A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. 20 C.F.R. § 10.619(a). The Board's function on appeal is to determine whether the hearing representative abused his or her discretion in granting or denying the subpoena request. *Mary Poller*, 55 ECAB 483, 489-90 (2004).

[8] With respect to sensory loss, a Grade 4 classification is characterized by "[d]istorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensation or pain, that is forgotten during activity." This classification represents a 1 to 25 percent sensory deficit. Table 15-15, A.M.A., *Guides* 424. Motor deficits are graded under Table 15-16, A.M.A., *Guides* 424. A Grade 4 classification represents "[a]ctive movement against gravity with some resistance," with a percentage deficit range from 1 to 25. *Id.* An almost identical grading system appears under Tables 16-10 and 16-11, A.M.A., *Guides* 482, 484, regarding upper extremity impairments. These tables may also be applied for determining the extent of lower extremity impairments due to sensory and motor deficits. *See* section 17.2l, A.M.A., *Guides* 550. Although Dr. Rodriguez and the Office medical adviser both determined that appellant's condition warranted a Grade 4 classification, Dr. Rodriguez relied on Table 16-11.

[9] *See* section 18.3d, A.M.A., *Guides* 573.

the basis for the second two percent impairment increase. Arguably this is a duplication of the two percent increase for pain, however, the record is unclear on this point.

Both the A.M.A., *Guides* and the Office procedures limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using Chapter 18.[10] Furthermore, the Office has indicated that Chapter 18 is "not to be used in combination with other methods to measure impairment due to sensory pain (Chapters 13, 16 and 17)."[11] The A.M.A., *Guides* do, however, provide for an incremental adjustment of up to three percent for pain when the conventional rating system does not adequately encompass the burden of the individual's condition. Where the pain-related impairment appears to increase the burden of the individual's condition "slightly," the physician can increase the percentage found under the conventional rating system by up to three percent.[12]

In this instance, the Office medical adviser increased appellant's impairment rating by at least two percent for pain and perhaps mistakenly by another two percent for the same pain. However, the Office medical adviser has not explained why the six percent conventional impairment rating he provided under Chapter 15 does not adequately encompass the burden of appellant's condition. In the absence of a valid explanation for utilizing Chapter 18, the Office should not have relied on the Office medical adviser's September 29, 2004 report as the basis for determining the extent of appellant's bilateral lower extremity impairment.[13] Furthermore, there is no apparent justification for his calculation of an additional two percent impairment beyond the eight percent he had already calculated for L3 nerve root impairment and pain. Accordingly, the Board finds that the record does not include a probative medical opinion on the nature and extent of appellant's impairment of the lower extremities. The case will be remanded to the Office for further development of the medical evidence, as appropriate, followed by a *de novo* decision regarding appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that appellant has not demonstrated that his erectile dysfunction is causally related to his October 17, 1986 employment injury. We further find that the case is not in posture for decision regarding appellant's entitlement to a schedule award.

[10] Section 18.3b, A.M.A., *Guides* 571.

[11] FECA Bulletin No. 01-05, Attachment 1, para. 5 (issued January 29, 2001).

[12] Section 18.3d, A.M.A., *Guides* 573; Figure 18-1, A.M.A., *Guides* 574.

[13] *See Mark A. Holloway*, 55 ECAB 321, 326 (2004); *Philip A. Norulak*, 55 ECAB 690, 696 (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part. However, the hearing representative's decision as it relates to appellant's entitlement to a schedule award is set aside and the case is remanded to the Office for further proceedings in accordance with this decision.

Issued: December 29, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board