United States Department of Labor
Employees' Compensation Appeals Board

BILL C. HURD, Appellant	)	
and	)	**Docket No. 05-1675**
	)	**Issued: February 8, 2006**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT, Employer	)	

Appearances:
Bill C. Hurd, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 11, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated June 23, 2005.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained more than a 10 percent impairment of his left upper extremity and more than a 2 percent impairment of his right upper extremity for which he received a schedule award.

[1] The record reflects that appellant previously filed an appeal on November 8, 2004 from an August 2, 2004 decision. In an April 22, 2005 order remanding the case, the Board noted that the case record had not been forwarded in a timely manner. The Board ordered that the Office reconstruct and properly assemble appellant's case and preserve his appeal rights. Docket No. 05-0273 (issued April 22, 2005). The Office reissued the schedule award decision on June 23, 2005.

FACTUAL HISTORY

On December 26, 2000 appellant, then a 39-year-old airplane inspector, filed a claim for an injury sustained on December 18, 2000 when he turned his head at work and felt sharp pain in his neck. He stopped work on December 21, 2000 and returned on December 28, 2000.[2] On February 23, 2001 the Office accepted appellant's claim for cervical disc displacement, C6-7 HNP and surgery. He received appropriate compensation benefits. Appellant filed a schedule award claim on March 18, 2002.

On October 29, 2002 the Office granted appellant a schedule award for a one percent impairment of the left upper extremity. The award covered a period of 3.12 weeks from May 3 to 24, 2002.

Appellant requested a hearing which was held on August 13, 2003.

In an August 19, 2003 report, Dr. Darrel S. Brodke, a Board-certified orthopedic surgeon and appellant's treating physician, provided an impairment rating for the right upper extremity. The impairment rating was based upon the affected extremity as opposed to the whole person. Dr. Brodke noted appellant's history of injury and treatment which included, anterior cervical discectomy and fusion with plate fixation and iliac crest bone grafting on May 17, 1999. He advised that he had some mild sensory loss and C6 radiculopathy and reached maximum medical improvement (MMI) on August 28, 2001. Dr. Brodke referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001)[3] and indicated that under the diagnosis-related estimate the cervical Category 5, based on appellant's C5-6 injuries, he was entitled to a five percent impairment of the right upper extremity. He noted that appellant had persistent decreased light touch sensation and radicular symptoms. Dr. Brodke advised that he was currently at activity as tolerated with limited neck flexion and rotation.

In a separate report also dated August 19, 2003, Dr. Brodke provided an impairment rating for the left upper extremity. He repeated that appellant did fairly well until his second work injury in December 2000 resulted in a second disc herniation at C6-7 and compressed the left C7 nerve root. Dr. Brodke advised that this required an anterior cervical discectomy and fusion at C6-7 with plate fixation and hardware removal of the plate at C5-6. He indicated that appellant continued to have symptoms of pain in the left upper extremity with decreased light touch sensation in the left C6 and C7 dermatomes as well as some ongoing C6 and C7 radicular symptoms. Dr. Brodke noted that he had sensory loss but no motor loss. He also indicated that he had loss of range of motion of the neck and arm which was secondary due to ongoing pain and symptoms from the injury. Dr. Brodke repeated that he was at maximum medical improvement August 28, 2001. He referred to the A.M.A., *Guides*[4] and determined that the second cervical injury at C6-7 caused him to fall into a diagnosis-related estimate cervical

[2] Appellant has a prior claim for a May 7, 1999 injury to the right shoulder, rotator cuff and right hand. Claim No. 12-182941. The Office accepted this claim for herniated nucleus pulposus (HNP) C5-6, right upper extremity radiculopathy and anterior cervical fusion. The Office doubled appellant's claims under claim number 12-0182941.

[3] A.M.A., *Guides* 394.

[4] *Id.*

Category 5 with persistent decreased light touch sensation and persistent radicular symptoms was equivalent to a 10 percent impairment of the left upper extremity, with mild to moderate C7 sensory loss. Dr. Brodke noted that appellant was currently at activity as tolerated with limited neck flexion and rotation and other limitations as his pain required.

By decision dated October 28, 2003, the Office hearing representative set aside the October 29, 2002 decision and remanded the case to the Office for further development regarding the percentage of impairment of both upper extremities.

In a memorandum dated December 17, 2003, an Office medical adviser reviewed Dr. Brooke's reports to provide an impairment rating. However, he indicated that, while Dr. Brodke utilized the A.M.A., *Guides*, the ratings were not done according to the protocols for rating cervical nerve roots as mandated by the Office. The Office medical adviser explained that Office procedures precluded the use of diagnosis-related estimate in these instances. He explained that a rating was difficult to calculate and recommended a second opinion examination.

By letter dated March 16, 2004, the Office referred appellant, together with a statement of accepted facts and copies of medical records, to Dr. William S. Muir, a Board-certified orthopedic surgeon, for a second opinion examination.[5]

An April 9, 2004 magnetic resonance imaging scan of the cervical spine read by Dr. Robert Lamb, a Board-certified diagnostic radiologist, revealed fused vertebra at the C5-6 and C6-7 levels and a mild disc bulges at C4-5, C2-3 and C3-4 with uncinate joint hypertrophy on the right at C3-4.

In an April 19, 2004 report, Dr. Muir noted appellant's history and conducted a physical examination. He noted that his cervical range of motion was limited to 90 percent. Dr. Muir provided neurological findings which included mild weakness in the triceps for strength, symmetric deep tendon reflexes and decreased sensation down both arms. X-rays showed a solid fusion, with no impingement on the spinal cord or exiting nerve roots. Dr. Muir advised that appellant would need medication on a long-term basis and some intermittent physical therapy. He concurred with Dr. Brodke's opinion that appellant had an impairment rating of 5 percent on the right upper extremity and 10 percent to the left upper extremity for a total of 15 percent.

In a memorandum dated May 5, 2004, the Office medical adviser noted that appellant had no motor loss in either the C6 or C7 roots, although he did have a sensory loss on the left side. He explained that Dr. Brodke's report utilized the diagnosis-related estimate system which while appropriate under the A.M.A., *Guides*, did not conform to standard Office practice. The Office medical adviser noted that the diagnosis-related estimate protocol from Category 5 utilized whole person measurements and did not allow for segmentation of the rating as done by Dr. Brodke. He indicated that Dr. Muir did not provide any significant elaboration and had concurred with the ratings of Dr. Brodke. The Office medical adviser indicated that he could

[5] In the statement of accepted facts, Dr. Muir was advised that the diagnosis-related estimate categories could not be used.

utilize the impairments given and provide a rating; however, he preferred that appellant be referred to another physician familiar with the proper procedures in order to provide a proper impairment rating.

The Office subsequently requested that the Office medical adviser provide an impairment rating.

In a May 19, 2004 report, the Office medical adviser indicated that he would attempt to provide a rating based upon the chart and information in the record. He opined that appellant had an impairment of 10 percent to the left upper extremity and 2 percent to the right upper extremity. The medical adviser found no impairment for motor loss.

On January 23, 2005 the Office granted appellant a schedule award for a 10 percent impairment of the left upper extremity and a 2 percent impairment of the right upper extremity.[6] The award covered a period of 34.32 weeks from August 28, 2001 to April 25, 2002.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[7] 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.[8] 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[9] The Act's implementing regulation has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule award losses.[10]

ANALYSIS

The Board notes that both Dr. Brodke and Dr. Muir provided impairment ratings. However, neither physician adequately explained how they derived their estimates of impairment under the protocols utilized by the Office. Dr. Brodke utilized the diagnosis based estimate method to calculate whole person impairment to appellant's upper extremities.[11] This chapter of the A.M.A., *Guides* pertains to the spine and the provision referenced by Dr. Brodke has no specific application to the upper extremities. Although a schedule award for the arm may be granted where an injury to the spine causes impairment to the arm, neither the Act nor its implementing regulations provides for a schedule award for impairment to the back itself or the

[6] The Office subtracted 1 percent from the 10 percent to the left upper extremity, as appellant was previously paid this amount on October 25, 2002.

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8107.

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

[10] 20 C.F.R. § 10.404.

[11] *See supra* note 3 at 393-94.

body as a whole.[12] Dr. Brodke's rating of the permanent impairment to appellant's upper extremities is, therefore, of diminished probative value. In turn, Dr. Muir's reports are also insufficient as he merely concurred with Dr. Brodke and did not explain appellant's impairment according to the Office's protocols under to the A.M.A., *Guides.*

The Office subsequently requested that the Office medical adviser utilize the measurements provided by the physicians to provide an impairment rating.

In a May 19, 2004 report, the Office medical adviser determined that appellant had a 10 percent impairment to his left arm and 2 percent impairment to his right arm. The Office medical adviser referred to Table 15-17, page 424 of the A.M.A., *Guides* to note that for the C6 nerve root, the maximum percentage of loss of function due to sensory deficit or pain was eight percent.[13] The Office medical adviser applied to Table 15-15, page 424 of the A.M.A., *Guides* to find that appellant had palpation which was minimal to nontender and warranted a Grade 4 sensory loss, which allows a 25 percent deficit. The Office medical adviser then multiplied the 8 percent maximum for sensory deficit for the C6 nerve root by the 25 percent deficit grade to find 2 percent impairment of the right upper extremity due to sensory deficit. He explained that in order for appellant to have a five percent impairment, he would have to be in a Grade 1 or 2 classification which was not supported by the medical record.[14]

Regarding the left upper extremity, the Board notes that appellant has eight percent impairment. The Office medical adviser noted that, at Table 15-17 for the C6 nerve root the maximum percentage of loss of function due to sensory deficit or pain was eight percent. He referred to Table 15-15[15] and determined that appellant had a Grade 3 deficit which allows a maximum deficit of 60 percent. The Office medical adviser multiplied the 8 percent maximum for sensory deficit for the C6 nerve root by the 60 percent grade to total 5 percent impairment for the left upper extremity. He noted that for the C7 nerve root on the left, the maximum percentage of loss of function due to sensory deficit or pain was 8 under Table 15-17. The Office medical adviser referred to Table 15-15[16]and again found a Grade 3 sensory deficit of 60 percent. He multiplied the C7 maximum impairment by the grade deficit to find 5 percent impairment of the left upper extremity for sensory loss. However, the Board notes that the medical adviser erred as the maximum sensory loss of C7 is under Table 15-17, five percent and not eight percent as noted by the Office medical adviser.[17] Therefore, 5 percent maximum for sensory deficit of the C7 nerve root should have been multiplied by the 60 percent sensory

[12] *See Guiseppe Aversa*, 55 ECAB ___ (Docket No. 03-2042, issued December 12, 2003).

[13] *Supra* note 3 at 424, Table 15-17.

[14] Although the Office medical adviser reference tables in Chapter 15, The Spine, the tables referenced and procedures used to calculate impairment are essentially the same as contained in Chapter 16, The Upper Extremities. Compare Tables 15-15, 15-16 and 15-17, at 424, with tables 16-10, at 482, 16-11, at 484 and 16-13, at 489.

[15] *Supra* note 3 at 424.

[16] *Id.*

[17] *Id.* at 424, Table 15-17.

deficit, which equals 3 percent for the C7 nerve deficit on the left. These percentages (five percent for C6 and three percent for C7) when combined under the Combined Values Charts would entitle appellant to an eight percent impairment of the left upper extremity. There is no medical evidence in conformance with the A.M.A., *Guides* which supports that appellant has more than eight percent impairment of his left upper extremity.

Consequently, appellant has not established that he is entitled to a schedule award for greater impairment than that for which he has received.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award greater than 10 percent impairment of his left arm and 2 percent for his right arm, for which he has already received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 23, 2005 is affirmed, as modified.

Issued: February 8, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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