United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 07-2275**
	)	**Issued: June 3, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Hopatcong, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 17, 2006, with respect to a schedule award. The record also contains an August 8, 2007 decision denying merit review of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a 13 percent impairment to her left leg; and (2) whether the Office properly denied reconsideration of an October 17, 2006 decision.

FACTUAL HISTORY

The Office accepted that appellant sustained a lumbosacral sprain in the performance of duty on May 14, 1999. Appellant underwent lumbar surgeries on January 30 and February 6, 2001. In a report dated October 12, 2001, Dr. David Weiss, an osteopath, opined that appellant had a 10 percent left leg permanent impairment. On April 18, 2003 appellant

underwent a thoracic laminectomy. An Office medical adviser opined in an April 22, 2004 report that appellant had not reached maximum medical improvement as she remained under active treatment.

Appellant was referred to Dr. David Rubinfeld, an orthopedic surgeon, for a second opinion evaluation. In a report dated May 28, 2005, Dr. Rubinfeld provided a history and results on examination. He noted that appellant had complaints of pain in both legs with intermittent numbness in the left foot and toes. Dr. Rubinfeld opined that appellant did not have a continuing orthopedic condition and had no permanent impairment.

By report dated September 15, 2005, an Office medical adviser opined that appellant had a five percent leg impairment due to sensory deficit in the L5 nerve root. The Office then referred appellant for evaluation by Dr. Robert Petrucelli, an orthopedic surgeon.[1] In a report dated February 1, 2006, Dr. Petrucelli provided a history, results on examination and review of medical records. With respect to permanent impairment, he identified Table 15-18 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Under Table 15-18, sensory deficit in the L5 nerve root is rated a maximum of 5 percent leg impairment, with a maximum 37 percent for motor deficit. Dr. Petrucelli graded the sensory impairment at 80 percent of the maximum (4 percent) and the motor deficit at 25 percent of the maximum or (9 percent). He then combined the 4 percent and 9 percent, finding a total 13 percent whole person impairment.

In a report dated April 6, 2006, an Office medical adviser opined that appellant had a 13 percent left leg impairment. The medical adviser noted that Dr. Petrucelli had incorrectly referred to a whole person impairment, rather than a leg impairment. The date of maximum medical improvement was reported as February 1, 2006.

By decision dated April 12, 2006, the Office issued a schedule award for a 13 percent permanent impairment to the left leg. The period of the award was 37.44 weeks from February 1, 2006. Appellant requested a hearing before an Office hearing representative, which was held on August 16, 2006. In a decision dated October 17, 2006, the hearing representative affirmed the April 12, 2006 schedule award decision.

By letter dated July 30, 2007, appellant's representative stated that he was requesting reconsideration. He indicated that he was submitting a May 7, 2007 report from Dr. Weiss and requesting that the schedule award be increased in accord with the opinion of Dr. Weiss. In a report dated May 7, 2007, Dr. Weiss provided results on current examination. He opined that based on the A.M.A., *Guides* appellant had a 30 percent left leg impairment and 3 percent right leg impairment.

In a decision dated August 8, 2007, the Office found that the July 30, 2007 letter requesting reconsideration was insufficient to warrant further merit review as no new and relevant evidence was submitted. The Office also noted "alternatively" the issue of an increased schedule award, stating that the evidence from Dr. Weiss "appears to support only a claim of 'increased impairment at a later date' which constitutes, in and of itself, a request for an

[1] The referral letter stated that there was a conflict in the medical evidence.

additional award. This does constitute a bar to your requesting reconsideration in the matter of an amended award." The Office advised appellant that he could claim an additional award by submitting a Form CA-7 claim for compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[2] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[3]

ANALYSIS -- ISSUE 1

The Office referred appellant for a second opinion examination by Dr. Rubinfeld, who found that appellant had no continuing orthopedic condition and no employment-related permanent impairment. An Office medical adviser determined that appellant had a five percent left leg impairment, based on an L5 nerve root sensory deficit.

Appellant was referred to Dr. Petrucelli. Although the referral letter stated that there was a conflict in the medical evidence, the Broad notes that there was no conflict under 5 U.S.C. § 8123(a) as no attending physician had offered an opinion.[4] The referral to Dr. Petrucelli was a second opinion referral and his report may constitute the weight of the medical evidence.[5]

Dr. Petrucelli described a permanent impairment to the left leg based on L5 sensory and motor deficit. Under Table 15-18 of the A.M.A., *Guides* the maximum impairment for L5 sensory deficit is 5 percent, while the maximum for loss of strength is 37 percent.[6] Dr. Petrucelli graded the sensory impairment as 80 percent of the maximum or a 4 percent leg impairment and the motor deficit as 25 percent of the maximum or 9 percent. Appellant argues that Dr. Petrucelli cannot be the weight of the evidence because he provided a whole person impairment. But Dr. Petrucelli did properly identify a leg impairment and the appropriate tables used to calculate the extent of left leg impairment. He incorrectly described combining the 9 and

[2] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[3] *A. George Lampo*, 45 ECAB 441 (1994).

[4] 5 U.S.C. § 8123(a) provides if there is a disagreement between an attending physician and a physician making an examination for the Office, a third physician is selected to resolve the conflict.

[5] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[6] A.M.A., *Guides* 424, Table 15-18. While this table is located in the section discussing impairments to the spine, which is not a scheduled member of the body, Tables 15-15 through 15-18 are for spinal nerve root impairments affecting the arms or legs.

4 percent leg impairments as a 13 percent "whole person" impairment rather than a leg impairment. However, Dr. Petrucelli's report clearly describes the impairment and the method used to calculate the degree of leg impairment. The Office medical adviser confirmed that combining a 9 percent loss of strength with a 4 percent sensory deficit or pain was a 13 percent leg impairment.

Based on the probative medical evidence of record, the Office properly determined that appellant had a 13 percent leg impairment. There was no probative medical evidence of a greater leg impairment. The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's impairment was 13 percent, he is entitled to 13 percent of 288 weeks or 37.44 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[7] In this case, the Office medical adviser properly concluded that the date of maximum medical improvement was the date of examination by Dr. Petrucelli. The award therefore properly runs for 37.44 weeks commencing on February 1, 2006.

LEGAL PRECEDENT -- ISSUE 2

As the Board explained in *Linda T. Brown*,[8] a claimant may seek a schedule award if the evidence establishes that she sustained an impairment causally related to the employment injury. Even if the term "reconsideration" is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award. The Office should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.[9]

ANALYSIS -- ISSUE 2

The August 8, 2007 Office decision appeared to acknowledge that appellant was claiming an increased schedule award based on the May 7, 2007 report from Dr. Weiss. The Office still issued a decision denying reconsideration and advised appellant to submit an additional claim for compensation. When the Office receives evidence that clearly indicates a claimant is seeking an increased schedule award based on new evidence, it should consider the evidence and issue a merit decision in accord with Board precedent. The case will be remanded to the Office for a merit decision with respect to an increased schedule award.

[7] *Albert Valverde*, 36 ECAB 233, 237 (1984).

[8] 51 ECAB 115 (1999). In *Brown*, the Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that the Office reconsider in 1997, submitting a current report with an opinion that she had a 25 percent permanent impairment to the arms and legs. The Office determined that appellant submitted an untimely request for reconsideration that did not show clear evidence of error. The Board remanded the case for a merit decision.

[9] *Id.; see also Paul R. Reedy*, 45 ECAB 488 (1994).

CONCLUSION

Appellant has not established more than a 13 percent left leg impairment. Since she submitted evidence regarding an increased schedule award, the case is remanded to the Office for a merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2006 is affirmed. The decision dated August 8, 2007 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 3, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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