

**United States Department of Labor
Employees' Compensation Appeals Board**

C.M., Appellant)	
)	
and)	Docket No. 07-115
)	Issued: June 18, 2007
TENNESSEE VALLEY AUTHORITY,)	
Chattanooga, TN, Employer)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 17, 2006 appellant, through his attorney, filed a timely appeal from the September 26, 2006 decision of the Office of Workers' Compensation Programs finding that he was not entitled to an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decision.

ISSUE

The issue is whether appellant has established that he has more than a five percent permanent impairment of each lower extremity.

FACTUAL HISTORY

On June 25, 2001 appellant, then a 51-year-old conveyer car dumper operator, filed a traumatic injury claim alleging that he hurt his right lower back and right hip while cleaning with a rake. The Office accepted his claim for lumbar sprain, displacement of a lumbar intervertebral disc without myelopathy and degeneration of lumbar intervertebral discs.

On January 9, 2004 the Office issued a schedule award for the five percent impairment to both of appellant's lower extremities. The award was based on the September 22, 2003 report of Dr. Richard Bagby, Jr., a Board-certified orthopedic surgeon, who found that appellant had three percent impairment for pain and two percent impairment for decreased strength in each leg as a result of problems with the L5-S1 nerve root. Dr. Bagby stated that the impairment was equivalent to the diagnosis-related estimate (DRE) lumbar Category IV of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.), Table 15-3, page 384.

On November 24, 2004 appellant underwent a lumbar spine fusion to treat his severe disc degeneration and central disc protrusion at L5-S1. On January 23, 2006 the Office authorized an examination to determine appellant's level of impairment following the lumbar fusion surgery. On May 24, 2006 Dr. Bruce Kaplan, a Board-certified neurologist, performed an examination and nerve conduction study at the request of appellant's treating physician. He reported that, although appellant's symptoms were improved from their preoperative condition, appellant continued to experience "heaviness" in his legs, primarily on the left, intermittent burning in the left calf and numbness in the third and fourth digits of the left foot. On examination, Dr. Kaplan found no weakness, but noted altered light touch sensation in the fourth and fifth digits of the left foot, reflexes of 2 at the knees and right ankle and trace reflexes at the left ankle. Based on an electromyography test, he found that there was no clear evidence of denervation of the lumbosacral myotomes in the lower extremities and that the lumbar paraspinal nerves showed typical postoperative change bilaterally. Dr. Kaplan stated that, while appellant's symptoms and asymmetric ankle reflexes strongly suggested S1 radiculopathy on the left side, he could find no clear electrodiagnostic evidence of radiculopathy in either leg.

Dr. Bagby conducted an impairment rating examination on July 19, 2006. He stated that appellant's symptoms had improved approximately 25 percent following his surgery, but noted that appellant continued to have weakness and numbness in the left foot and leg and, to a lesser degree, weakness and pain in the right leg. Dr. Bagby found that appellant was slow and stiff in rising from a chair, but that he loosened with walking. He reported that the heel walk test revealed very mild weakness of the tibialis anterior. Dr. Bagby stated that, with forward flexion, appellant had 80 percent rotation and 70 percent extension of the spine. He noted that all of appellant's deep tendon reflexes were hypoactive and symmetrical, with the possible exception of diminution of the left ankle jerk. Dr. Bagby stated that appellant had no atrophy of the left lower extremity, but did have some sensory changes. He found that appellant had reached maximum medical improvement as of July 19, 2006. Dr. Bagby found that appellant had a permanent impairment of 25 percent of the whole person based on DRE lumbar Category V of the A.M.A., *Guides*, Table 15-3, page 384. He stated that appellant's complete loss of motion in a segment of his spine due to a successful arthrodesis and his continued radiculopathy put him at the lower end of Category V.

On September 8, 2006 Dr. Dyer, an Office medical adviser, reviewed Dr. Bagby's report. He found that appellant had no additional impairment of either the left or right leg. Dr. Dyer stated that appellant's previous schedule award was based on an L5-S1 nerve root radiculopathy and that the sensory and reflex symptoms Dr. Bagby found in appellant's legs were indicative of this same dysfunction. Dr. Dyer stated that the clinical findings in the report provided no basis for an additional schedule award for either leg, even for the more symptomatic left leg. He found that Dr. Bagby incorrectly rendered a whole person impairment rating of 25 percent based

on DRE lumbar Category V. Dr. Dyer noted that, under the Federal Employees' Compensation Act, the Office did not provide schedule awards for spinal impairment or accept ratings based on whole person impairment.

By decision dated September 26, 2006, the Office denied appellant's claim for an additional schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² 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 is to be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.³ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.⁴

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.⁵ Neither the Act nor the regulations provide for the payment of a schedule award for loss of use of the back or the body as a whole person.⁶ The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength.⁷

ANALYSIS

On January 9, 2004 appellant received a schedule award for five percent impairment to each lower extremity caused by weakness and pain related to dysfunction of the L5-S1 nerve root. On July 19, 2006 appellant was examined by Dr. Bagby, a Board-certified orthopedic surgeon, to determine whether he had any additional impairment following his lumbar fusion surgery in November 2004. Dr. Bagby's examination revealed continued pain, numbness and weakness in both of appellant's legs, but primarily his left leg. He noted a possible diminution of appellant's left ankle jerk. Dr. Bagby opined that, based on the diagnosis-related estimate criteria of the A.M.A., *Guides*, Table 15-3, page 384, appellant had lumbar impairment of 25

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ 20 C.F.R. § 10.404(a).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁵ *Tomas Martinez*, 54 ECAB 623 (2003).

⁶ *Jesse Mendoza*, 54 ECAB 802 (2003).

⁷ *See Paul A. Toms*, 28 ECAB 403 (1987).

percent, based on whole person impairment, because of his spinal fusion and radiculopathy. The Office provided Dr. Bagby's report to the Office medical adviser, to determine whether appellant had increased impairment. The Board notes that, under Office procedures, referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.⁸

In a September 8, 2006 report, the Office medical adviser correctly found that Dr. Bagby's rating of 25 percent whole person impairment for appellant's lumbar spine was improper. The Board has held that a schedule award for the leg may be granted where a back injury causes impairment to the leg; however, neither the Act nor its implementing regulation provides for a schedule award for impairment to the spine itself or the body as a whole.⁹ Dr. Bagby did not provide a specific impairment rating based solely on radiculopathy involving the lower extremities. The Board therefore finds that Dr. Bagby's back impairment rating cannot be used as the basis for a schedule award.

Neither Dr. Bagby nor Dr. Kaplan presented clinical findings to support an additional schedule award. Neither physician provided an impairment rating of the lower extremities. Dr. Bagby stated that appellant's surgery had helped his symptoms but that he "continued" to have weakness, pain and tingling. He did not indicate that these symptoms had worsened since the previous impairment rating. Dr. Bagby noted sensory changes and symmetrical hypoactive deep tendon reflexes, with "possibly some diminution ... of the left ankle jerk."¹⁰ Again, however, he did not find that these conditions were worse than his presurgery impairment. Dr. Kaplan reported that appellant's symptoms had improved since his surgery, but he continued to experience "heaviness" of the legs, intermittent burning of the left calf and numbness of two toes on the left foot. He found no weakness, but did find hypoactive reflexes, especially in the left ankle. Dr. Kaplan found that the diagnostic tests did not present clear evidence of radiculopathy in either leg. He did not state that appellant's symptoms were worse than they were before the surgery, and, in fact, indicated that they had improved.

The medical evidence of record does not establish that appellant has more than the five percent impairment to each lower extremity already awarded. He is not entitled to any additional schedule award. The Board finds that the Office properly relied on Dr. Dyer's rationalized opinion that appellant did not have increased impairment of either lower extremity under the Act. The Board finds that the record does not establish that appellant is entitled to an increased schedule award.

⁸ See *Thomas J. Fragale*, 55 ECAB 619 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

⁹ See *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹⁰ The finding of "possible" reflex diminution in the left ankle is not sufficient to establish worsening of appellant's condition as the Board has held that speculative medical opinions are of no probative value. *Ricky S. Storms*, 52 ECAB 349 (2001).

CONCLUSION

The Board finds that appellant has not established that he has more than five percent permanent impairment of each lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2006 is affirmed.

Issued: June 18, 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