United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	
DEPARTMENT OF DEFENSE, FORT CAMPBELL SCHOOL SYSTEM, LUCAS ELEMENTARY SCHOOL, Fort Campbell, KY, Employer	)	**Docket No. 07-290** **Issued: May 2, 2007**

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 November 13, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated September 8, 2006, which denied his claim for a schedule award. 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 met his burden of proof to establish that he has an impairment caused by his accepted shoulder and neck strains which would entitle him to a schedule award.

FACTUAL HISTORY

On September 13, 2004 appellant, then a 45-year-old maintenance worker, filed a traumatic injury claim, alleging that on September 1, 2004 he sustained an acute cervical strain with right cervical radiculopathy when he lost his footing while carrying boxes downstairs on a hand truck. He stopped work on September 7, 2004 and returned on September 13, 2004 with intermittent periods of disability thereafter. Appellant came under the care of Dr. Daniel Wade Huffman, Board-certified in family medicine. In an attending physician's report dated September 16, 2004, Dr. Huffman diagnosed right shoulder and cervical strains, which he opined were employment related. He referred appellant for physical therapy and provided physical restrictions. An October 27, 2004 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated large osteophyte complexes at C4-5, C5-6 and C6-7 resulting in varying levels of spinal canal stenosis and neuroforaminal narrowing. In a report dated November 8, 2004, Dr. M. Robert Weiss, a Board-certified neurosurgeon, noted the history of injury and appellant's complaints of neck and bilateral arm pain. Physical examination demonstrated 5/5 strength in the upper extremities with the exception of some subtle triceps and biceps weakness, perhaps 4/5, with normal sensation throughout. Muscle bulk and tone were normal and all major joints had normal active and passive range of motion. Dr. Weiss discussed the MRI scan findings and recommended continued physical therapy and a cervical myelogram. On November 22, 2004 he advised that appellant's symptoms were improving, that he was not interested in surgery at that time and that he could work without restrictions.

On December 7, 2004 the Office accepted that appellant sustained employment-related shoulder and neck strains. In a January 6, 2005 report, Dr. Weiss noted appellant's continued symptoms of pain. He advised that appellant had no focal or lateralizing findings but persistent symptoms and the suggestion on his MRI scan of rather significant neural impingement. Dr. Weiss stated: "If [appellant] feels that symptoms have stabilized and that he is willing to tolerate the symptoms, is fearful of surgery and does not want further interventions, diagnostic studies, therapies, etc., then I would suggest [that] he has reached maximum medical improvement, that he would have a 10 percent impairment to the body as a whole and remain at the workplace with no restrictions." He again recommended a myelogram. A February 11, 2005 cervical myelogram demonstrated moderate to marked anterior extradural defects at C4-5, C5-6 and C6-7 with attenuation of the thecal sac, predominantly on the left side at the level of C-6. A postmyelogram computerized tomography (CT) demonstrated an osteophyte at the level of C4-5 intruding rather markedly on the ventral aspect of the thecal sac and spinal cord, diffuse end place osteophyte formation at C5-6 intruding on the thecal sac and findings suggestive of a herniated disc at the level of C6-7. In a February 21, 2005 report, Dr. Weiss noted that surgical multilevel anterior fusion was discussed with appellant. He stated that he demonstrated the findings of the imaging studies to appellant and told him that he could not guarantee resolution of his neck pain but that the surgery would be designed to improve his radicular arm symptoms and axial discomfort.

On April 14, 2005 appellant filed a schedule award claim. By letter dated June 2, 2005, the Office requested that Dr. Weiss evaluate appellant in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[1]

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

It enclosed a form for rating impairment to the shoulder. In a June 6, 2005 report, Dr. Weiss advised that appellant reached maximum medical improvement on February 21, 2005 and that he had no restrictions and no impairment according to the A.M.A., *Guides*. On June 9, 2005 appellant noted his disagreement with Dr. Weiss regarding his impairment rating and requested a change of physicians.

By decision dated August 19, 2005, the Office found that appellant was not entitled to a schedule award, based on the June 6, 2005 opinion of Dr. Weiss. In a separate August 19, 2005 decision, the Office denied appellant's request to change physicians. On August 29, 2005 he requested a hearing that was held on June 29, 2006. At the hearing, the hearing representative identified two issues: entitlement to a schedule award and appellant's request to change physicians. Appellant testified regarding his continuing symptoms of radicular arm pain and loss of sensation and noted that he had not seen Dr. Weiss since January 2005. His wife argued that Dr. Weiss' reports were contradictory in that he initially said that appellant had 10 percent impairment and then changed his opinion to no impairment. The hearing representative advised appellant of the type of medical evidence needed to support his schedule award claim.

In a September 8, 2006 decision, the hearing representative found that appellant was not entitled to a schedule award caused by his September 1, 2004 employment injury.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] 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*[4] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the back or spine.[6] In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides*, *supra* note 1.

[5] *See Joseph Lawrence, Jr., supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] *Pamela J. Darling*, 49 ECAB 286 (1998).

be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[7] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[8]

ANALYSIS

The Board finds that appellant has not established that he is entitled to a schedule award. It is a claimant's burden to submit sufficient evidence to establish entitlement to a schedule award.[9] The Office determined that appellant was not entitled to a schedule award for his accepted cervical and shoulder strains as the medical evidence of record did not support that he sustained any permanent partial impairment in accordance with the A.M.A., *Guides.* Dr. Huffman did not provide any impairment analysis in his September 16, 2004 report. While Dr. Weiss, an attending neurosurgeon, advised on January 6, 2005 that, without surgery, appellant had reached maximum medical improvement and would have a 10 percent impairment to the body as a whole, he provided no impairment rating in accordance with the A.M.A., *Guides*. Office procedures and Board precedent require that the record must contain a medical report with a detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment. The percentage should be computed in accordance with the fifth edition of the A.M.A., *Guides*.[10] In Dr. Weiss' February 21, 2005 report, he merely noted that he discussed surgical options with appellant. On a June 6, 2005 report, however, Dr. Weiss specifically advised that appellant had reached maximum medical improvement on February 21, 2005 and had no impairment in accordance with the A.M.A., *Guides*. The Board finds that this report constitutes the weight of the medical evidence as there is no other competent medical opinion in the record that discusses an impairment rating.

While Dr. Weiss also noted that appellant had radicular arm symptoms, he clearly advised that appellant had no impairment under the A.M.A., *Guides* and his conclusions were based on the objective studies which showed preexisting neck degeneration.

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[7] *Thomas J. Engelhart*, 50 ECAB 319 (1999). Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve. A.M.A., *Guides*, *supra* note 1 at 423.

[8] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[9] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6 (August 2002); *see Patricia J. Penney-Guzman, supra* note 8.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for his accepted neck and shoulder strains.[11]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 8, 2006 be affirmed.

Issued: May 2, 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

[11] The Board notes that, at the June 26, 2006 hearing, the Office hearing representative properly identified the issues as entitlement to a schedule award and appellant's request to change physicians. The decision dated September 8, 2006, does not address the second issue, which is still outstanding. The Board does not have jurisdiction over the September 19, 2005 decision, in which the Office denied appellant's request to change physicians as its jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *See William N. Downer*, 52 ECAB 217 (2001). The Board also notes that appellant submitted evidence with his appeal to the Board. As the Board's review is limited by 20 C.F.R. § 501.2(c) to the evidence in the case record which was before the Office at the time of its final decision, the Board cannot review this additional evidence on appeal. *Thomas L. Agee*, 56 ECAB ___ (Docket No. 05-335, issued April 19, 2005).