United States Department of Labor
Employees' Compensation Appeals Board

C.O., Appellant	)	
and	)	**Docket No. 07-1555**
	)	**Issued: June 24, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Martinsburg, WV, Employer	)	

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

Oral Argument April 16, 2008

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 16, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 16, 2007 merit decision concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), 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 more than a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm, for which he received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on March 1, 2007 in which it set aside an April 13, 2006 decision of the Office and remanded the case to the Office

for further development regarding appellant's entitlement to schedule award compensation.[1] The Board found that the case was not in posture for decision regarding whether appellant had more than a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm, for which he received a schedule award.[2] The Board stated that it appeared 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. It noted, however, that there was some suggestion in the reports of physical examination results that appellant had deficits at a cervical level other than C6 which preexisted the February 1, 1994 employment injury or were caused by it.[3] The Board also indicated that, in addition to the opinion of Dr. Liberman, the record contained an opinion of Dr. Bruce A. Guberman, an attending Board-certified internist, which suggested that appellant had permanent impairment emanating from cervical levels other than C6 which should be included in the calculation of his schedule award.[4]

The Board determined 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 Board found that the Office never fully explained why it felt that impairment emanating from C6 should be the only impairment included in the calculation of his entitlement to schedule award compensation. The Board remanded the case 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. It directed the Office to issue an appropriate decision after

[1] Docket No. 06-1695 (issued March 1, 2007). The Office accepted that on February 1, 1994 appellant, then a 52-year-old nurse, sustained a cervical strain, subluxation of the cervical spine and contusions of the jaw and right ankle when the ambulance in which he was riding was hit by another vehicle. 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.

[2] The Office based its May 19, 2005 award on the January 10, 2005 opinion of an Office medical adviser who calculated that appellant had a two percent impairment in each arm due to sensory loss associated with the C6 nerve root. This result was reached by multiplying a 25 percent grade times the 8 percent maximum value for the C6 nerve root in each arm. *See* American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) 424, Tables 15-15, 15-17. The Office medical adviser indicated that the higher impairment (nine percent in each arm) described in the November 29, 2004 report of Dr. Joseph Liberman, an attending Board-certified neurologist, was of limited probative value because he included deficits related to the C7 and C8 nerve roots, deficits which neither preexisted nor were caused by the February 1, 1994 employment injury. The record contains medical reports from late 2004, which generally indicated that appellant had decreased sensation to pinprick, numbness and radiating pain in both arms.

[3] On March 4, 1994 an attending physician reported that appellant had hypesthesia in the C8 dermatome primarily on the right. However, the findings of June 6, 1994 electromyogram (EMG) and nerve conduction velocity studies of the upper extremities revealed normal results. The findings of July 28, 1994 computerized tomography (CT) scan testing of appellant's cervical spine revealed a subluxation of C5 over C6 with no definite evidence of fracture.

[4] On January 23, 2006 Dr. Guberman indicated that appellant had sensory abnormalities in both arms consistent with bilateral cervical radiculopathy particularly at the C8 nerve root level. He concluded that appellant had an eight percent permanent impairment of his right arm and a seven percent permanent impairment of his left arm. Dr. Guberman calculated impairments based on sensory loss and range of motion deficits that were caused by this C8 radiculopathy.

conducting such development it deemed necessary. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office noted that it was accepted that appellant sustained a cervical subluxation at C5-6 on February 1, 1994. The Office asked Dr. Morley Slutsky, a Board-certified orthopedic surgeon serving as an Office medical adviser, to review the medical evidence of record and consider whether appellant had impairment emanating from cervical levels other than C6, which should be included in the calculation of his schedule award. Dr. Slutsky had previously been asked to provide an opinion on the permanent impairment of appellant's upper extremities. In an April 8, 2006 report, he determined that appellant's range of motion problems and C8 radiculopathy were not related to his accepted employment injuries. Dr. Slutsky stated that appellant's subluxation was at C5-6 rather than C8 and noted that acute cervical sprains/strains did not last for years.[5]

In an April 2, 2007 report, Dr. Slutsky provided an extensive discussion of the medical evidence of record. In response to an Office question regarding whether appellant sustained an injury at C8 on February 1, 1994 or whether he had a C8 injury prior to February 1, 1994, Dr. Slutsky stated:

> "According to the medical notes provided, the claimant had no neck problems prior to his work[-]related accident.
>
> "In addition to this, there was no objective evidence provided that the claimant suffered an injury at the C8 level. There was mention once of a possible clinical finding of C8 sensory deficit (March 4, 1994). All subsequent clinical notes provided for review (please see below) do not confirm this and the claimant apparently underwent EMG/NCS test of the upper extremities which was reported as being normal. If there was significant damage to the C8 nerve roots one would expect positive evidence of this on the EMG/NCS testing. On September 9, 1994 Dr. Liberman rated the claimant for loss of cervical range of motion and loss of shoulder range of motion. He did not document finding ratable C8 deficits.
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> "So I do not feel, on a more probable than not basis that the claimant did not suffer an injury at the C8 level as a result of the work[-]related injury.
>
> "Since there is a C8 level injury, there is no impairment for this condition."
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> "I have just reviewed the January 23, 2006 exam[ination] as directed to do. The accepted conditions are cervical sprain and subluxation. There are no impairments due to these accepted conditions. There was no objective evidence

[5] Dr. Slutsky provided impairment calculations which included ratings for C8 deficits but noted that these deficits were not for preexisting or employment-related conditions.

to link up the loss of shoulder [range of motion] and C8 radiculopathy to the accepted conditions above."

* * *

"However, I have performed calculations based upon both shoulder [range of motions] and C8 neuropathy as these were the two deficits Dr. Guberman provided calculations for. Again, I do not feel these are related to the accepted conditions but the Department [of Labor] will make this final determination. Based upon this information presented by Dr. Guberman, the final right upper extremity impairment is eight percent and the final left upper extremity impairment is seven percent."[6]

In an April 18, 2007 decision, the Office determined that appellant had no greater than a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm. The Office indicated that the medical evidence of record showed that it would not be appropriate to include deficits in appellant's impairment rating other those that associated with the C6 nerve distribution.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulations[8] 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 regulations as the appropriate standard for evaluating schedule losses.[9] It is well established that 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.[10]

[6] Dr. Slutsky provided impairment calculations which included ratings for C8 deficits but again noted that these deficits were not for preexisting or employment-related conditions.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *Id*.

[10] *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."

ANALYSIS

The Office accepted that on February 1, 1994 appellant, then a 52-year-old nurse, sustained a cervical strain, subluxation of the cervical spine and contusions of the jaw and right ankle when the ambulance in which he was riding was hit by another vehicle. On May 19, 2005 the Office granted appellant a schedule award for two percent permanent impairment of both his right and left arms. The Board finds that appellant has not met his burden of proof to establish that he has more than a two percent permanent impairment to both of his upper extremities.

In a January 10, 2005 report, an Office medical adviser[11] calculated that appellant had a two percent impairment to in each arm due to sensory loss associated with the C6 nerve root. The Office medical adviser properly reached this conclusion by multiplying a 25 percent grade times the 8 percent maximum value for the C6 nerve root in each arm.[12] The Board notes that it was appropriate to use a 25 percent grade for sensory loss as the medical reports from late 2004 generally indicate that appellant had decreased sensation to pinprick, numbness and radiating pain in both arms. There is no indication that appellant had sensory loss associated with the C6 nerve distribution, which caused interference with activity such that it would be appropriate to use a higher grade for sensory loss.[13] The Office medical adviser indicated that it would not be appropriate to include sensory deficits associated with other nerve distributions, such as C7 and C8, because these deficits neither preexisted nor were caused by the February 1, 1994 employment injury.

In a March 1, 2007 decision, the Board remanded the case to the Office so 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. As noted above, preexisting impairments are to be included in calculating schedule awards.[14] The Office referred the case to another Office medical adviser, Dr. Slutsky, a Board-certified orthopedic surgeon.[15]

On April 2, 2007 Dr. Slutsky concluded that there were not any deficits, other than deficits associated with the C6 nerve, which should be included in the calculation of appellant's schedule award. He determined that appellant did not sustain injury to any cervical disc level other than C6 on February 1, 1994 and found that there was no clear evidence that prior to February 1, 1994 he had impairment emanating from any cervical disc level. The Board notes that Dr. Slutsky's conclusions are well reasoned and based on an extensive review of the medical evidence.

[11] The name of the Office medical adviser is illegible.

[12] *See* A.M.A., *Guides* 424, Tables 15-15, 15-17.

[13] *See id.* at 424, Table 15-15.

[14] *See supra* note 10 and accompanying text.

[15] Dr. Slutsky had previously been asked to provide an opinion on the permanent impairment of appellant's upper extremities. In an April 8, 2006 report, he determined that appellant's range of motion problems and C8 radiculopathy were not related to his accepted employment injuries.

Dr. Slutsky explained that, although there was mention once of a clinical finding of C8 sensory deficit on March 4, 1994, all subsequent clinical notes did not confirm this finding and June 6, 1994 EMG and NCS testing of the upper extremities was reported as being normal. He further stated that if "there was significant damage to the C8 nerve roots one would expect positive evidence of this on the EMG/NCS testing."[16] Dr. Slutsky also noted that on September 9, 1994 Dr. Liberman rated appellant for upper extremity impairment, but did not document any ratable C8 deficits. The Board notes that appellant has not submitted medical evidence showing that he has an 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.[17]

The Board notes that, considering the opinions of the two Office medical advisers, the medical evidence establishes that appellant does not have more than two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm. Appellant has not submitted medical evidence showing that he has greater impairment for which he received a schedule award.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a two percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.

[16] The Board further notes that the findings of July 28, 1994 CT scan testing of appellant's cervical spine only revealed a subluxation of C5 over C6 without fracture. There were no signficiant findings at other cervical levels.

[17] Dr. Slutsky provided impairment calculations which included ratings for C8 deficits but noted that these deficits were not for preexisting or employment-related conditions. The record contains several reports, including a November 29, 2004 report of Dr. Liberman and a January 23, 2006 report Dr. Guberman, an attending Board-certified internist, which contain impairment ratings for deficits related to cervical disc levels other than C6. For the reasons explained above, these opinions are of limited probative value on the relevant issue of the present case.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 16, 2007 decision is affirmed.

Issued: June 24, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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