United States Department of Labor
Employees' Compensation Appeals Board

C.O., Appellant	)	
and	)	**Docket No. 06-1695**
	)	**Issued: March 1, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Martinsburg, WV, Employer	)	

Appearances:
Appellant, pro se
No Appearance, for the Director

Oral Argument February 8, 2007

DECISION AND ORDER

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

JURISDICTION

On July 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 13, 2006 merit decision concerning his entitlement to schedule award compensation. Pursuant to 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 more than a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.

FACTUAL HISTORY

On February 2, 1994 appellant, then a 52-year-old nurse, filed a traumatic injury claim alleging that he sustained injury on February 1, 1994 when the ambulance in which he was riding

was hit by another vehicle. The Office accepted that appellant sustained a cervical strain, subluxation of the cervical spine and contusions of the jaw and right ankle.[1]

Beginning around the time of the accident, appellant's attending physicians periodically reported that he had symptoms associated with C5-6, such as tenderness over C5-6. They also reported symptoms emanating from other levels such as C7 and C8. For example, on March 4, 1994 an attending physician reported that appellant had hypesthesia in the C8 dermatome primarily on the right. In June 1994 appellant began receiving treatment for his cervical condition from Dr. Joseph Liberman, a Board-certified neurologist. The findings of June 6, 1994 electromyogram (EMG) and nerve conduction studies of the upper extremities revealed normal results. The findings of July 28, 1994 computerized tomography (CT) scan testing of his cervical spine revealed a subluxation of C5 over C6 with no definite evidence of fracture. He sustained recurrences of employment-related disability on August 28, 1994 and August 22, 1995.

On March 13, 2000 Dr. Liberman found that appellant had a 6 percent impairment of the whole person due to cervical spondylolysis and an 18 percent impairment due to decreased cervical range of motion. On March 28, 2001 he determined that appellant had a 25 percent impairment of the whole person due to 3.5 millimeter subluxation of C5 over C6.

On January 3, 2005 appellant filed a claim for a schedule award due to his accepted employment injuries.

On November 29, 2004 Dr. Liberman determined that appellant had a nine percent permanent impairment of his right arm and a nine percent permanent impairment of his left arm under the standards for evaluating nerve root or spinal cord impairment in Chapter 15 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Dr. Liberman determined that the impairment rating for each arm was due to sensory loss associated with the C6, C7 and C8 nerve roots. He indicated that appellant's pain grade was 50 percent as derived from Table 15-15 on page 424 of the A.M.A., *Guides*.[2]

On January 10, 2005 an Office medical adviser reviewed the medical evidence of record, including the November 29, 2004 report of Dr. Liberman. He determined that appellant had a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm. The Office medical adviser calculated that appellant had a 2 percent impairment in each arm due to sensory loss associated with the C6 nerve root which was calculated by multiplying a 25 percent grade times the 8 percent maximum value for that nerve root. He

[1] The findings of February 1, 1999 x-ray testing of the cervical spine showed negative results.

[2] It appears Dr. Liberman determined that appellant had a 4 percent impairment in each arm due to sensory loss associated with the C6 nerve root which was calculated by multiplying the 50 percent grade times the 8 percent maximum value for that nerve root. He also apparently found that appellant had a 2.5 percent impairment in each arm due to sensory loss associated with the C7 nerve root which was calculated by multiplying the 50 percent grade times the 5 percent maximum value for that nerve root and a 2.5 percent impairment in each arm due to sensory loss associated with the C8 nerve root which was calculated by multiplying the 50 percent grade times the 5 percent maximum value for that nerve root. Dr. Liberman appears to have added these values for each arm to equal the 9 percent impairment rating for the right arm and the 9 percent impairment rating for the left arm. Ordinarily the resultant the 2.5 percent figures would be rounded up to 3 percent before performing such an addition calculation.

posited that Dr. Liberman used the A.M.A., *Guides* improperly and that appellant's impairment should only be evaluated with respect to impairment stemming from C6.

The case record was referred to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion on appellant's impairment. On March 24, 2004 Dr. Smith stated that appellant had a zero percent permanent impairment of his right arm and a zero percent permanent impairment of his left arm. However, it does appear that he completed a full evaluation of appellant's impairment as he did not explain his determination or the basis for his rating.

In a May 19, 2005 decision, the Office granted appellant a schedule award for a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm. The award ran for 12.48 weeks from November 29, 2004 to February 24, 2005. In calculating appellant's pay rate for schedule award purposes, the Office based its pay rate on his earnings at the time of his August 28, 1994 recurrence of employment-related disability.[3]

Appellant requested a hearing before an Office hearing representative. At the January 6, 2006 hearing, he testified that Dr. Smith only briefly examined him and that the opinion of Dr. Liberman better reflected his permanent impairment.

Appellant submitted a January 23, 2006 report of Dr. Bruce A. Guberman, an attending Board-certified internist, who indicated that a July 1994 CT scan showed subluxation of C5 over C6 and that appellant had sensory abnormalities in both arms consistent with bilateral cervical radiculopathy particularly at the C8 nerve root level. Dr. Guberman reported the findings of his examination and performed an impairment rating which found that appellant had an eight percent permanent impairment of his right arm and a seven percent permanent impairment of his left arm. He found that appellant had a 3 percent impairment for each arm due to sensory loss associated with the C8 nerve which was calculated by multiplying a 60 percent grade times the 5 percent maximum value for that nerve root. On the right, Guberman found that appellant had a five percent impairment for limited right shoulder motion consisting of the following: two percent for 150 degrees of flexion, one percent for 150 degrees of abduction, and two percent for 60 degrees of internal rotation. On the left, he found that appellant had a four percent impairment for limited left shoulder motion consisting of the following: two percent for 150 degrees of flexion, one percent for 150 degrees of abduction, and one percent for 70 degrees of internal rotation. Dr. Guberman then combined the respective impairment ratings for each arm to reach the total impairment for each arm.

In a decision dated and finalized February 13, 2006, the Office hearing representative set aside the Office's April 8, 2005 decision and remanded the case for further development. The hearing representative determined that an Office medical adviser should review the January 23, 2006 report of Dr. Guberman and provide an impairment calculation.

[3] In its pay rate calculation, the Office appears to have included unspecified amounts for night differential pay and Saturday and Sunday and holiday premium pay. The record reveals that appellant earned $5,012.35 in night differential pay and Saturday and Sunday and holiday premium pay in the year prior to February 1, 1994, but it is not clear how much he earned in these pay categories at later times.

On April 8, 2006 another Office medical adviser reviewed the impairment rating of Dr. Guberman. He determined that appellant had only a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm because there was no objective evidence to link a C8 radiculopathy to the accepted employment injuries.

In an April 13, 2006 decision, the Office determined that appellant was not entitled to an additional schedule award as he had already received compensation for a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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.[6] In determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[7]

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[8] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[9] The Board has found that, if a claimant has one recurrence which

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id.*

[7] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

[8] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[9] 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle appellant to a new recurrence pay rate.[10]

It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[11]

ANALYSIS

The Office accepted that appellant sustained a cervical strain, subluxation of the cervical spine and contusions of the jaw and ankle. The Office granted appellant a schedule award compensation for a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm. The Office based this award on the opinions of two Office medical advisers who determined that appellant had employment-related impairment due to sensory loss associated with the C6 nerve distribution.[12]

The Board notes that it appears from the record that appellant most likely sustained injury to his C6 nerve during his February 2, 1994 employment injury or at least that he had a preexisting C6 nerve condition. The findings of July 28, 1994 CT scan testing of his cervical spine revealed a subluxation of C5 over C6. As noted above, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[13]

Appellant also submitted a November 29, 2004 impairment rating in which Dr. Liberman, an attending Board-certified neurologist, determined that he had a nine percent permanent impairment of his right arm and a nine percent permanent impairment of his left arm. In addition to finding sensory deficit associated with the C6 nerve, Dr. Liberman also found sensory deficit associated with the C7 and C8 nerves. On January 23, 2006 Dr. Guberman, an attending Board-certified internist, found that appellant had an eight percent permanent impairment of his right arm and a seven percent permanent impairment of his left arm based on limited right shoulder motion and sensory loss associated with the C8 nerve.

The Board notes that additional consideration should be given to whether appellant had impairment emanating from cervical levels other than C6 which should be included in the calculation of his schedule award, either because the impairment was due to an injury sustained during the February 1, 1994 employment accident or because it preexisted the accident. The record contains medical evidence which shows that appellant had symptoms emanating from cervical levels other than C6 shortly after February 1, 1994. For example, on March 4, 1994 an

[10] *Carolyn E. Sellers*, 50 ECAB 393, 396 (1999).

[11] *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[12] For each arm, the advisers calculated the impairment by multiplying a 25 percent grade for sensory loss associated with the C6 nerve times the 8 percent maximum value for that nerve root. *See* A.M.A., *Guides* 424, Tables 15-15, 15-17.

[13] *See supra* note 7.

attending physician reported that appellant had hypesthesia in the C8 dermatome primarily on the right. The Office medical advisers never fully explained why they felt that impairment emanating from C6 should be the only impairment included in the calculation of appellant's entitlement to schedule award compensation.

For these reasons, the case will be remanded to the Office for further evaluation of the extent of appellant's upper extremity impairment due to employment-related or preexisting conditions affecting the upper extremities. After such development it deems necessary, the Office should issue an appropriate decision.[14]

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he is entitled to more schedule award compensation than that already received for a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.

[14] The Board further notes that appellant has asserted that he was not paid at a correct pay rate when he received his schedule award compensation beginning in May 2005. The May 19, 2005 award of compensation indicated that his pay rate was calculated according to his pay at the time of his August 28, 1994 recurrence of employment-related disability. The Board notes that appellant also sustained a recurrence of employment-related disability on August 22, 1995 and Board precedent provides that if a claimant has one recurrence which meets the requirements of 5 U.S.C. § 8101(4) any subsequent recurrence would also meet such requirements and would entitle the claimant to a new recurrence pay rate. *See supra* 10 and accompanying text. In its pay rate calculation, the Office appears to have included amounts for night differential pay and Saturday and Sunday and holiday premium pay, but the specific amounts which were included remain unclear.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 13, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 1, 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