United States Department of Labor
Employees' Compensation Appeals Board

JOHN H. WARE, Appellant	)	
and	)	**Docket No. 06-240**
	)	**Issued: May 16, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. 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 November 7, 2005 appellant filed a timely appeal of a January 4, 2005 decision of the Office of Workers' Compensation Programs, which granted schedule awards for a 16 percent impairment of the right and left lower extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether appellant has more than 16 percent impairment to both the right and left lower extremities, for which he received a schedule award. On appeal, appellant's attorney contends that appellant is also entitled to a schedule award for his claimed erectile dysfunction.

FACTUAL HISTORY

On November 23, 1990 appellant, then a 52-year-old tractor trailer operator, was injured in the performance of duty while pulling a bulk mail container. The Office accepted his claim for an acute lumbar strain with radiculopathy and approved a lumbar discectomy L4-5 with facetectomy at L5-S1, which he underwent on August 13, 1991. The Office also approved

subsequent surgeries of March 29, 1994, which consisted of a discectomy at L5-S1 and May 29, 1996, which consisted of a decompressive lumbar laminectomy L4-5, L5-S1, lysis of perineural adhesion and disc inspection of L5-S1. It paid appropriate compensation for the respective periods of disability, with the exception of a claim for the period November 13 and December 9, 1996.[1]

On September 9, 1999 appellant underwent a lumbar decompressive laminectomy L3-4 with bilateral mesial facetectomy and foraminotomy and a right L3-4 discectomy, L4-5 decompression with disc inspection and lysis of perineural fibrosis, which was not approved in advance by the Office. He stopped work on February 2, 1999 and retired effective November 16, 1999. On May 2, 2001 appellant underwent a temporary dual electrode spinal cord stimulator placement, which was not authorized by the Office.

On May 25, 2004 following an Office hearing representative's decision of February 17, 2004, the Office subsequently approved appellant's surgical procedures of September 9, 1999 and May 2, 2001, as well as the implantation of the spinal cord stimulator. The approval was based on the May 10, 2004 report of Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon and Office referral physician, who reviewed appellant's case record and opined that the residuals of the November 23, 1990 work injury resulted in the need for surgery. He further opined that the implantation of a spinal cord stimulator on May 2, 2001 was medically necessary to relieve appellant's pain which resulted from the work injury, appellant's degenerative conditions in the low back and the scar tissue of the first surgical procedure, which stemmed from the November 23, 1990 work accident. Although his examination revealed a normal stance and gait and no motor or sensory deficits of the lower extremities based on the L1, L2, L3, L4, L5 and S1 nerve roots, Dr. Draper opined that appellant had "in fact low back pain." He further stated that appellant's prognosis was poor and recommended that no further treatment be received other than the continuation of pain medication.

On June 1, 2004 appellant claimed a schedule award. He submitted a July 9, 2004 report from Dr. George L. Rodriquez, a Board-certified physiatrist, who reviewed the history of injury and provided findings on examination of appellant. Dr. Rodriquez noted bilateral radiating pain and weakness to both lower extremities and erectile dysfunction. He opined that appellant's conditions of herniated nucleus pulpous at L3-4, L4-5 and L5-S1 with multiple surgical procedures, lumbar radiculopathy at L3, L4 and L5 and erectile dysfunction were secondary to the work-related injury of November 23, 1990 and that appellant reached maximum medical improvement on May 31, 2001. Dr. Rodriquez opined that appellant had a 30 percent left leg impairment and a 30 percent right leg impairment based on dysesthesia and motor impairment of the femoral and sciatic nerves and had a 10 percent impairment due to erectile dysfunction according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He found that appellant had bilateral sensory and motor deficit to the femoral nerve and a bilateral motor deficit to the sciatic nerve and provided a rating utilizing Tables 16-10, 16-11 and 17-37, as well as the Combined Values Chart in the A.M.A., *Guides*. For the left lower extremity, Dr. Rodriquez found that under Table 16-10, page

[1] These recurrences were denied in an Office decision dated February 28, 1997 and affirmed by an Office hearing representative by decision dated September 8, 1998.

482, appellant's dysesthesia of the femoral nerve would be classified as a Grade 1 sensory deficit, which corresponded to an 85 percent sensory deficit. As the maximum impairment for dysesthesia of a femoral nerve was 7 percent under Table 17-37 on page 552, Dr. Rodriquez found 6 percent left lower extremity impairment. Under Table 16-11 on page 484, appellant's motor impairment of the femoral nerve would be classified as a Grade 4 motor deficit which corresponded to a 25 percent motor deficit. The maximum motor impairment of the femoral nerve was 37 percent under Table 17-37 on page 552. Dr. Rodriquez multiplied these values to find 9 percent left lower extremity impairment due to motor loss of the femoral nerve. He used Table 16-11 on page 484, to classify motor impairment of the sciatic nerve as a Grade 4 motor deficit, which corresponded to a 25 percent motor deficit. As the maximum motor impairment of the sciatic nerve was 75 percent impairment under Table 17-37 on page 552, Dr. Rodriquez multiplied these values to find 19 percent left lower extremity impairment due to motor loss of the sciatic nerve. He utilized the Combined Values Chart on page 604 to find that the combined left lower extremity impairment was 30 percent impairment. Dr. Rodriquez utilized the same tables and values for the right leg, to find a 30 percent combined right leg impairment. He also utilized Table 7-5 on page 156 to estimate that appellant had a 10 percent permanent impairment due to erectile dysfunction.

The Office referred the medical record to an Office medical adviser.[2] In a December 9, 2004 report, an Office medical adviser reviewed the record and opined that appellant reached maximum medical improvement on February 29, 2004. The Office medical adviser noted that Dr. Draper, the Office referral physician, found no motor or sensory deficits in his May 10, 2004 report, but that Dr. Rodriquez had found rated these deficits in his July 9, 2004 report. Based on Dr. Rodriquez' findings and the fifth edition of the A.M.A., *Guides*, the Office medical adviser recommended that appellant be awarded a schedule award for a 16 percent permanent impairment to his right leg and a 16 percent permanent impairment to his left leg. Under Table 15-18 page 424, the Office medical adviser found that the maximum impairment to the L5 nerve root was 5 percent for sensory or pain loss and a 37 percent for motor loss. The maximum impairment to the S1 nerve root was 5 percent for sensory or pain loss and 20 percent for motor loss. Under Table 15-15 on page 424, a Grade 4 sensory loss of 25 percent multiplied by the 5 percent maximum sensory loss of the L5 nerve root resulted in a 1.25 sensory loss for L5 nerve root. A Grade 4 sensory loss of 25 percent multiplied by the 5 percent maximum sensory loss of the S1 nerve root resulted in a 1.24 sensory loss for the S1 nerve root. Under Table 15-16 on page 424, a Grade 4 motor loss equated to a 25 percent motor deficit which, when multiplied by an L5 maximum motor impairment of 37 percent, resulted in 8.25 percent impairment for the L5 nerve root. A Grade 4 motor loss of 25 percent multiplied by a S1 maximum motor loss impairment of 20 percent resulted in 5 percent impairment for the S1 nerve root. The Office medical adviser determined that the L5 sensory impairment of 1.25 percent plus the L5 motor impairment of 8.25 percent yielded a total L5 sensory/motor impairment of 10 percent. The S1 sensory impairment of 1.25 percent plus the S1 nerve motor impairment of 5 percent yielded a total S1 sensory/motor impairment of 6 percent. The Office medical adviser then combined the 10 percent L5 impairment with the 6 percent S1 impairment and, utilizing the Combined Values Chart, found that appellant had a 16 percent lower extremity impairment for each extremity.

[2] The Office noted that appellant was in receipt of Veteran's Administration disability benefits of 60 percent for his right and left lower extremities.

By decision dated January 4, 2005, the Office issued a schedule award for a 16 percent permanent impairment to the right and to the left leg. The award covered 92.16 weeks of compensation and ran from the period December 9, 2004 to September 15, 2006.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.404 of the implementing federal regulation,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[5] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[6]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[7] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[8] The Board notes that section 8109(19) specifically excludes the back from the definition of organ.[9] However, 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]

ANALYSIS

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is required.

The Office found 16 percent permanent impairment to both the right and left lower extremities based on the December 9, 2004 report of the Office medical adviser.[11] The Office

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[6] *See Joseph Lawrence, Jr., supra* note 5; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

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

[8] 5 U.S.C. § 8107; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[9] 5 U.S.C. § 8109(c).

[10] *Thomas J. Engelhart, supra* note 7.

[11] The Office's procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

medical adviser compared the findings of Dr. Draper, the Office referral physician, to those of Dr. Rodriquez. He indicated that, based on the findings contained of Dr. Rodriquez, appellant had both sensory and motor impairments stemming from his accepted work-related conditions. The Office medical adviser applied Dr. Rodriquez' findings to the protocols of the A.M.A., *Guides* pertaining to impairments due to spinal nerve root impairments affecting the lower extremity.[12]

Dr. Rodriquez, however, indicated that appellant's impairment rating was due to bilateral radiating pain and weakness to both lower extremities and calculated an impairment rating based on spinal peripheral nerve impairment. Lower extremity muscle strength impairment is addressed in section 17.2e of the A.M.A., *Guides*, titled Manual Muscle Testing and states that, weakness caused by an identifiable motor deficit of a specific peripheral nerve should be assessed according to section 17.2l, [p]eripheral [n]erve [i]njuries.[13] It is not clear why the Office medical adviser calculated appellant's impairment based on spinal nerve root impairment as appellant's injuries were at the L3-4 level, where the femoral nerve is located and at the L4-5 and L5-S1 levels, where the sciatic nerve is located. Additionally, a review of Dr. Rodriquez' calculations for dysesthesia and motor impairment of the femoral nerve and motor impairment of the sciatic nerve yield 30 percent impairment to each lower extremity, as was found.

The Office should seek clarification from the Office medical adviser as to why Dr. Rodriquez' impairment rating based on spinal peripheral nerve impairment was not utilized. Additionally, the Office medical adviser did not address why he assigned a Grade 4 or a 25 percent sensory deficit under Table 15-15 page 424 when Dr. Rodriquez classified appellant's dysesthesia of the femoral nerve as a Grade 1 sensory deficit or an 85 percent sensory deficit under Table 16-10 page 482.[14] Although Dr. Rodriquez opined that appellant's erectile dysfunction condition was employment related and assigned a 10 percent permanent impairment due to such condition, the Office has not issued a final decision on whether such condition is consequential to the accepted injury. Thus, the Board has no jurisdiction on whether appellant is entitled to a schedule award for such claimed erectile dysfunction condition.[15]

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[12] A.M.A., *Guides* (5th ed.), Table 15-15, Determining Impairment Due to Sensory Loss and Table 15-18, Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity, p. 424.

[13] A.M.A., *Guides*, 531, *see also* Table 17-1 at page 525. Impairments due to loss of muscle strength may not be combined with impairments due to spinal peripheral nerve injury. A.M.A., *Guides* 526, Table 17-2.

[14] The Board has recognized that the selection of a percentage from the range of values allowed by the A.M.A., *Guides* involves a subjective judgment. *John Keller*, 39 ECAB 543, 547 (1988). The application of both Table 15-15 and Table 16-10 of the A.M.A., *Guides* requires a subjective judgment as it allows for selection of a value between a range of percentages between grades of sensory deficits when an impairment rating is assigned due to a sensory loss. The Board has recognized that an attending physician, who has an opportunity to examine appellant, is often in a better position to make certain judgments regarding schedule awards. *See Richard Giordano*, 36 ECAB 134, 139 (1984); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (August 2002). The procedure manual notes that, when the A.M.A., *Guides* ask for a percentage within a range, the physician may be asked why he assigned a particular percentage of impairment. In this case, the Office medical adviser did not provide any rationale or explanation as to why the sensory deficit would be lower than that assessed by Dr. Rodriquez.

[15] *See* 20 C.F.R. § 501.2(c).

Accordingly, the Board will remand the case to the Office for appropriate further medical development. Following this and any other further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision on whether appellant has more than 16 percent impairment of both the right and left lower extremities for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated January 4, 2005 is set aside and the case remanded for further development consistent with this decision.

Issued: May 16, 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