United States Department of Labor
Employees' Compensation Appeals Board

W.P., Appellant	)	
	)	**Docket No. 06-2051**
and	)	**Issued: April 13, 2007**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2006 appellant filed a timely appeal of the July 14, 2006 merit decision of the Office of Workers' Compensation Programs which found that appellant had no more than an eight percent permanent impairment of the left lower extremity for which he received a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether the Office properly determined that appellant had no more than 8 percent permanent impairment of the left leg and 10 percent permanent impairment of the right leg for which he received a schedule award.

FACTUAL HISTORY

On September 18, 1995 appellant, then a 46-year-old mail handler, filed a traumatic injury claim alleging that on September 16, 1995 he injured his back while helping a coworker hook an over-road container to a tow motor. The Office accepted appellant's claim for lumbar

strain with herniated nucleus pulposus at L5-S1. Appellant stopped work on September 18, 1995 and returned to a light-duty position on September 20, 1995.[1]

Appellant came under the treatment of Dr. Thomas R. Bryant, a Board-certified orthopedist, who noted in a report dated September 18, 1995, a history of injury and subsequent treatment for pain in the lower lumbar area bilaterally. Dr. Bryant noted findings upon physical examination of tenderness in the lower lumbar area and lumbosacral junction and advised that appellant was totally disabled. Appellant was also treated by Dr. E. Carter Morris, III, a Board-certified orthopedist, who noted in a report dated August 5, 1996, that appellant presented with back pain and right leg pain caused by a work-related injury in September 1995. Dr. Morris noted findings upon physical examination of positive straight leg raises and decreased light touch sensation in the right foot. He recommended surgical intervention. On September 3, 1996 Dr. Morris performed a lumbar microdiscectomy. In reports dated September 11 to November 8, 1996, he noted that appellant was progressing well postoperatively with improvement in the radicular pain in his leg. In reports dated November 11, 1996 to May 31, 1997, Dr. Morris advised that appellant returned to light-duty work in late November 1996 and experienced persistent neuralgia in the right leg. On April 21, 1997 he advised that appellant reached maximum medical improvement. Appellant submitted a magnetic resonance imaging (MRI) scan of the lumbar spine dated July 1, 1996 which revealed degenerative disc changes at L5-S1 with midline disc protrusion and slight indentation of the thecal sac.

In a letter dated June 16, 1997, the Office requested that appellant's treating physician provide an evaluation as to the extent of permanent partial impairment of the lower extremity in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*).

In a July 2, 1997 report, Dr. Morris determined that appellant had 10 percent permanent impairment of the lower extremities in accordance with the A.M.A., *Guides*. On July 8, 1997 an Office medical adviser reviewed Dr. Morris' report and determined that appellant sustained a four percent permanent impairment of the left leg.

In a letter dated July 9, 1997, the employing establishment offered appellant a permanent light-duty position as a modified part-time flexible mail processor. Appellant accepted that position on July 14, 1997.[3]

On August 14, 1997 the Office referred appellant for a second opinion to Dr. Steven M. Theiss, a Board-certified orthopedist, for an impairment evaluation. In a report dated

[1] Appellant filed a separate claim for a traumatic injury to the right ankle which occurred on May 7, 1988 and was accepted by the Office as File No. 06-0437347.

[2] A.M.A., *Guides* (4th ed. 1993).

[3] By decision dated October 3, 1997, the Office indicated that appellant had been employed as a modified part-time flexible mail processor effective July 14, 1997 which was over 60 days and that the pay in that position of $687.20 per week was equivalent to the pay rate for the position he held at the time of his injury; thus, no loss of wages occurred. The Office concluded that the position of modified part-time flexible mail processor fairly and reasonably represented appellant's wage-earning capacity.

September 9, 1997, Dr. Theiss opined that appellant sustained a 10 percent permanent impairment of the right leg in accordance with the A.M.A., *Guides*. In a November 6, 1997 report, an Office medical adviser determined that appellant had three percent permanent impairment of the right leg.

In a decision dated November 20, 1997, the Office granted appellant a schedule award for 10 percent permanent impairment of the right leg.

Appellant continued to submit medical reports from Dr. Bryant dated March 28, 1997 to March 28, 2005, who treated him for chronic low back pain and noted that a myelogram revealed osteophytes and a possibility of nerve root impingement. An MRI scan of the lumbar spine dated March 24, 2000 revealed asymmetry of the nerve roots and lateral recesses and foramina at L5-S1 on the right. An x-ray of the lumbar spine dated March 15, 2000 revealed degenerative disc disease of the lumbar spine and an x-ray of the right hip dated March 15, 2000 revealed osteoarthritis.

On May 2, 2006 appellant submitted a claim for a schedule award. In support of his claim, he submitted a report from Dr. Donald P. Brobst, a Board-certified orthopedist, dated April 11, 2006, who noted a detailed history of appellant's work-related ankle injury on May 7, 1988 and low back injury of September 16, 1995. Dr. Brobst provided an impairment rating in accordance with the A.M.A., *Guides*.[4] He determined that appellant had reached maximum medical improvement on April 11, 2006. Dr. Brobst determined that appellant sustained an 8.4 percent permanent impairment of the right and left legs due to motor and sensory deficits. He calculated that appellant had a one percent impairment of the lower extremities for sensory deficit or pain in the distribution of the L5 nerve root under Table 15-18 of the A.M.A., *Guides*.[5] Dr. Brobst further calculated that appellant had a maximum sensory loss of five percent of the lower extremities, a Grade 4 pain in the distribution of the L5 nerve root under Table 15-15.[6] Impairment due to sensory loss was calculated as 1 percent impairment for the lower extremities by multiplying the 20 percent grade with the 5 percent maximum allowed for the L5 nerve. Dr. Brobst calculated that appellant had a 7.4 percent impairment of the lower extremities for loss of strength in the distribution of the L5 nerve root under Table 15-18 of the A.M.A., *Guides*. He further calculated that appellant had a maximum power and motor deficit of 20 percent of the left leg, a Grade 4 pain in the distribution of the L5 nerve root under Table 15-16.[7] Impairment due to power and motor deficits was calculated as 7.4 percent impairment for each leg by multiplying the 20 percent grade with the 37 percent maximum allowed for the L5 nerve.

In a May 26, 2006 report, an Office medical adviser concurred with the impairment findings of Dr. Brobst but noted that appellant had previously been awarded a schedule award for 10 percent impairment of the right leg.

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

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

[6] *See id.* at 424, Table15-15.

[7] *See id.* at 424, Table 1516.

In a decision dated July 14, 2006, the Office granted appellant a schedule award for eight percent permanent impairment of the left leg and zero percent additional impairment for the right leg. The Office noted that appellant had been previously granted a 10 percent permanent impairment of the right leg. The period of the award was April 11 to September 19, 2006.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulation[9] set 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.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulation.[10] As neither the Act nor its regulation provides 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.[11] The Board notes that section 8109(19) specifically excludes the back from the definition of "organ."[12] 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.[13]

ANALYSIS

On appeal, appellant argues that he is entitled to greater than an eight percent permanent impairment of the left lower extremity. The Office accepted his claim for lumbar strain with herniated nucleus pulposus at L5-S1. However, as noted above, the Act does not permit a schedule award based on impairment to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper or lower extremities due to his accepted back condition.

Appellant submitted a report from Dr. Brobst dated April 11, 2006 which determined that he sustained an eight percent permanent impairment of each leg in accordance with the A.M.A., *Guides*. Dr. Brobst properly utilized his findings upon examination on April 11, 2006 and correlated them to specific provisions in the A.M.A., *Guides* (5th ed.) to determine the

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

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

[11] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[12] 5 U.S.C. § 8109(c).

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

impairment rating. He further noted that Table 15-15, 15-16 and 15-18 of the A.M.A., *Guides* provides guidance for evaluating spinal nerve root impairments. Dr. Brobst determined that appellant had reached maximum medical improvement on April 11, 2006. He determined that appellant sustained an 8.4 percent permanent impairment of the right and left legs due to motor and sensory deficits. Dr. Brobst calculated that he had a one percent impairment of the lower extremities for sensory deficit or pain in the distribution of the L5 nerve root under Table 15-18 of the A.M.A., *Guides*.[14] He further calculated that appellant had a maximum sensory loss of five percent of the lower extremities, a Grade 4 pain in the distribution of the L5 nerve root under Table 15-15.[15] Impairment due to sensory loss was calculated as 1 percent impairment for the lower extremities by multiplying 20 percent (allowed under Grade 4 in Table 15-15) with the 5 percent maximum allowed for the L5 nerve. Dr. Brobst calculated that appellant had a 7.4 percent impairment of the lower extremities for loss of strength in the distribution of the L5 nerve root under Table 15-18 of the A.M.A., *Guides*. He further calculated that appellant had a maximum power and motor deficit of 20 percent of the left leg, a Grade 4 pain in the distribution of the L5 nerve root under Table 15-16.[16] Impairment due to power and motor deficits was calculated as 7.4 percent impairment for the lower extremities by multiplying the 20 percent grade with the 37 percent maximum allowed for the L5 nerve.[17] Dr. Brobst properly applied the A.M.A., *Guides* to the information provided in his report and reached an impairment rating of eight percent for each lower extremity. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than an eight percent impairment of each lower extremity.[18] There is no evidence which supports that appellant has greater than an eight percent permanent impairment of both the left and right legs. An Office medical adviser reviewed the report of Dr. Brobst and concurred with his calculations.

The Office also properly noted that, because appellant was previously granted a schedule award for 10 percent permanent impairment of the right lower extremity, he was not entitled to an additional schedule award for the right lower extremity.

CONCLUSION

The Board finds that the Office properly determined that appellant had no more than an 8 percent permanent impairment of the left lower extremity for which he received a schedule award and that he has no more than 10 percent permanent impairment of the right lower extremity for which he previously received a schedule award.

[14] A.M.A., *Guides* 424, Table15-18.

[15] *See id.* at 424, Table 15-15.

[16] *See id.* at 424, Table 15-16.

[17] The physician also provided a detailed calculation of a schedule award for the ankle.

[18] The Office did not issue a schedule award decision with regard to appellant's ankle injury. The Board only has jurisdiction over final decisions of the Office, therefore, Board does not have jurisdiction over the matter. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board