United States Department of Labor
Employees' Compensation Appeals Board

ROBERT O. WATSON, Appellant	)	
and	)	**Docket No. 06-349**
	)	**Issued: July 11, 2006**
DEPARTMENT OF THE TREASURY, FEDERAL LAW ENFORCEMENT TRAINING CENTER, Glynco, GA, Employer	)	

Appearances:
Robert O. Watson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2005 appellant filed a timely appeal from a merit decision of an Office of Workers' Compensation Programs' hearing representative dated September 6, 2005 which affirmed a three percent impairment of the right lower extremity.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has more than a three percent impairment to his right lower extremity for which he received a schedule award. On appeal, appellant contends that the Office erred in finding a conflict in medical opinion, and that the impartial medical examiner's

[1] In a decision dated October 19, 2005, an Office hearing representative vacated an April 21, 2005 Office decision which denied right knee surgery and remanded the case to the district Office to develop the issue of whether appellant's right knee condition is a compensable consequential injury. As the Office has not issued a final decision on the claimed consequential injury, it is not currently before the Board.

report should not carry the weight of the medical opinion evidence, because he failed to account for his right knee condition, which he asserts is a consequential injury.

FACTUAL HISTORY

On March 12, 1999 appellant, then a 50-year-old law enforcement instructor, filed a claim alleging that he injured his lower back and right knee when he fell from a bench while hanging a punching bag on March 11, 1999. The Office accepted the claim for a lumbar strain and herniated disc at L4-5. Appellant stopped work on June 17, 2001 and has not returned. He initially elected retirement benefits on July 1, 2002; however, appellant subsequently elected benefits under the Federal Employees' Compensation Act effective February 21, 2004.

On December 12, 2002 appellant filed a claim for a schedule award. In a May 23, 2002 medical report, Dr. Howard Weiss, a Board-certified physical medicine and rehabilitation specialist, provided an impression of degenerative disc disease at L4-5 and L5-S1 and mild lumbar stenosis at L3-4, L4-5. He opined that these conditions were causally related to the March 11, 1999 work injury and that appellant was at maximum medical improvement and could return to work on a modified light-duty work status for eight hours a day. He further opined that appellant sustained a six percent whole body impairment as a result of his injury pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2]

In a November 18, 2002 medical report, Dr. James Galyon, a Board-certified orthopedic surgeon, noted the history of injury and that appellant had persistent weakness and pain in both legs since that time, with a giving way of both thighs. He noted that he relied upon his memory of what previous measurements were in appellant's thighs and calves and provided current measurements of appellant's right and left thighs and right and left calves. Dr. Galyon advised that the strength of his knees against force was tested, as well as foot and ankle flexion and dorsiflexion and opined that there was a mild weakness in both lower extremities. Based on the A.M.A., *Guides*, he opined that appellant had a 20 percent permanent disability in each lower extremity based on atrophy and weakness. Under Table 17-6, page 530, Dr. Galyon opined that appellant had an eight percent mild to moderate atrophy of the lower extremities. Under Table 17-8, page 532, Dr. Galyon opined that appellant had a 12 percent weakness in both legs.

In a December 23, 2002 report, an Office medical adviser advised that, as Dr. Galyon's impairment rating was based on appellant's recollection of muscle measurements, it was not appropriate. The Office medical adviser further noted that the affected muscles were usually compared with the normal muscle. The Office medical adviser recommended that under section 17-2d, page 530, another method for determining diminished muscle strength should be used.

In a March 4, 2003 letter, the Office provided Dr. Galyon with a copy of the Office medical adviser's report and requested a response. In a March 28, 2003 report, Dr. Galyon responded that he had used the exact tables recommended by the Office medical adviser and that his previous report should be sufficient to explain the reasons for appellant's impairment.

---

[2] A.M.A., *Guides* (5th ed. 2001).

In a June 11, 2003 report, Dr. Galyon advised that he reevaluated appellant for bilateral weakness. The thigh measured 19 3/4 inches on the right and 20 inches on the left. The calf measured 20 inches on the right and 21 inches on the left. Dr. Galyon further advised that he measured appellant's strength with manual testing and that appellant was weak in both legs. Under Table 17-7, page 531, he opined that appellant had a Level 4 muscle function, which was active movement against gravity with some resistance and that appellant had a permanent partial disability. Dr. Galyon stated that, since there was bilateral weakness, he utilized a second method of measuring residual weakness at Table 17-6 on page 530 regarding unilateral muscle atrophy.

In a September 4, 2003 report, an Office medical adviser noted that Dr. Galyon provided a Grade 4 muscle weakness in both lower extremities. He advised that the best way to rate appellant's thigh atrophy/weakness was as a loss of function due to strength/motor deficit. The Office medical adviser noted that, under Table 15-18, page 424, the maximum loss of function due to strength for the L4 nerve root was 34 percent. Under Table 15-16, page 424, a Grade 4 classification, which was noted as active movement against gravity with some resistance, produced a 25 percent motor deficit. The Office medical adviser then multiplied the 34 percent maximum loss of function due to strength by the 25 percent motor deficit to find that appellant had a 6 percent impairment to each of his left and his right lower extremities.

The Office found a conflict in medical opinion regarding the extent of impairment to appellant's lower extremities between Dr. Galyon and the Office medical adviser. It referred him, together with a list of questions, statement of accepted facts and the medical record, to Dr. Charles Douglas Wilburn, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a December 22, 2003 report, Dr. Wilburn noted appellant's medical history and the history of injury. He listed appellant's current symptoms, which included pain across the low back going predominantly into the right posterior hip and radiating into the right thigh, with occasional collapsing of the right leg and tenderness in the left lateral hip area. Dr. Wilburn presented his examination findings, noting no obvious difference in size of appellant's right calf and thigh compared to the left side. His impression was that of mild to moderate spondylosis with some degenerative disc changes noted at the L4-5 and the L5-S1 level without any clear cut neurological deficit, nerve root tension signs or true radicular leg pain. He also found moderate dorsal lumbar spondylosis at the lumbosacral junction and a mild paresthesias of the right leg which followed an S1 dermatome, but without any reflex change or definite motor weakness or atrophy. Dr. Wilburn opined that appellant had reached maximum medical improvement and, by history, his injury caused all his current symptoms, which included a restriction of the ability to function as he did previously with residual loss of sensation but no weakness. He opined that appellant has paresthesia and pain in the low back, hip and thigh. Dr. Wilburn stated that appellant fell in the diagnostic-related estimate (DRE) lumbar Category 3 and sustained a 13 percent permanent impairment to the body as a whole, due to some dermatome sensory changes as well as objective findings noted on neural diagnostic testing and a history of persistent pain from his documented lumbar spondylytic changes.

In a March 25, 2004 report, the Office requested that Dr. Wilburn determine whether appellant was eligible for a schedule award. The Office noted that, in his December 22, 2003

report, the physician had indicated a 13 percent impairment rating of the whole body. It advised that the Act did not allow for a schedule award based upon ratings of the whole body or of the spine unless nerve impairments existed affecting the extremities.

In an April 21, 2004 report, Dr. Galyon opined that appellant had a 20 percent disability of each lower extremity based upon atrophy and weakness, symptoms of pain and giving way.[3] He noted that appellant's complaints on April 16, 2004 were of significant back pain, radicular pain into his right leg, pain along the lateral aspect of the thigh all the way down to the knee, weakness in the right leg, swelling in the right leg, occasional aching pain in the left buttock and the left posterior thigh and also left knee weakness, easily hyperextendable left knee. Dr. Galyon opined that appellant's back injury with degenerative changes caused right leg atrophy and weakness, causing appellant's right leg to give way and swell from time to time. Under Table 17-6, page 530 of the A.M.A., *Guides*, he assigned an 8 percent lower extremity impairment due to right sided leg muscle atrophy and, under Table 17-8, page 532, assigned a weakness value in the leg as 12 percent.

In a June 3, 2004 addendum, Dr. Wilburn stated that appellant had right leg paresthesia in the distribution of the S1 nerve root. He stated that this resulted in a three percent impairment to the right lower extremity as a result of sensory loss and paresthesia.

The Office also received medical reports from Dr. Galyon which noted weakness, buckling and the giving way of appellant's right knee, which he opined was causally related to his work injury. Dr. Galyon diagnosed a torn meniscus in the right knee with the recommendation for an arthroscopic evaluation and debridement of the knee, which he stated was caused or significantly aggravated by the fall in 2003. By decision dated April 21, 2005, the Office denied appellant's request for his right knee surgery. Appellant requested a review of the written record. By decision dated October 19, 2005, an Office hearing representative vacated the April 21, 2005 decision and remanded the case to the Office for further development of whether appellant's right knee condition and requested surgery was a consequential injury.

In a June 16, 2004 report, an Office medical adviser noted that Dr. Wilburn's June 3, 2004 addendum report allowed a three percent impairment of appellant's right lower extremity for paresthesia in the S1 distribution. Under Table 15-15 page 424 of the A.M.A., *Guides*, a Grade 3 sensory loss equated to a 60 percent sensory deficit and, under Table 15-18, page 424, the maximum loss of function due to sensory deficit or pain for the S1 nerve root was 5 percent. The Office medical adviser stated that a 3 percent impairment results when the 60 percent sensory deficit is multiplied by the 5 percent S1 nerve root deficit and noted his concurrence with Dr. Wilburn's impairment rating.

By decision dated July 21, 2004, the Office granted appellant a schedule award for a three percent impairment of the right lower extremity.

In a July 28, 2004 letter, appellant disagreed with the July 21, 2004 decision and requested an oral hearing, which was held on May 3, 2005. Appellant presented copies of

[3] Given Dr. Galyon's statements relating solely to the right lower extremity, it is assumed that Dr. Galyon's rating is for the right lower extremity only.

medical reports from Dr. Galyon, dated November 13, 2003 to March 21, 2005, documenting his right knee condition. An October 11, 2005 magnetic resonance imaging (MRI) scan found chronic tearing of the anterior and posterior labrum with very mild thinning of the posterior lateral articular cartilage; mild spinal stenosis at L4-5, moderately advanced bilateral degenerative facet arthroplasty at L5-S1 and degenerative changes in the L3-4 disc. A September 20, 2004 report from Dr. Joseph C. Boals,[4] noted the history of injury and found on examination, a decreased range of motion in the back in all planes, an estimated 3/5 to 4/5 weakness in both quads to manual muscle testing, a positive straight leg raise on the right side, decreased sensation in the distribution of the S1 nerve root involving the right leg and foot. Dr. Boals opined that there were residuals from appellant's injury to the back with ongoing radiculopathy evidenced by decreased sensation in the right leg and bilateral quadriceps weakness. Utilizing the A.M.A., *Guides*, Dr. Boals opined that appellant had a 13 percent impairment of the body as a whole for a DRE lumbar Category 3 under Table 15-3, page 384 which converted to a 16 percent lower extremity impairment to each extremity under Table 17-3, page 527. Dr. Boals additionally opined that, under Table 17-8, page 532, a Grade 3 impairment due to loss of strength in extension of the knee could be assigned to result in a 17 percent lower extremity impairment.

By decision dated September 6, 2005, an Office hearing representative found that the weight of the medical opinion evidence was represented by Dr. Wilburn, the impartial medical specialist. The Office hearing representative noted that, as the Office had not approved a claim for a consequential injury to appellant's right knee, no additional benefit could be awarded.

LEGAL PRECEDENT

The schedule award provision of the Act[5] and its implementing regulation[6] 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, 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

The schedule award provision under the Act are limited to specific members or functions of the body enumerated under section 8107 and its implementing regulation. A schedule award is not payable for loss or loss of use, of any member of the body not specifically enumerated and is not payable for the body as a whole.[8] Neither the Act nor the implementing federal regulation

[4] Dr. Boals credentials are not of record.

[5] 5 U.S.C. § 8107(a)-c).

[6] 20 C.F.R. § 10.404.

[7] *See Mark A. Holloway*, 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

[8] *See Ann L. Tague*, 49 ECAB 453 (1998).

provide for the payment of a schedule award for loss of use of the back or spine.[9] The 1960 amendments to the Act, however, modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule, regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, 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.[10]

The Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS

Appellant was issued a schedule award for three percent impairment to the right lower extremity based on the findings contained in the December 22, 2003 and June 3, 2004 reports of Dr. Wilburn, selected by the Office as the impartial medical specialist.

At the onset, appellant argues that a conflict in medical opinion did not arise between Dr. Galyon's June 11, 2003 report, for appellant and the Office medical adviser's September 4, 2003 report, for the Office. The Act provides that, if there is a 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 the examination.[12] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13] In reviewing Dr. Galyon's June 11, 2003 report, the Office medical adviser used the information contained in his report to obtain an impairment rating based on a different methodology in the A.M.A., *Guides*. The Office medical adviser offered an impairment rating based on an identifiable motor deficit of a specific peripheral nerve, while Dr. Galyon rated appellant's impairment of the lower extremities based on atrophy and muscle strength weakness. The Board notes, however, that Table 17-2 on page 526 of the A.M.A., *Guides* specifically prohibits an impairment rating based on the combination of muscle atrophy and muscle strength. Thus, Dr. Galyon's impairment rating was based on an improper application of the A.M.A., *Guides* and his opinion is of diminished probative value and

[9] *See Pamela J. Darling*, 49 ECAB 286 (1998).

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

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

[12] 5 U.S.C. § 8123.

[13] 20 C.F.R. § 10.321 (1999).

is insufficient to give rise to a conflict with the Office medical adviser's opinion.[14] Accordingly, the Board finds that a conflict in medical opinion was not created between Dr. Galyon and the Office medical adviser and the Office's subsequent referral to Dr. Wilburn constituted that of a second opinion physician.

The Board finds that the weight of the medical evidence rests with Dr. Wilburn's December 22, 2003 examination and subsequent impairment rating of June 3, 2004. Dr. Wilburn submitted a well-rationalized medical opinion based upon a complete and accurate factual and medical history. His report was based on a proper factual and medical background as he was provided with a statement of accepted facts and reviewed the medical record in his report. After noting appellant's symptoms and presenting his examination findings, Dr. Wilburn opined that he had mild to moderate spondylosis with some degenerative disc changes noted at the L4-5 and the L5 disc one level with no clear cut neurological deficit, nerve root tension signs or true radicular leg pain; moderate dorsal lumbar spondylosis at the lumbosacral junction; and a mild paresthesias of the right leg which followed an S1 dermatome but with no reflex change or definite motor weakness or atrophy. He opined that appellant's work injury caused his current symptoms, which included a restriction of ability to function as he did previously with residual loss of sensation but no weakness. Dr. Wilburn initially opined that appellant's dermatome sensory changes as well as objective findings resulted in 13 percent impairment to the body as a whole based on a DRE lumbar Category 3. The Office properly requested a clarifying opinion from Dr. Wilburn on March 25, 2004 as he had identified Table 15-3, which provides criteria for rating impairments to the whole person due to lumbar spine injuries.[15] In a June 3, 2004 addendum, Dr. Wilburn referred to his examination findings of December 22, 2003 in according a three percent impairment to appellant's right lower extremity as a result of sensory loss and paresthesia arising from the S1 nerve root.

The Office medical adviser correctly applied the proper tables and figures in the A.M.A., *Guides* to Dr. Wilburn's findings, in determining that appellant had three percent leg impairment. The Office medical adviser applied the A.M.A., *Guides* to the findings of Dr. Wilburn and found that appellant had Grade 3 impairment for pain in the S1 nerve root. Table 15-18 provides that an S1 nerve root impairment affecting the lower extremity has a maximum leg impairment of five percent for loss of function due to sensory deficit or pain.[16] Under Table 15-15, Grade 3 impairment for slight pain that interferes with some activities results in up to 60 percent of the maximum impairment.[17] The medical adviser indicated that 60 percent of the maximum

---

[14] *Norman D. Armstrong,* 55 ECAB ___ (Docket No. 04-306, issued June 23, 2004). *See also Shalanya Ellison,* 56 ECAB ___ (Docket No. 04-824, issued November 10, 2004) (schedule awards under the Act are to be based on the A.M.A., *Guides*; an estimate of permanent impairment is irrelevant and of diminished probative value where it is not based on the A.M.A., *Guides*).

[15] *Id.* at 384, Table 15-3. As the Office properly noted, although an injury to the spine may result in an impairment to a scheduled member, neither the Act nor its regulations provide for a schedule award for impairment to the back itself or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act. *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

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

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

5 percent results in a 3 percent leg impairment. This is in accord with the A.M.A., *Guides* and the findings of Dr. Wilburn, who described mild paresthesias of the right leg with no reflex change, definite motor weakness or atrophy.

In an April 21, 2004 report, Dr. Galyon opined that appellant has a 20 percent disability to his right lower extremity. However, the Board notes that Dr. Galyon appears to account for appellant's right knee condition, which has not been accepted by the Office as a consequential injury and is currently under separate development. The Board finds that Dr. Galyon's subsequent impairment rating is insufficient to create a conflict with that of Dr. Wilburn.

Additionally, the September 20, 2004 impairment rating by Dr. Boals is insufficient to establish greater impairment. Based on a DRE lumbar Category III, Dr. Boals opined that appellant had a 13 percent impairment rating of the body as a whole or a 16 percent lower extremity impairment to each lower extremity based on spinal impairment. As noted, Table 15-3, page 384, upon which Dr. Boals relied, is not appropriate as neither the Act nor its regulations provide for a schedule award for impairment to the back itself or to the body as a whole. The 17 percent lower extremity impairment issued due to loss of strength in extension of the knee is not at issue in the current claim as it is under separate development.

The Board finds that there is no other probative medical evidence of record to establish that appellant has more than three percent impairment to his right lower extremity, for which he received a schedule award. As noted the opinions of Dr. Galyon and Dr. Boals are of limited probative value. Accordingly, the Board finds that appellant has no more than a three percent permanent impairment of his right lower extremity.

CONCLUSION

The Board finds that appellant has no more than a three percent impairment of his right 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 September 6, 2005 is affirmed.

Issued: July 11, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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