United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 07-167**
	)	**Issued: February 13, 2008**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Lompoc, CA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2006 appellant filed a timely appeal from the June 13, 2006 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed the denial of additional schedule compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the claim.

ISSUE

The issue is whether appellant has more than a 15 percent permanent impairment of the right lower extremity or more than a 2 percent impairment of the left, for which he received a schedule award.

FACTUAL HISTORY

On December 21, 1990 appellant, then a 33-year-old legal technician, sustained an injury in the performance of duty: "While packing inmate property I tripped on a box of property and tried to catch myself before I fell and hurt my back." The Office accepted his claim for a herniated disc at L5-S1. Appellant underwent an L5-S1 discectomy on February 22, 1991. On

February 3, 1994 he received a schedule award for a 15 percent permanent impairment of his right lower extremity and a 2 percent impairment of his left. On April 12, 2002 appellant underwent additional lumbar surgery.

On February 6, 2003 Dr. Edwin M. Gangemi, a physiatrist, evaluated appellant's impairment. He noted full range of motion of all planes and joints in the hips, knees and ankles bilaterally. For motor strength, Dr. Gangemi reported right hip flexion 3/5, left hp flexion 4/5, right knee extension 4/5, left knee extension 4+/5, right ankle dorsiflexion 4/5, left ankle dorsiflexion 4/5, right plantar flexion 4+/5 and left plantar flexion 5/5. Sensation at L3 was symmetrically equal bilaterally. There was diminished pinprick on the right at L4, L5 and S1. Deep tendon reflexes were 3+ hyperactive for the left patella, 3+ for the right patella, and 0 and 1+ hypoactive for the Achilles. Dr. Gangemi diagnosed chronic low back pain, lumbar radiculitis, lumbar radiculopathy, status post lumbar laminectomy and urinary retention with self-catheterization for 12 months. He concluded that appellant had a 23 percent whole person impairment.

On November 4, 2003 Dr. Gangemi conducted an extended appraisal of the lower extremities:

> "Full active range of motion of all joints and planes tested in the hips, knees and ankles bilaterally. Tone is normal. There is no crepitus or atrophy noted. Motor strength in the lower extremities is 5/5 throughout, with the exception of the right knee flexion, which was found to be 4+/5, and left knee flexion, which was found to be 5-.
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> "Cranial nerves II-XII tested to be intact. Sensory is intact to light and deep touch, proprioception and joint position sense and pinprick. Deep tendon reflexes of the patella and Achilles are 1+ bilaterally. Dermatomal testing reveals decrease sensation in the right L5-S1 dermatomal distribution. Distal pulses are 2+ and symmetrically equal. Negative Romberg. Negative Babinski."

Dr. Gangemi reported that electrodiagnostic testing of the lower extremities showed chronic nerve root irritation of the L5-S1 nerve roots bilaterally, as well as early peripheral neuropathy affecting both sural sensory and both superficial peroneal and tibial motor nerves in a demyelinating fashion. He stated that results of a functional capacity evaluation showed a final whole person impairment of 23 percent: 21 percent for spine impairment and 2 percent for left lower extremity impairment.

On July 8, 2004 Dr. Gangemi reported that appellant underwent electrodiagnostic evaluation of the upper extremities for complaints of neck pain and fasciculations in the upper extremities, particularly in the right lateral forearm. He reported that this was a normal study.

On July 22, 2004 Dr. Gangemi reported that appellant underwent an electrodiagnostic evaluation of the lower extremities for complaints of back pain and fasciculations in the lower extremities, particularly in the right anterior leg. Testing revealed left L5, S1 radiculopathy and right L5, S1 irritation of the posterior primary rami, consistent with irritation proximal to the mentioned lumbar and sacral nerve roots.

On August 17, 2004 Dr. Jason D. Cohen, the orthopedic surgeon, reported that appellant was now four weeks status post a motor vehicle accident with persistent neck and some right arm paresthesias, but lower extremity motor, reflex and sensory examinations were all within normal limits. Lumbar radiographs showed good position of the instrumentation at L4-5 and L5-S1 and interbody arthrodesis.

On April 19, 2005 appellant filed a claim for an additional schedule award. The Office referred the case to an Office medical adviser for review.

On August 24, 2005 the Office medical adviser reported that there was no additional impairment above that previously awarded based on the most recent reports of Dr. Cohen and Dr. Gangemi and the July 8, 2004 electromyogram (EMG) and nerve conduction velocity (NCV) study of the lower extremities. In fact, the medical adviser noted that, based on the normal EMG and NCV of July 8, 2004, there was no residual neuropathy of either lower extremity, and in August 2004 Dr. Cohen's examination found both to be neurologically normal. The medical adviser added that on November 4, 2003 Dr. Gangemi found only some decreased sensation in the L5-S1 dermatome and 5/5 motor strength throughout, with the exception of 4+/5 in right knee flexion. Dr. Cohen's examination was more recent, he explained, as was the EMG test. He concluded that appellant had no impairment of either lower extremity.

In a decision dated October 21, 2005, the Office denied appellant's claim for an additional schedule award.

Appellant requested an oral hearing before an Office hearing representative. He submitted an April 6, 2006 report from Dr. Cohen, who deferred to Dr. Gangemi on the issue of impairment:

> "[Appellant] has been referred in the past by Dr. Gangemi to undergo disability rating. He states his disability rating was given to him at 23 percent, both extremities. I support Dr. Gangemi's rating and his disability for his determination. I certify that his condition is fixed and will not continue to improve in the future. Any further information needed as it relates to his workers' compensation disability can be obtained from Dr. Gangemi's reports."

Appellant also submitted an April 29, 2006 report from Dr. Gangemi, who repeated his impairment rating from 2003:

> "Please be advised that the above mentioned was first examined by us on July 24, 2003. The patient was involved in a fall episode, which occurred on December 21, 1990. During reevaluation despite attending physical therapy treatments on a regular basis, [appellant] continues to suffer from low back pain and lower extremity pain. The patient was undergoing physical therapy treatments along with medications; although he made slow and steady progress with regards to the symptoms. He seemed to be resistance to physical therapy. Functional capacity testing of the lower extremities, which was done on February 4, 2003, showed total whole body impairment of 23 percent including spine impairment of 21 percent and left lower extremity impairment of 2 percent.

> The patient's treatment consists [of] electrical stimulation, soft tissue mobilization with soft tissue massage, moist heat, ice, PREs and home exercise. [Appellant's] trigger condition is the result of soft tissue scarring as well as nerve root impingement."

In a decision dated June 13, 2006, the Office hearing representative affirmed the October 21, 2005 decision denying an additional schedule award. The hearing representative found no evidence that appellant had any impairment greater than 15 percent to the right lower extremity and 2 percent to the left.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[1] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[2]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[3] Because neither the Act nor the regulations provide compensation for impairment to the back, no claimant is entitled to such an award.[4] Indeed, the Act specifically excludes the back from the definition of "organ."[5]

Nonetheless, amendments to the Act modified the schedule award provisions to provide compensation 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. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of impairment originated in the spine.[6]

The Act does not authorize the payment of schedule awards for the permanent impairment of the "whole person" or "whole body." Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.[7]

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001).

[3] *William Edwin Muir*, 27 ECAB 579 (1976).

[4] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

[5] 5 U.S.C. § 8101(19).

[6] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[7] *Ernest P. Govednick*, 27 ECAB 77 (1975).

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[8]

ANALYSIS

Appellant has not met his burden to establish that he is entitled to an additional schedule award. The best evidence he submitted was the disability rating from Dr. Gangemi, his physiatrist. But there are two basic problems with this rating. First, Dr. Gangemi made no reference to the A.M.A., *Guides*, which is the standard the Office uses to measure permanent impairment. He did not show how he applied specific tables in the A.M.A., *Guides* to his findings on examination. This diminishes the value of Dr. Gangemi's opinion. Second, his rating of 23 percent was for the "whole body," and there is no provision for paying a schedule award for impairment to the whole body.[9] As Dr. Gangemi explained in his April 29, 2006 report, this total impairment of the whole body included a spine impairment of 21 percent and left lower extremity impairment of 2 percent. No claimant may receive a schedule award for spine impairment. Appellant has already received a schedule for a two percent impairment of his left lower extremity. So even if one assumes these ratings are consistent with the A.M.A., *Guides*, Dr. Gangemi's rating fails to support that appellant is entitled to an additional schedule award. The Board will therefore affirm the Office hearing representative's decision affirming the denial of an additional award.

The Board notes that the Office medical adviser misread the July 8, 2004 electrodiagnostic evaluation. Dr. Gangemi did report that it was a normal study, but it was a normal study of the upper extremities, not the lower. The July 22, 2004 electrodiagnostic study of the lower extremities was not normal. It revealed left radiculopathy and right irritation. The Office medical adviser correctly noted, however, that Dr. Gangemi's findings on physical examination were nonetheless minimal on November 4, 2003, and more recently, on August 17, 2004, Dr. Cohen reported that lower extremity motor, reflex and sensory examinations were all within normal limits. While this tends to weigh against a finding of increased impairment, the problems discussed earlier with Dr. Gangemi's rating are fatal to appellant's claim.

CONCLUSION

The Board finds that appellant has no more than a 15 percent permanent impairment of the right lower extremity or more than a 2 percent impairment of the left, for which he has received a schedule award.

[8] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[9] Dr. Cohen, the orthopedic surgeon, incorrectly reported that Dr. Gangemi's rating was 23 percent for both extremities.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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