United States Department of Labor
Employees' Compensation Appeals Board

JAMES C. PAGE, Appellant	)	
and	)	**Docket No. 06-509**
	)	**Issued: July 21, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Lorain, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 28, 2005 appellant filed a timely appeal of a December 1, 2005 merit decision of the Office of Workers' Compensation Programs denying his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the schedule award issues of this case.

ISSUE

The issue is whether appellant has established he is entitled to a schedule award for a permanent impairment to a scheduled member of the body under 5 U.S.C. § 8107.

FACTUAL HISTORY

There are three claims for injury associated with the case record submitted to the Board. Appellant filed a traumatic injury claim on March 11, 1991 for a low back injury; there is no indication as to whether an injury was accepted. The Office accepted that appellant sustained a cervical strain and a herniated C5-6 disc on July 24, 1991 from a motor vehicle accident while in the performance of duty. On July 12, 2000 appellant filed a notice of recurrence of disability as

of May 30, 2000, which was developed as an occupational claim for a lumbar injury resulting from a change in his mail carrier route. The Office accepted an aggravation of lumbosacral spondylosis.

In a report dated September 18, 2003, Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, provided a history and results on examination. He opined that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) appellant had a two percent right leg impairment due to motor deficit. Dr. Kaffen identified Table 15-16 and found that the impairment was 10 percent of the maximum 20 percent leg impairment for the S1 nerve root.

The Office referred the case to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for a second opinion. In a report dated February 9, 2004, he provided a history and results on examination. Dr. Ghanma opined that the herniated disc at C5-6 from the July 24, 1991 motor vehicle accident had resolved with no residuals. With respect to the aggravation of lumbosacral spondylosis, he opined that the work-related condition had also resolved. Dr. Ghanma reported no objective findings regarding the lower extremities and he concluded that appellant had no permanent impairment under the A.M.A., *Guides*.

The case was then referred to Dr. Kim Stearns, a Board-certified orthopedic surgeon, for an impartial referee examination to resolve the conflict. The Office asked Dr. Stearns to provide an opinion as to whether the accepted conditions had resolved and whether any current diagnosis was related to the work injuries, as well as provide an opinion regarding a permanent impairment to the lower extremities.

In a report dated September 7, 2004, Dr. Stearns provided a history and results on examination. She indicated that appellant had negative clinical findings with respect to the cervical spine and opined that the herniated C5-6 disc had resolved. Dr. Stearns noted that appellant had mild tenderness and spasm in the paralumbar muscles with limited motion, but appellant did not appear to have radicular findings on examination. She found that the work-related aggravation of lumbosacral spondylosis had a resolved, although appellant did have a permanent lumbar impairment from the spondylosis. With respect to the percentage of permanent impairment, Dr. Stearns stated: "At this point I do not find any impairment with respect to the lower extremities. I think the impairment is related to the lumbosacral area, which would be [five] percent based on the allowed condition and there are no apparent radicular findings on physical exam[ination] at this point, so I do not find any impairment."

The Office referred the medical evidence to an Office medical adviser, who opined in a November 24, 2004 report that appellant did not have an impairment to the upper or lower extremities. The medical adviser indicated that there were no physical findings to support a ratable permanent impairment.

By decision dated December 29, 2004, the Office determined that appellant was not entitled to a schedule award based on the evidence of record. Appellant requested a hearing before an Office hearing representative, which was held on August 8, 2005. In a decision dated December 1, 2005, the hearing representative affirmed the December 29, 2004 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] 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.

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.[3] 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.[4]

It is well established that, when a case is referred to a referee examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5]

ANALYSIS

In the present case, there was a conflict in the medical evidence between Dr. Kaffen and the second opinion physician, Dr. Ghanma. Dr. Kaffen opined that appellant had a two percent right leg impairment from his employment-related lumbar injury based on motor deficit in the S1 nerve root. Dr. Ghanma, however, found that the employment injuries had resolved and that appellant had no physical findings that would result in a ratable permanent impairment to the lower extremities.

The referee examiner, Dr. Stearns, provided an opinion that appellant did not have any employment-related permanent impairment to a schedule member. With respect to the neck condition, she found that the employment-related condition had resolved. As to the aggravation of the lumbosacral spondylosis, Dr. Stearns also opined that the condition had resolved. Although she noted physical findings from the spondylosis and stated that there was an

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] 5 U.S.C. § 8123.

[4] 20 C.F.R. § 10.321 (1999).

[5] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

impairment to the lumbosacral area, there were no radicular findings regarding the lower extremities. Neither the Act nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. The back is specifically excluded from the definition of "organ" under the Act.[6] Appellant is not entitled to any schedule award for the back or spine. In addition, Dr. Stearns clearly stated that there were no radicular findings and she found no permanent impairment to the lower extremities. An Office medical adviser also concurred with the opinion that no employment-related permanent impairment to a scheduled member of the body was established.

As noted above, a well-reasoned opinion from then physician chosen to resolve a conflict under 5 U.S.C. § 8123(a) is entitled to special weight. The weight of the evidence rests with Dr. Stearns and does not establish that appellant sustained any permanent impairment under 5 U.S.C. § 8107 to a schedule member. Accordingly, the Office properly found that appellant was not entitled to a schedule award in this case.

CONCLUSION

Appellant did not establish that he was entitled to a schedule award for a permanent impairment to a scheduled member of the body under 5 U.S.C. § 8107.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 1, 2005 is affirmed.

Issued: July 21, 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

[6] *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).