United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
	)	
and	)	**Docket No. 08-298**
	)	**Issued: June 18, 2008**
DEPARTMENT OF THE NAVY,	)	
PHILADELPHIA NAVAL STATION,	)	
Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 November 7, 2007 appellant, through her attorney, filed a timely appeal from a December 11, 2006 merit decision of the Office of Workers' Compensation Programs and a June 19, 2007 hearing representative's decision granting her an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

ISSUE

The issue is whether appellant has more than an eight percent permanent impairment of the right lower extremity for which she received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board. In the first appeal, the Board set aside July 15, 1998 and February 8, 1999 decisions finding that appellant did not establish a recurrence

of disability beginning May 24, 1990 causally related to her March 2, 1989 employment injury.[1] The Board found that a conflict in medical opinion existed on the issue of whether she sustained a recurrence of disability on May 24, 1990 and remanded the case for resolution of the conflict. On appeal for the second time, the Board affirmed a November 29, 2004 decision finding that appellant did not establish an employment-related recurrence of disability beginning May 24, 1990.[2] The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On March 16, 2006 appellant filed a claim for a schedule award. In an impairment evaluation dated January 12, 2006, Dr. Nicholas Diamond, an osteopath, diagnosed herniated discs at L3-4 and L5-S1, right S1 radiulopathy, L5 on S1 spondylolisthesis, failed back syndrome and chronic pain syndrome. He measured her gastrocnemius circumference as 37.5 centimeters on the right and 39 centimeters on the left. Dr. Diamond measured quadriceps circumference as 39.5 centimeters on the right and 40 centimeters on the left. He stated, "Manual muscle strength testing of the lower extremities reveals the quadriceps and gastrocnemius are graded at 4/5 to 4+/5 on the right versus 4+/5 on the left." Dr. Diamond determined that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001) appellant had a 2 percent impairment due to a 4/5 motor strength deficit of the right extensor hallucis longus[3] a 12 percent impairment due to a 4/5 motor strength deficit of the right quadriceps[4] and a 17 percent impairment due to a 4/5 motor strength deficit of the right gastrocnemius.[5] He combined the right lower extremity impairments due to loss of motor strength to finding a 28 percent permanent impairment. Dr. Diamond noted that appellant had no sensory loss but complained of pain down her lower extremity "with numbness and tingling which waxes and wanes." He added 3 percent impairment due to pain to find a total right lower extremity impairment of 31 percent.[6] Dr. Diamond opined that appellant reached maximum medical improvement on January 12, 2006.

By decision dated March 22, 2006, the Office denied appellant's claim for a schedule award on the grounds that she did not establish impairment causally related to her accepted employment injury. Appellant requested an oral hearing. After review of the case record, in a

[1] Docket No. 99-1852 (issued May 24, 2001). The Office accepted that on March 2, 1998 appellant, then a 33-year-old safety specialist, sustained low back strain in the performance of duty. She was pregnant at the time of her employment injury. Appellant stopped work on June 5, 1989. She resigned from the employing establishment on January 2, 1990 with the stated reason "to stay home and raise daughter."

[2] Docket No. 05-1120 (issued November 4, 2005). In a report dated January 3, 2002, Dr. Evan D. O'Brien, a Board-certified orthopedic surgeon and impartial medical examiner, diagnosed a lumbar strain due to appellant's March 2, 1998 employment injury. He opined that the strain resolved no later than May 23, 1990. Dr. O'Brien diagnosed disc herniations at L3-4 and L5-S1 unrelated to her employment injury.

[3] A.M.A., *Guides* 532, Table 17-8.

[4] *Id*.

[5] *Id*.

[6] *Id*. at 574, Table 18-1.

decision dated June 7, 2006 a hearing representative set aside the March 22, 2006 decision. The hearing representative found that the Office should request an opinion on whether appellant had a permanent impairment of the right lower extremity from an Office medical adviser.

The Office prepared a statement of accepted facts which indicated that Dr. Steven Valentino, an osteopath, performed an impartial medical examination on June 2, 1998.[7] The Office did not mention the December 11, 2001 examination by Dr. O'Brien, the impartial medical examiner. On June 15, 2006 an Office medical adviser found that appellant had a three percent impairment of the right lower extremity based on the June 1998 opinion of Dr. Valentino. He determined that Dr. Diamond's findings on examination were not supported by the other medical evidence.

In a decision dated June 27, 2006, the Office granted appellant a schedule award for a three percent right lower extremity impairment.

On July 10, 2006 she requested a hearing. The hearing representative reviewed the record and, in a September 15, 2006 decision, determined that the case was not in posture for a hearing. He found that the statement of accepted facts provided to the Office medical adviser was inadequate as it did not discuss Dr. O'Brien's impartial medical examination. The hearing representative further noted that the Office medical adviser did not address whether appellant sustained a permanent impairment causally related to her accepted employment injury. He remanded the case for a supplemental opinion from the Office medical adviser.

On October 13, 2006 the Office medical adviser reviewed the newly prepared statement of accepted facts and found that, based on Dr. O'Brien's evaluation, appellant had a 12 percent permanent impairment of the right lower extremity. He noted that the findings on physical examination differed among physicians and recommended that the Office obtain an "additional impartial examination" before issuing a schedule award determination.

On October 23, 2006 the Office referred appellant to Dr. Kevin F. Hanley, for a second opinion evaluation. It requested that Dr. Hanley address whether appellant had a ratable impairment as a result of an accepted condition. In a report dated November 15, 2006, Dr. Hanley reviewed magnetic resonance imaging (MRI) studies from 1989 forward and stated, "There are changes at the L5-S1 disc on both and it would appear that an L5-S1 disc abnormality did occur as a consequence of her original injury. Therefore any findings in the lower extremity at this time that seems to suggest an L5 or S1 radiculopathy in my mind would be related." On physical examination, Dr. Hanley found no weakness or sensory loss but right calf atrophy of 1.2 centimeters. He diagnosed right S1 radiculopathy. Dr. Hanley noted that, according to section 17.2 on pages 530 of the A.M.A., *Guides*, calf atrophy between 1 to 1.9 centimeters constituted an impairment ranging from three to eight percent. He opined that appellant had a six percent permanent impairment due to one centimeter of right calf atrophy. Dr. Hanley found that appellant reached maximum medical improvement on May 1, 1990.

[7] In a June 1998 report, Dr. Valentino, who provided a second opinion examination, found that appellant's employment-related lumbar strain had resolved on March 2, 1998 and that she did not sustain herniated discs or radiculopathy due to her employment injury.

On November 27, 2006 an Office medical adviser concurred with Dr. Hanley's finding that appellant had impairment due to right calf atrophy but found that she was entitled to an impairment of eight percent in accordance with Office practice "to utilize the maximum percentage in the given category…." He noted that the impairment due to calf atrophy was consistent with Dr. O'Brien's findings of weakness of the right dorsiflexors. The Office medical adviser opined that the claim should be expanded to include right radiculopathy at S1. He found that she reached maximum medical improvement on November 15, 2006.

In a decision dated December 11, 2006, the Office granted appellant a schedule award for an additional five percent right lower extremity impairment. The period of the award ran for 14.4 weeks from August 22 to November 30, 1998.

On December 15, 2006 appellant, through her attorney, requested an oral hearing. At the hearing held on April 2, 2007, counsel argued that Dr. Hanley's opinion was insufficiently detailed to constitute the weight of the medical evidence. He also contended that a conflict in opinion existed between Dr. Diamond and Dr. Hanley.

By decision dated June 19, 2007, the hearing representative affirmed the December 11, 2006 decision. She additionally expanded acceptance of the claim to include S1 radiculopathy.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[8] and its implementing federal regulations,[9] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[10] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[11]

The A.M.A., *Guides* states that manual muscle testing depends on the examinee's cooperation and is subject to his or her conscious and unconscious control. To be valid, the results should be concordant with other observable pathologic signs and medical evidence.[12] The A.M.A., *Guides* further requires that measurements be made by one or two observers and if made by one observer that the measurements should be consistent on different occasions.[13]

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] 20 C.F.R. § 10.404(a).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[12] A.M.A., *Guides* 531.

[13] *Id*.

ANALYSIS

The Office accepted that appellant sustained low back strain due to factors of her federal employment. Appellant stopped work on June 5, 1989 and did not return. The Board affirmed a finding that she did not establish a recurrence of disability beginning May 24, 1990 due to her March 2, 1989 employment injury.[14] The Office subsequently expanded acceptance of the claim to include S1 radiculopathy.

In a January 12, 2006 impairment evaluation, Dr. Diamond measured atrophy and performed manual muscle testing. He found that appellant had manual muscle strength in the quadriceps and gastrocnemius of 4/5 and 4+/5 on the right and 4+/5 on the left. Dr. Diamond concluded that she had a 2 percent impairment due to a 4/5 motor strength deficit of the right extensor hallucis longus[15] a 12 percent impairment due to a 4/5 motor strength deficit of the right quadriceps[16] and a 17 percent impairment due to a 4/5 motor strength deficit of the right gastrocnemius.[17] He combined the right lower extremity impairments due to loss of motor strength to finding a 28 percent permanent impairment. The A.M.A., *Guides*, however, provide that strength measurements are functional tests influenced by subjective factors that are difficult to control; consequently, the A.M.A., *Guides* does not assign a large role to such measurements.[18] Section 17.2e on page 531 of the A.M.A., *Guides* states: "Measurements can be made by one or two observers. If the measurements are made by one examiner, they should be consistent on different occasions." Dr. Diamond did not indicate that he performed manual muscle testing on more than on occasion. He also found that appellant had three percent impairment due to pain using Chapter 18. Examiners, however, should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[19] Dr. Diamond did not explain why appellant's condition could not be adequately rated under other chapters. As his report does not conform to the A.M.A., *Guides*, it is of diminished probative value.[20]

[14] *See Elizabeth A. Carita, supra* note 2.

[15] A.M.A., *Guides* 532, Table 17-8.

[16] *Id*.

[17] *Id*.

[18] *Id*. at 507.

[19] *P.C.*, 58 ECAB ___ (Docket No. 07-410, issued May 31, 2007); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* 18.3(b).

[20] *See generally Derrick C. Miller*, 54 ECAB 266 (2002).

On October 13, 2006 an Office medical adviser recommended that the Office obtain an additional impairment evaluation.[21] The Office referred appellant to Dr. Hanley for an impairment evaluation. On November 15, 2006 Dr. Hanley diagnosed a disc abnormality at L5-S1 due to her March 2, 1989 employment injury. He found that she had no weakness or sensory loss on examination but had right calf atrophy of 1.2 centimeters. Dr. Hanley diagnosed right S1 radiculopathy. He noted that according to section 17.2 on pages 530 of the A.M.A., *Guides*, calf atrophy between 1 to 1.9 centimeters constituted an impairment ranging from three to eight percent. Dr. Hanley opined that she had a six percent permanent impairment due to one centimeter of right calf atrophy.

Under Table 17-6 on page 530 of the A.M.A., *Guides*, calf atrophy of 1 to 1.9 centimeters can range from three to eight percent lower extremity impairment. An Office medical adviser reviewed Dr. Hanley's report and accorded appellant eight percent impairment due to calf atrophy of 1.2 centimeters. The medical evidence conforming which the A.M.A., *Guides* does not establish that she has more than eight percent right lower extremity impairment.

The Office medical adviser determined that appellant reached maximum medical improvement on November 15, 2006. Dr. Hanley found that appellant reached maximum medical improvement on May 1, 1990. It is well established that the period of a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[22] The Board has noted a reluctance to find a date of maximum medical improvement which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits.[23] The Board, therefore, requires persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.[24] In its December 11, 2006 decision, however, the Office determined that appellant reached maximum medical improvement on June 22, 1998. The Board finds that the period of the schedule award should commence on November 15, 2006, the date of the evaluation by Dr. Hanley upon which the Office based its schedule award determination. The case will be remanded for the Office to determine whether the change in the date of commencement of the schedule award changes the pay rate applicable to the schedule award.

[21] The Office medical adviser further utilized the January 3, 2002 report of Dr. O'Brien to find that appellant had a 12 percent permanent impairment of the right lower extremity. Dr. O'Brien, however, evaluated her to determine the nature and extent of her employment-related condition and disability. He did not provide an impairment evaluation in accordance with the A.M.A., *Guides*. Further, Dr. O'Brien found that appellant had no residuals from her employment injury of a low back strain and that her herniated discs at L3-4 and L5-S1 were not due to her work injury. The Board also notes that the Office medical adviser recommended an additional impartial medical examination; however, the record did not contain a conflict in opinion as Dr. Diamond's report is not in accord with the A.M.A., *Guides*.

[22] *Mark A. Holloway*, 55 ECAB 321 (2004).

[23] *James E. Earle*, 51 ECAB 567 (2000).

[24] *Id*.

On appeal, appellant's attorney contends that a conflict exists among the physicians. As discussed, however, Dr. Diamond's impairment evaluation did not conform to the A.M.A., *Guides* and thus is of diminished probative value.[25] He also asserts that Dr. Hanley's report is incomplete as it does not contain manual muscle testing. As discussed, however, the A.M.A., *Guides* does not assign a large role to such measurements as they are subjective in nature.[26]

CONCLUSION

The Board finds that appellant has no more than an eight percent permanent impairment of the right lower extremity for which she received a schedule award. The Board further finds that the case must be remanded to change the date the schedule award begins and to determine whether the changes alter the pay rate.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 19, 2007 and December 11, 2006 are affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 18, 2008
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

[25] *See Derrick C. Miller*, *supra* note 20.

[26] A.M.A., *Guides* 507.