United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 07-39**
	)	**Issued: June 4, 2007**
DEPARTMENT OF DEFENSE, DEFENSE DISTRIBUTION DEPOT NORFOLK, Fort Belvoir, VA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 2, 2006 appellant filed a timely appeal from the August 29 and April 6, 2006 decisions of the Office of Workers' Compensation Programs' concerning his schedule award claims. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has any impairment to his upper extremities and whether he has more than an eight percent impairment to his left lower extremity.

FACTUAL HISTORY

On January 8, 1996 appellant, then a 39-year-old supply technician, sustained traumatic injury when he slipped on ice and fell at work. The claim was accepted low back strain and cervical strain and subsequently expanded to include the conditions of herniated disc L5-S1 and lumbar radiculopathy. Appellant stopped work on January 10, 1996 and returned on

January 12, 1996. He received appropriate compensation benefits. Appellant received a schedule award on June 17, 1998 for five percent impairment to the left leg. He subsequently received a schedule award for an additional three percent impairment to the left leg on February 12, 2004, for a total of eight percent impairment of the left lower extremity.

On April 23, 2004 appellant filed a schedule award claim for his upper extremities. In an April 8, 2004 report, Dr. Robert Mehrberg, a physiatrist, noted the history of injury, provided findings on examination and opined that appellant had chronic pain syndrome. He noted that appellant had a prior history of possible L5-S1 radiculopathy and cervicalgia with magnetic resonance imaging (MRI) scan evidence of bilateral foraminal stenosis. Dr. Mehrberg stated the limited range of motion and sensory symptoms in the left upper extremity could possibly represent a radicular irritation at the C5 or C6 root level. He opined, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), that appellant had a five percent impairment of the whole person for the neck and upper extremity based on Table 15-5, page 392. In a June 17, 2004 letter, the Office noted that Dr. Mehrberg provided a whole person impairment. It requested that Dr. Mehrberg provide an impairment rating based on the A.M.A., *Guides* and to specify whether such impairment was in addition to the previously awarded eight percent impairment of the left leg. On June 29, 2004 Dr. Mehrberg advised that his impairment rating of April 8, 2004 was for the arms and cervical spine.

By letter dated April 7, 2005, the Office referred appellant to Dr. Warren H. Foer, a Board-certified neurosurgeon, for a second opinion examination. In a May 4, 2005 report, Dr. Foer reviewed the medical record, including the reports of neurodiagnostic studies and MRI scans of both the cervical and lumbosacral spines. He noted appellant's complaints of posterior neck pain with bilateral arm pain and numbness in his hands together with low back discomfort and leg pain, left more so than right. Based on physical examination findings, Dr. Foer stated that appellant showed evidence of degenerative disc disease in the cervical and lumbosacral spine with chronic mechanical low back pain and reports of leg pain and paresthesias. However, he stated that appellant did not have clinical findings implicating any specific nerve root impingement or radiculopathy as his sensory findings were nonanatomical. Dr. Foer opined that the medical evidence was not sufficient to make a permanent partial impairment rating of either upper extremity as there was no evidence of motor weakness and the sensory examination was nonanatomical and did not follow known dermatomal distributions. He opined that appellant's mechanical musculoskeletal pain in his cervical spine and lumbar spine were related to his evolved degenerative disc disease in those areas.

The Office determined that a conflict in medical evidence was created between the opinions of Dr. Mehrberg and Dr. Foer with respect to whether any upper extremity impairment existed. It referred appellant to Dr. Arthur I. Kobrine, a Board-certified neurosurgeon, for an impartial medical evaluation.[1] In a July 11, 2005 report, Dr. Kobrine reviewed the factual and medical background, including x-rays, MRI and electromyogram (EMG) scans. Examination findings revealed a good range of motion of the head and normal strength, tone, reflex and

[1] Dr. Kobrine was provided with the medical record, a statement of accepted facts and a set of questions regarding appellant's permanent impairment.

sensory examination for the upper and lower extremities. Straight leg raising was noted to cause back pain but not leg pain. Dr. Kobrine stated that he found no evidence of any objective neurologic abnormality. He opined that while appellant had a cervical and lumbar strain because of the January 8, 1996 fall, there was no evidence that the fall resulted in any permanent impairment. Dr. Kobrine advised that the x-ray changes at C5-6 were compatible with common progressive degenerative disc disease and were not of a traumatic origin. He also advised that appellant's symptoms from the accident, namely stiffness and strain, would have been resolved within four to six weeks from the accident. Therefore, any continuing symptoms would not be related to the January 8, 1996 accident. Dr. Kobrine opined that appellant reached maximum medical improvement and had no permanent impairment as a result of the January 8, 1996 injury.

By decision dated September 8, 2005, the Office denied appellant's claim for a schedule award to the upper extremities or an additional schedule award of his left lower extremity. It credited Dr. Kobrine with the weight of the medical opinion evidence with respect to an award to the upper extremities.

On October 19, 2005 appellant requested a hearing, which was held on January 26, 2006. He stated that his claim was only for the upper extremities and described his symptoms, which had gradually increased since his 1996 injury. Appellant also described his physical limitations in his legs. In an October 11, 2005 report, Dr. Antonio Quidgley-Nevares, a physiatrist, noted the history of injury and indicated that the results of past MRI scan studies of the cervical spine and low back, as well as an EMG/nerve conduction study, were unchanged. He provided examination findings and diagnosed chronic pain syndrome secondary to myofascial pain, with a history of possible radiculopathy at L5-S1 and cervicalgia with MRI scan evidence of foraminal stenosis bilaterally. Dr. Quidgely-Nevares indicated that appellant reached maximum medical improvement and had upper extremity and lower extremity sensory loss between 1 to 25 percent, with no motor deficits. He stated that the evaluation of the lumbar spine per the diagnosis-based estimate method was category two or five percent to eight percent whole body impairment under Table 15.3, page 384 of the A.M.A., *Guides*. Evaluation of the cervical spine was also category two or five percent to eight percent whole body impairment under Table 15.5, page 392 of the A.M.A., *Guides*.

In an April 6, 2006 decision, an Office hearing representative affirmed the September 8, 2005 decision.

On June 11, 2006 appellant requested reconsideration and submitted March 27 and June 1, 2006 reports from Dr. Quidgley-Nevares. On the March 27, 2006 report Dr. Quidgely-Nevares advised that appellant was being treated for myofascial pain syndrome in his low back with medication and trigger point injections. He opined that appellant's myofascial pain syndrome was a result of the January 8, 1996 fall. On June 1, 2006 Dr. Quidgely-Nevares noted treating appellant for his chronic upper and lower back problems and provided dates of office visits.

By decision dated August 29, 2006, the Office denied modification of its April 6, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set 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. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[4]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulation.[5] 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.[6] The Board notes that section 8109(19) specifically excludes the back from the definition of organ.[7] 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.[8]

Section 8123(a) of the Act[9] 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.[10] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[11]

ANALYSIS

The Office accepted appellant's claim for low back strain, cervical strain, herniated disc L5-S1 and lumbar radiculopathy. As noted above, the Act does not permit a schedule award

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[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] *See Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[5] *See Richard R. Lemay*, 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005); *see also Thomas J. Engelhart*, 50 ECAB 319 (1999).

[6] 5 U.S.C. § 8107; *see also Richard R. Lemay, supra* note 5.

[7] *Id*. at § 8109(19).

[8] *See Richard R. Lemay* and *Thomas J. Engelhart, supra* note 5.

[9] 5 U.S.C. §§ 8101-8193.

[10] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[11] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

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 conditions. The Board finds that appellant has not established that he has any impairment of his upper extremities or more than eight percent impairment of his left leg, as previously granted.

With respect to an impairment to the upper extremities, the Office found that a conflict in medical opinion arose between Dr. Mehrberg, appellant's physician, and Dr. Foer, who provided a second opinion evaluation for the Office. The Office properly referred appellant to Dr. Kobrine for an impartial evaluation as to the extant of any impairment of his upper extremities.

In situations where the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[12] The Board finds that Dr. Kobrine's well-rationalized opinion is entitled to special weight on the issue of whether appellant is entitled to a schedule award for the upper extremities as it was based on a complete and accurate factual and medical background. In a July 11, 2005 report, Dr. Kobrine reviewed the history of injury, appellant's complaints and the medical record, including MRI and EMG scans. He conducted a thorough physical examination and provided detailed physical and objective findings on examination. Dr. Kobrine advised that there was no evidence of any objective neurological abnormality and the x-ray changes at C5-6 were compatible with common progressive degenerative disc disease and not of traumatic origin. He also advised that appellant's symptoms from the work injury would have resolved within 4 to 6 weeks. Dr. Kobrine concluded that appellant had no impairment of his upper extremities due to the accepted injury.

Appellant submitted additional reports from Dr. Quidgley-Nevares, who indicated that appellant had upper and lower extremity sensory loss between 1 to 25 percent, with no motor deficits. He referred generally to Tables 15.3 and 15.5 regarding impairments due to lumbar spine and cervical spine in which the impairment is expressed as whole person impairment.

Dr. Quidgley-Nevares' opinion is of diminished probative value as he did not properly rate appellant's impairment. To be entitled to a schedule award, there must be a permanent impairment to a scheduled member of the body. 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.[13] Dr. Quidgley-Nevares reference to Tables 15.3 and 15.5, pertaining to the spine, rather than the extremities, is not appropriate for a schedule award determination under the Act. While, he stated that appellant exhibited an upper extremity and a lower extremity sensory loss between 1 to 25 percent, he did not explain how his calculations were derived in accordance with the A.M.A., *Guides* or base such assessments on objective findings. Dr. Quidgley-Nevares failed to provide sufficient information pertinent to an impairment evaluation. Therefore, his reports are of diminished probative value.[14]

[12] *Manuel Gill*, 52 ECAB 282 (2001).

[13] *See Richard R. Lemay, supra* note 5.

[14] *Lela M. Shaw*, 51 ECAB 372, 374 (2000).

Dr. Quidgley-Nevares reports are insufficient to create a conflict in the medical opinion evidence with the opinion of Dr. Kobrine, with respect to impairment of the upper extremities.

There is also no evidence of record establishing that appellant is entitled to an additional award to his legs. The only evidence submitted with respect to the lower extremity were Dr. Quidgley-Nevares reports, which are of diminished probative value for the reasons noted above. He did not explain, pursuant to appropriate sections of the A.M.A, *Guides*, how appellant's employment injury caused additional impairment to the legs beyond that which the Office has already accepted. Both Dr. Foer and Dr. Kobrine[15] noted that while appellant showed evidence of degenerative disc disease in the lumbosacral spine, there was no evidence of any specific nerve root impingement or radiculopathy and his sensory findings were nonanatomical. There is no other probative evidence of record to establish that appellant is entitled to an additional award to his lower extremities.

CONCLUSION

The Board finds that appellant has not established that he has any impairment of his upper extremities or that he has greater than an eight percent impairment of his lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 29 and April 6, 2006 are affirmed.

Issued: June 4, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[15] With respect to an impairment of the lower extremities, Dr. Kobrine acted as a second opinion examiner as no conflict in medical evidence existed when he examined appellant.