United States Department of Labor
Employees' Compensation Appeals Board

R.K., Appellant	)	
and	)	**Docket No. 07-1169**
	)	**Issued: September 17, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Oshkosh, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 27, 2007 appellant filed a timely appeal from an April 6, 2006 decision of the Office of Workers' Compensation Programs granting him a schedule award for a five percent permanent impairment to his right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant has more than a five percent permanent impairment to his right lower extremity.

FACTUAL HISTORY

On December 14, 2002 appellant, a 58-year-old letter carrier, filed an occupational disease claim alleging that he sustained injuries to his back as a result of repetitive employment duties. The Office accepted his claim for aggravation of a herniated disc at L5-S1. Subsequently, the Office authorized a laminectomy and discectomy, with a posterior lumbar

interbody fusion at the L5-S1 level, which was performed on February 3, 2003. On September 25, 2003 appellant filed a claim for a schedule award.

Appellant submitted reports dated June 19, September 11 and 26, 2003 from Dr. Robert F. Mann, a Board-certified neurological surgeon. On June 19, 2003 Dr. Mann provided an assessment of status post posterior lumbar interbody fusion at the L5-S1 level. He noted that appellant had some radicular symptoms postoperatively, which had resolved. On physical examination, Dr. Mann observed a normal gait and trace weakness in the dorsiflexors on the left. On September 11, 2003 he again found trace weakness in the left dorsiflexors. Deep tendon reflexes were absent. Appellant reported occasional numbness in his left lower extremity. In a September 26, 2003 attending physician's report, Dr. Mann described appellant's history of injury as "LBP [lower back pain] and RLE [right lower extremity] pain," and indicated that he had worked as a mail carrier for many years. Findings included foraminal narrowing at L5-S1 and lumbar disc herniation. Dr. Mann opined that appellant had a 10 percent permanent disability due to limited range of motion in the lumbar spine.

On October 21, 2003 the Office asked Dr. Mann to provide information as to the degree of permanent impairment of appellant's lower extremities pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.), including objective findings; an opinion as to whether appellant had reached maximum medical improvement (MMI); the date of MMI and the percentage of impairment with an explanation as to how it was calculated. The Office provided a lower extremity impairment evaluation record and worksheet for purposes of the calculation.

On December 18, 2003 Dr. Mann opined that appellant had a 10 percent permanent impairment "DBE [diagnosis-based estimate]." Referencing motor power, he noted "trace weakness L dorsiflexors." He indicated that deep tendon reflexes were absent in the lower extremities. Dr. Mann also found decreased range of motion in the L5-S1 segment. On March 18, 2004 he reported that appellant continued to experience some weakness in the left dorsiflexors (4/5). Otherwise, Dr. Mann was symptom-free, unless he overextended himself. On examination, straight leg raising was negative. Motor power was 5/5, except for the left dorsiflexors, which were 4/5. Range of motion of the lumbar spine was normal. On November 4, 2004 Dr. Mann noted that appellant's gait and plantar flexors were normal. Straight leg raising was negative. Motor power assessment revealed 4+/5 weakness in the right dorsiflexors. The record also contains May 15, 2003 physical therapy report countersigned by Dr. Mann and a June 10, 2003 physical therapy report bearing an illegible signature.

On February 22, 2005 appellant filed another claim for a schedule award. By letter dated June 16, 2005, the Office advised appellant to forward a copy of its letter to his treating physician for the purpose of obtaining information as to the degree of his permanent impairment pursuant to the A.M.A., *Guides*. On October 6, 2005 the Office received an unsigned copy of its June 16, 2005 letter to appellant, which contained responses to questions posed by the Office.[1] The notations indicated that appellant had a decreased range of motion in the L5-S1 segment. Regarding decrease of strength, atrophy, ankylosis, sensory changes or other pertinent objective

[1] The Board notes that, although it was unsigned, the Office medical adviser indicated that the report received by the Office on October 6, 2005 was prepared by Dr. Mann.

findings, the notations reflected "Motor power -- trace. Weakness L dorsiflexors, DTR [deep tendon reflexes] absent in LE [lower extremity])." Subjective complaints included cramping in the right lower extremity. The recommended percentage of permanent impairment was "10 percent DBE." Notations indicated that September 11, 2003 was the date of MMI.

The Office forwarded the case file and statement of accepted facts to the district medical adviser for review and an opinion as to the degree of permanent impairment of appellant's lower extremities and date of MMI. In a January 16, 2006 report, the district medical adviser recommended a five percent impairment rating for appellant's right lower extremity. He rejected Dr. Mann's recommended rating of "10 percent DBE" based on appellant's residual symptoms and weakness, stating that the Federal Employees' Compensation Act does not recognize whole person impairment or impairment related to the axial skeleton. Noting that appellant continued to experience occasional cramping in the right lower extremity, the district medical adviser allowed a one percent impairment rating for Grade 4 pain in the distribution of the S1 nerve root on that side, pursuant to Tables 15-15 and 15-18 of the A.M.A., *Guides*, at page 424. He allowed an additional four percent impairment rating in light of a demonstrated 4+/5 strength in dorsiflexion on the right, pursuant to Tables 15-16 and 15-18 of the A.M.A., *Guides*, at page 424. Applying the Combined Values Chart on page 604 of the A.M.A., *Guides*, the district medical adviser concluded that appellant had a total right lower extremity impairment of five percent and estimated that the date of MMI occurred on February 3, 2004, 12 months after his surgery. He stated that there was no objective data to support any left lower extremity impairment.

On April 6, 2006 the Office granted a schedule award for a five percent permanent impairment of appellant's right lower extremity. The period of the award was from February 3 to May 13, 2004 (14.4 weeks). The Office found that the date of MMI was February 3, 2004.

LEGAL PRECEDENT

The schedule award provision of the Act,[2] and its implementing regulation,[3] 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

ANALYSIS

The Board finds that the case is not in posture for a decision on whether appellant has more than a five percent impairment of his right lower extremity, for which he received a

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *See id.; Jacqueline S. Harris*, 54 ECAB 139 (2002).

schedule award. Further development of the medical evidence is required. The Office's April 6, 2006 schedule award was based on the January 16, 2006 report of the district medical adviser, who, in turn, ostensibly relied on reports from appellant's attending physician. However, Dr. Mann's reports are inconsistent and, therefore, cannot form the basis for a proper schedule award determination. Moreover, the district medical adviser did not provide a clear rationale for his recommendation.

On December 18, 2003 Dr. Mann opined that appellant had a 10 percent permanent impairment "DBE." Referencing motor power, he noted "trace weakness L dorsiflexors." On March 18, 2004 he again reported that appellant continued to experience some weakness in the left dorsiflexors (4/5). However, on November 4, 2004 Dr. Mann found weakness in the *right* dorsiflexors (4+/5). (Emphasis added.) In October 6, 2005 responses to questions posed by the Office, Dr. Mann noted "Motor power -- trace. Weakness L dorsiflexors, DTR absent in LE." The inconsistencies in Dr. Mann's reports cast doubt on their validity. Moreover, none of the above-referenced reports included detailed findings on examination from which an accurate assessment of permanent disability could be made. Therefore, they are of diminished probative value. The Board notes that the October 6, 2005 responses to questions posed by the Office were in the form of unsigned notes. Although the Office medical adviser relied on the responses, in part, in making his recommendation to the Office, there is no evidence of record that Dr. Mann prepared them.

The Office forwarded the case file to the district medical adviser for review, and an opinion as to the degree of permanent impairment of appellant's lower extremities and date of MMI.[5] The medical adviser's January 16, 2006 report is insufficiently rationalized to support the Office's April 6, 2006 schedule award. He recommended a five percent impairment rating for appellant's right lower extremity, finding that there was no objective data to support any left lower extremity impairment. However, the medical adviser did not address Dr. Mann's findings regarding weakness in the left dorsiflexors. Noting that appellant continued to experience occasional cramping in the right lower extremity, he awarded a one percent impairment rating for Grade 4 pain in the distribution of the S1 nerve root on that side, pursuant to Tables 15-15 and 15-18 of the A.M.A., *Guides*, at page 424. The medical adviser awarded an additional four percent impairment rating in light of a demonstrated 4+/5 strength in dorsiflexion on the right, pursuant to Tables 15-16 and 15-18, at page 424. However, he did not explain why he based his recommendation on a finding contained in Dr. Mann's November 4, 2004 report, as opposed to his other reports, which did not contain a finding of right dorsiflexion weakness. Applying the Combined Values Chart on page 604 of the A.M.A., *Guides*, he concluded that appellant had a total right lower extremity impairment of five percent and estimated that the date of MMI occurred on February 3, 2004, a year after appellant's surgery. However, the medical adviser did not explain why he concluded that the date identified by Dr. Mann as the date of MMI, September 11, 2003, was an inappropriate date.

The Board finds that further development of the medical evidence is necessary in order to clarify the extent of permanent impairment of appellant's lower extremities. Accordingly, the

[5] The Office's procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

Board will remand the case to the Office for that purpose. Following this and any other further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that this case is not in posture for a decision on whether appellant has more than a five percent impairment of his right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2006 decision of the Office of Workers' Compensation Programs is set aside and remanded to the Office for action in accordance with the terms of this decision.

Issued: September 17, 2007
Washington, DC

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

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

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