United States Department of Labor
Employees' Compensation Appeals Board

ROBERT DELILLO, Appellant	)	
and	)	**Docket No. 06-175**
	)	**Issued: May 8, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Passaic, NJ, Employer	)	

Appearances:
Thomas R. Uliase, *Esq.,* for the appellant
Office of the 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 October 31, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' schedule award decision dated June 3, 2005. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award claim.

ISSUE

The issue is whether appellant has more than a 16 percent permanent impairment to his left lower extremity.

FACTUAL HISTORY

Appellant, a 54-year-old letter carrier, injured his left leg and back on December 8, 1995 when he was hit by a car while crossing a boulevard. He filed a claim for benefits which the Office accepted for left leg contusion and lumbar radiculopathy. The Office subsequently authorized surgery for a cervical laminectomy consisting of decompression of the cervical cord

at the C4 through C6 levels, arthroscopy and subacromial decompression of the right shoulder, which appellant underwent on December 3, 1996.[1]

On May 7, 1999 appellant filed a Form CA-7 claim for a schedule award.

In a report dated March 13, 2001, Dr. Gary Korenman, Board-certified in psychiatry and neurology, stated that appellant had a cervical myelopathy, causally related to the December 8, 1995 employment injury. He rated a 20 percent impairment of the whole person. In a supplemental report dated June 25, 2001, Dr. Korenman stated that appellant had a 90 percent impairment and had not yet reached maximum medical improvement.

In order to ascertain whether appellant had any permanent impairment causally related to his accepted left leg contusion and lumbar radiculopathy conditions, the Office referred him to Dr. Kenneth Falvo, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 7, 2002, Dr. Falvo found that appellant had no disability related to the lumbar spine, no disability related to a contusion of the left leg, and no permanent impairment of the left lower extremity causally related to his accepted conditions.

By decision dated February 6, 2003, the Office denied appellant's claim for a schedule award.

By letter dated February 12, 2003, appellant's attorney requested a hearing, which was held on October 28, 2003. In a report dated October 8, 2003, Dr. David Weiss, an osteopath, stated that appellant had a 45 percent impairment of the left lower extremity. Dr. Weiss made the following calculations: a sensory deficit loss of left L3 nerve root, which he rated a four percent impairment, pursuant to Tables 15-15 and 15-18 at page 424 of A.M.A., *Guides*; a sensory deficit loss of left L5 nerve root, which he rated a four percent impairment, pursuant to Tables 15-15 and 15-18 at page 424 of A.M.A., *Guides*; and a sensory deficit loss of left S1 nerve root of four percent, pursuant to Tables 15-15 and 15-18 at page 424 of A.M.A., *Guides*. Dr. Weiss found that appellant had a 12 percent impairment for a 4/5 loss of motor strength deficit of the left quadriceps (knee extension), pursuant to Table 17-8 at page 532 of A.M.A., *Guides*; a 25 percent impairment for a 4/5 loss of motor strength deficit of the left quadriceps (ankle plantar-flexion), pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*; and a three percent impairment based on pain, pursuant to Figure 18-1 at page 574 of A.M.A., *Guides*, which amounted to a total 45 percent left lower extremity impairment. Dr. Weiss also rated appellant's cervical impairment.

By decision dated January 29, 2004, the Office hearing representative set aside the February 6, 2003 decision, finding that there was a conflict in the medical evidence between the opinions of Dr. Weiss and Dr. Falvo. The Office remanded the case for referral to an impartial medical specialist to resolve the conflict regarding the correct amount of impairment to assign to appellant's accepted conditions.

[1] Although the Office authorized the surgical procedure for the cervical region, the record does not indicate that the Office accepted any cervical or shoulder condition as causally related to the accepted injury.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. John M. Flinchbaugh, Board-certified in orthopedic surgery, for an impartial medical evaluation. In a report dated March 23, 2004, Dr. Flinchbaugh determined that appellant had a 25 percent left lower extremity impairment. He calculated this impairment based on gait change and derangement pursuant to Table 17-5 at page 529 of the A.M.A., *Guides*, deriving a 15 percent impairment of mild severity, at subtitle D, and adding a 10 percent impairment for lower extremity muscle weakness based on weakness in his ankles and toes pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*.

Dr. Flinchbaugh also noted some decreased sensation over the webspace of his large toe and second toe of each foot, along with some weakness of dorsiflexion of the large toes and mild weakness of his ankles. He did not provide a rating for these symptoms.

In an memorandum/impairment evaluation dated May 27, 2004, the Office medical adviser found that appellant had a 16 percent left lower extremity impairment based on the following calculations which were based on the toe symptomatology noted, but not rated, by Dr. Flinchbaugh: a two percent impairment for loss of sensation in the great toe, at Table 17-37, page 552 of the A.M.A., *Guides*; some loss of strength in the great toe, dorsiflexion 4/5, for a two percent impairment at Table 17-8 at page 532 the A.M.A., *Guides*; and 12 percent impairment for loss of dorsiflexion of the left ankle, 4/5 at Table 17-8 at page 532 the A.M.A., *Guides*, for a total 16 percent impairment of his left lower extremity.[2]

On June 10, 2004 the Office granted appellant a schedule award for a 16 percent permanent impairment of the left lower extremity for the period March 8, 2004 to January 24, 2005, for a total of 46.08 weeks of compensation.

By letter dated June 21, 2004, appellant's attorney requested an oral hearing, which was held on March 28, 2005. Appellant's attorney argued that appellant was entitled to an award greater than a 16 percent left lower extremity impairment. He noted that Dr. Flinchbaugh had rendered impairment ratings for both lower extremities and argued that therefore the Office should have granted an award for impairment stemming from both lower extremities. Appellant also contended that because the Office had approved surgery for cervical laminectomy Dr. Weiss's ratings for cervical impairment should be added to appellant's schedule award.

By decision dated June 3, 2005, an Office hearing representative affirmed the June 10, 2004 Office decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] sets forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the

[2] Dr. Flinchbaugh also rated a five percent impairment for bilateral carpal tunnel syndrome. However, appellant has not filed and the Office has never accepted a claim based on bilateral carpal tunnel syndrome.

[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

amount of compensation is paid in proportion to the percentage loss of use.[4] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[5]

Section 8123(a) of the Act provides that, if there is 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 an examination.[6]

ANALYSIS

In this case, the Office found a conflict in the medical evidence between the impairment ratings of Dr. Weiss, who found appellant had a 45 percent left lower extremity impairment, and Dr. Falvo, who found that appellant did not have an impairment causally related to his accepted left leg contusion and lumbar radiculopathy conditions. The case was referred to Dr. Flinchbaugh, an impartial medical specialist, whose finding of a 25 percent left lower extremity impairment was derived from a 15 percent impairment for mild gait change and derangement under Table 17-5 at page 529 of the A.M.A., *Guides*, and a 10 percent impairment for lower extremity muscle weakness based on weakness in his ankles and toes pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*.

The Office medical adviser, however, did not determine appellant's impairment rating based on Dr. Flinchbaugh's findings for mild gait change and derangement and lower extremity muscle weakness. Instead, the Office medical adviser found that Dr. Flinchbaugh had also made these additional findings: a loss of sensation in the great toe, from which he derived a 2 percent impairment pursuant to Table 17-37, page 552 of the A.M.A., *Guides*; a 4/5 loss of dorsiflexion strength in the great toe, from which he derived a 2 percent impairment at Table 17-8 at page 532 the A.M.A., *Guides*; and a 4/5 loss of dorsiflexion of the left ankle, from which he calculated a 12 percent impairment pursuant to Table 17-8 at page 532 the A.M.A., *Guides*, which amounted to a total 16 percent left lower extremity impairment. The Office relied on the Office medical adviser's opinion and accorded appellant a 16 percent schedule award in its June 10, 2004 decision.

The Board finds that the Office medical adviser's May 27, 2004 report, which utilizes the physical findings made be the impartial medical examiner, constitutes the weight of medical opinion evidence. As noted, where there are opposing medical reports of virtually equal weight, the opinion of an impartial medical specialist is entitled to special weight if well rationalized and based upon a proper medical and factual background.[7] In this case, the Office medical adviser did rely on findings rendered by Dr. Flinchbaugh, but rated appellant's impairment based on a

[4] 5 U.S.C. § 8107(c)(19).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8123 (a).

[7] *See Soloman Polen*, 51 ECAB 341 (2000); *Edward E. Wright*, 43 ECAB 702 (1992).

different set of findings and measurements than those utilized by Dr. Flinchbaugh. Notwithstanding this different formula, the Office medical adviser used Dr. Flinchbaugh's calculations to determine an impairment rating which was in conformance with the applicable tables and figures of the A.M.A., *Guides*. The Board therefore finds that the Office properly relied on the Office medical adviser's 16 percent lower extremity impairment rating in its June 10, 2004 decision, and accordingly found that his opinion constituted the weight of the medical evidence in granting appellant a schedule award for a 16 percent left lower extremity impairment.

Following this decision, appellant's attorney requested a hearing and argued that the Office should have granted an award for impairment stemming from both lower extremities, as rated by Dr. Weiss. He also contended that because the Office had approved surgery for cervical laminectomy based on Dr. Weiss's ratings for cervical impairment. However, appellant did not submit any additional medical evidence in support of his claim. There is no rationalized medical opinion of record that appellant has a right lower extremity impairment causally related to the accepted injury. Furthermore, the Office never accepted a claim for an employment-related cervical condition. The Board therefore affirms the June 3, 2005 decision of the Office hearing representative, which affirmed the June 10, 2004 Office decision awarding appellant a schedule award for a 16 percent left lower extremity impairment.

CONCLUSION

The Board finds that appellant has no more than a 16 percent impairment of the left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 8, 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