United States Department of Labor
Employees' Compensation Appeals Board

CARL J. CLEARY, Appellant	)	
and	)	**Docket No. 05-1558**
	)	**Issued: May 10, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 20, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 8, 2005 merit decision, concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 13 percent impairment of his legs, for which he received a schedule award.

FACTUAL HISTORY

On March 5, 2001 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim alleging that he sustained an injury at work on that date due to a slip and fall on icy steps. He briefly stopped work and then began working in a limited-duty position for the employing establishment. The Office accepted that appellant sustained a low back contusion and herniated nucleus pulposus (HNP) at L5-S1.

The findings of x-ray testing obtained on March 6, 2001 revealed marked degenerative disc changes at the L5-S1 and slight degenerative changes at L2-3 and L4-5. The findings of magnetic resonance imaging (MRI) scan obtained on April 19, 2001 showed a moderate to large disc herniation at L5-S1 with occlusion of the left neural foramen, a broad-based soft disc protrusion at L4-5 and mild disc protrusion and degeneration at L2-3 and L3-4.

The Office authorized a laminectomy and discectomy at L5-S1 which was performed on August 29, 2001 by Dr. Leonard Bruno, an attending Board-certified neurosurgeon. During the procedure, the left S1 nerve root was retracted medially in order to allow for incision of the L5 disc.

After the surgery, appellant reported varying levels of pain radiating into both lower extremities, primarily on the left. In a September 18, 2002 report, Dr. Bruno indicated that appellant reported that his legs were virtually pain free. In a report dated September 15, 2003, he stated that appellant was experiencing increased left-sided S1 radiculitis.[1]

Appellant submitted a March 31, 2005 report in which Dr. George L. Rodriguez, an attending Board-certified physical medicine and rehabilitation physician, concluded that he had a 12 percent impairment of his right leg and a 15 percent permanent impairment of his left leg. Dr. Rodriguez detailed his complaints and findings of examination, including weakness and pain radiation into the legs. Dr. Rodriguez indicated that, with respect to his right leg, appellant had an upper-level Grade 4 sensory loss (25 percent) associated with the L5 nerve distribution which, when multiplied by the 5 percent maximum impairment value for L5 sensory loss, yielded a 1 percent impairment rating.[2] Appellant had a mid-level Grade 4 motor loss (10 percent) in the L3, L4, L5 and S1 nerve distributions and then listed the maximum impairment values for each of these nerve distributions: L3 (20 percent), L4 (34 percent), L5 (37 percent) and S1 (20 percent). Dr. Rodriguez multiplied each of these maximum impairment values times the 10 percent motor loss grade to determine that appellant had the following impairment for motor loss of the right leg associated with specific nerve distributions: L3 (2 percent rating), L4 (3 percent), L5 (4 percent) and S1 (2 percent). He then added all the right leg impairment ratings to equal 12 percent.

With respect to his left leg, appellant had an upper-level Grade 4 sensory loss (25 percent) in the L5 nerve distribution which, when multiplied by the 5 percent maximum impairment value for L5 sensory loss, yielded a 1 percent impairment rating. He then noted that he had a mid-level Grade 4 motor loss (10 percent) in the L3, L4 and L5 nerve distributions and an upper-level Grade 4 motor loss (25 percent) in the S1 nerve distribution and then listed the maximum impairment values for each of these nerve distributions: L3 (20 percent), L4 (34 percent), L5 (37 percent) and S1 (20 percent). Dr. Rodriguez multiplied each of these maximum impairment values times the 10 or 25 percent motor loss grade, as appropriate, to determine that

[1] The periodic reports did not indicate that appellant had any significant problems with range of motion in his legs. The reports generally indicated that he had full strength in his legs, but sometimes they recorded modestly decreased strength in his legs.

[2] Dr. Rodriguez listed impairment ratings for the various function losses after rounding up or rounding down his calculations as appropriate. He indicated that all his calculations were based on Tables 15-15, 15-16 and 15-18 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

appellant had the following impairment for motor loss of the left leg associated with specific nerve distributions: L3 (2 percent rating), L4 (3 percent), L5 (4 percent) and S1 (5 percent). He then added all the left leg impairment ratings to equal 15 percent.

Appellant filed a claim alleging that he was entitled to schedule award compensation for impairment of the legs due to his March 5, 2001 employment injury.

On May 27, 2005 the Office medical adviser reviewed the evidence of record, including the March 31, 2005 report of Dr. Rodriguez and concluded that appellant had a 6.25 percent impairment of his right leg and a 6.25 percent permanent impairment of his left leg. The Office medical adviser indicated that, for each leg, he had an upper-level Grade 4 sensory loss (25 percent) associated with the S1 nerve distribution which, when multiplied by the 5 percent maximum value for S1 sensory loss, yielded a 1.25 percent impairment rating for each leg. Appellant had an upper-level Grade 4 motor loss (25 percent) associated with the S1 nerve distribution which, when multiplied by the 20 percent maximum value for S1 motor loss, yielded a 5 percent impairment rating for each leg. The Office medical adviser then added the 1.25 and 5 percent impairment ratings for each leg to determine that he had a 6.25 percent impairment of each leg.[3]

By decision dated July 8, 2005, the Office granted appellant a schedule award for a 13 percent impairment of the "bilateral lower extremities." The Office based its award on the opinion of the Office medical adviser.[4]

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

[3] The Office medical adviser indicated that all his calculations were based on Tables 15-15, 15-16 and 15-18 of the fifth edition of the A.M.A., *Guides*.

[4] In granting appellant a schedule for a 13 percent permanent impairment, it appears that the Office added the Office's medical adviser's calculation of the 6.25 percent for the left leg and the 6.25 percent for the right leg to equal a total 12.5 percent impairment of the legs and then rounded this figure up to 13 percent. However, under the Act, each leg impairment is considered separately; there is no provision for a bilateral leg impairment. *See* 5 U.S.C. § 8107(c)(2). While the Office may, as an administrative convenience, grant a schedule award containing a single impairment rating representing the addition of left and right leg impairments, it must first calculate the two leg impairments separately before deriving such a figure. When calculating appellant's leg impairments separately, each impairment of 6.25 would be rounded down to 6.00 percent and the addition of the two separate leg impairments would total 12 percent rather than 13 percent. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (June 2003).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

It is well-established that in determining the amount of a schedule award for a given member of the body that sustained an employment-related permanent impairment, preexisting impairments of that scheduled member of the body are to be included.[8]

ANALYSIS

The Office accepted that appellant sustained a back contusion and HNP at L5-S1 due to a fall at work on March 5, 2001. Appellant claimed entitlement to schedule award compensation for impairment of the legs due to his March 5, 2001 employment injury. By decision dated July 8, 2005, the Office granted him a schedule award for a total 13 percent permanent impairment of both legs based on a May 27, 2005 opinion of the Office medical adviser.

The Board finds that, in his May 27, 2005 report, the Office medical adviser properly evaluated the medical evidence of record and concluded that appellant had a 6.25 percent impairment of his right leg and a 6.25 percent impairment of his left leg. The Office medical adviser correctly indicated that, for each leg, he had an upper-level Grade 4 sensory loss (25 percent) associated with the S1 nerve distribution which, when multiplied by the 5 percent maximum value for S1 sensory loss, yielded a 1.25 percent impairment rating for each leg.[9] He then properly noted that appellant had an upper-level Grade 4 motor loss (25 percent) associated with the S1 nerve distribution which, when multiplied by the 20 percent maximum value for S1 motor loss, yielded a 5 percent impairment rating for each leg.[10] The Office medical adviser then correctly added all the 1.25 and 5 percent impairment ratings for each leg to determine that appellant had a 6.25 impairment of each leg.[11]

Appellant alleged that the March 31, 2005 report of Dr. Rodriguez established that he had a 12 percent permanent impairment of his right leg and a 15 percent permanent impairment of his left leg. However, Dr. Rodriguez included several impairment ratings that were not permissible under the relevant standards for evaluating permanent impairment. For example, Dr. Rodriguez included ratings for impairment loss related to sensory and motor loss associated with the L3, L4

[7] *Id*.

[8] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

[9] *See* A.M.A., *Guides* 424, Tables 15-15 and 15-18

[10] *See id.* at 424, Tables 15-16 and 15-18. The Board notes that the Office medical adviser properly indicated that appellant had sensory and motor loss associated with the S1 nerve distribution. Although his claim was accepted for HNP at L5-S1, a review of the medical evidence reveals that appellant's problems were associated with the S1 nerve distribution in each leg rather than the L5 nerve distribution. The Board further notes that the medical evidence does not reveal that appellant had limited range of motion of his legs. *See* A.M.A., *Guides* 533-38.

[11] The Office medical adviser indicated that all his calculations were based on Tables 15-15, 15-16 and 15-18 of the fifth edition of the A.M.A., *Guides*.

and L5 nerve distributions. Appellant argued that these values should be included because preexisting conditions should be included in rating a given scheduled member. As noted above, in determining the amount of a schedule award for a given member of the body that sustained an employment-related permanent impairment, preexisting impairments of that same scheduled member of the body are to be included.[12] Although diagnostic testing obtained shortly after March 5, 2001 showed bulges and degenerative changes at several levels in appellant's back, there is no indication that he had a preexisting impairment in the scheduled members for which he received his schedule award, *i.e.*, his legs.[13] Therefore, the opinion of Dr. Rodriguez does not provide an assessment of appellant's impairment which was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.[14]

As the report of the Office medical adviser provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[15] Appellant did not submit medical evidence showing that he has more than a 13 percent total impairment of his legs, for which he received a schedule award.[16]

CONCLUSION

The Board finds that appellant has no more than a 13 percent total impairment of his legs, for which he received a schedule award.

[12] *See supra* note 8 and accompanying text. With respect to the values based on the L5 nerve distribution, there is no evidence that the March 5, 2001 employment injury caused impairment in that nerve distribution. *See supra* note 10.

[13] The Board also notes that the impairment rating that Dr. Rodriguez provided for motor loss associated with the S1 nerve distribution for the right leg (2 percent) was actually lower than that provided for the right leg by the Office district medical director (5 percent) because Dr. Rodriguez used a 10 percent motor loss grade in his calculations whereas the Office medical adviser used a 25 percent motor loss grade.

[14] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

[15] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[16] As noted, when the Office granted its July 8, 2005 schedule award it appears to have added the 6.25 percent for the left leg and the 6.25 percent for the right leg to equal a total 12.5 percent impairment of the legs and then rounded this figure up to 13 percent. However, each of appellant's leg impairments should have been considered separately before adding them to reach a single figure for total leg impairment and, given this requirement, each leg impairment of 6.25 should have been rounded down to 6.00 percent and the addition of the two separate leg impairments should have totalled 12 percent rather than 13 percent. *See supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 8, 2005 decision is affirmed.

Issued: May 10, 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