United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 08-531**
	)	**Issued: June 13, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
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 December 12, 2007 appellant filed a timely appeal from a December 4, 2007 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether appellant has more than seven percent impairment to his right leg and six percent impairment to his left leg, for which he received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board.[1] Appellant's claim was accepted by the Office for a herniated disc at L5-S1 and permanent aggravation of S1 radiculopathy. On July 1, 2006 he was granted schedule awards for seven percent impairment to his right leg and six percent impairment of his left leg. In a December 8, 2006 decision, the Board found a conflict in

[1] Docket No. 06-1866 (issued December 8, 2006).

medical opinion between Dr. Jacob Salomon, an attending Board-certified general surgeon, and an Office medical adviser as to the extent of permanent impairment to appellant's lower extremities. The facts and history of the case are set forth in the Board's prior decision and are incorporated herein by reference.[2]

Following remand, the Office referred appellant to Dr. Jaroslaw B. Dzwinyk, a Board-certified orthopedic surgeon, selected as the impartial medical specialist, who was requested to provide an impairment rating of the lower extremities in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). In a January 12, 2007 report, Dr. Dzwinyk reviewed appellant's history of injury and medical treatment and noted his complaint of pain at the lower end of the lumbar area. He noted that appellant's pain radiated into both groin areas and medial thighs but he denied any distal radiation of the pain below the knees or any neurological symptoms, such as numbness, loss of sensation or paresthesias. Dr. Dzwinyk noted findings on examination of the spine with no evidence or paravertebral muscle spasm and mild tenderness over the lumbosacral junction. No obvious pain behavior or overreaction was noted. Appellant was able to reach below the knees on side bending and stand on both heels and toes. Neurological evaluation of both lower extremities was reported as normal for deep tendon reflexes at the ankles and knees. No atrophy was found in the thighs or calves. Dr. Dzwinyk noted that diagnostic studies revealed disc space collapse at the L5-S1 with vertebral end plate edema. The bulging disc resulted in mild to moderate encroachment of the foramina bilaterally.

Dr. Dzwinyk noted that there were no current physical findings to support evidence of an S1 radiculopathy since there were no symptoms of pain radiating distal to the knee. He opined that the examination did not disclose any lower extremity impairment, as virtually all of the observed functional impairment was to the low back due to the degenerative disc disease at L5-S1. Dr. Dzwinyk noted that the Federal Employees' Compensation Act did not provide a schedule award for permanent impairment of the back itself. He noted the prior rating by the Office medical adviser and stated that, based on the lack of objective findings, "there is nothing to support a change in the percentage of impairment that was already awarded."

In a March 1, 2007 decision, the Office denied modification of its July 1, 2006 schedule award determination, finding that the weight of medical opinion did not establish greater impairment.

Appellant requested a review of the written record on March 5, 2007. By decision dated June 3, 2007, an Office hearing representative affirmed the March 1, 2007 decision.

On July 17, 2007 appellant requested reconsideration. He enclosed copies of medical records previously reviewed, contending that the report of Dr. Dzwinyk should not outweigh the opinion of Dr. Salomon.[3] The Office forwarded a portion of the medical record to an Office

[2] During the pendency of the prior appeal, an Office hearing representative issued an October 13, 2006 decision concerning the schedule award. This decision is null and void as the Board and the Office may not have concurrent jurisdiction over the same issue. *See Lawrence Sherman*, 55 ECAB 359 (2004); *Cathy B. Millin*, 51 ECAB 330 (2000); *Douglas E. Billings*, 41 ECAB 880 (1990).

[3] Appellant also submitted an affidavit from Christopher Cummings, a roommate, as to limitations due to his back pain.

medical adviser who, on September 18, 2007, stated that appellant's primary complaint at the referee examination was of back pain at the lower lumbar spine. Physical examination revealed mildly restricted lumbar range of motion with normal reflexes, no atrophy, and negative straight leg raising bilaterally. The Office medical adviser indicated that the details of the prior permanent impairment rating were not available for review and he could not comment on whether any changes to appellant's schedule award should be made.

The Office subsequently referred the medical record to the Office medical adviser who, on November 30, 2007, reviewed the reports of Dr. Salomon and Dr. Dzwinyk. The Office medical adviser noted that appellant's permanent impairment determination had been based on Grade 4 pain and strength deficits to the bilateral lower extremities in the S1 nerve distribution. However, Dr. Dzwinyk's physical examination and evaluation of recent diagnostic testing found no new impairment that would increase the permanent impairment beyond that already awarded. The Office medical adviser recommended that the prior schedule award and date of maximum medical improvement remained unchanged.

In a December 4, 2007 decision, the Office denied modification of the July 1, 2006 schedule award.

LEGAL PRECEDENT

The schedule award provision of the Act[4] and its implementing regulations[5] 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 should 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 standards applicable to all claimants.[6] 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.[7]

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[8] However, as the Act makes provision for the lower extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originates in the spine.[9]

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] 20 C.F.R. § 10.404(a).

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

[8] *George E. Williams*, 44 ECAB 530 (1993).

[9] *Id.*

It is well established that in situations where a case is referred to an impartial medical specialist for the purpose of resolving a medical conflict, the opinion of such specialist will be given special weight when based on a proper factual background and sufficiently well rationalized.[10]

ANALYSIS

Appellant's claim was accepted by the Office for a herniated disc at L5-S1 and a permanent aggravation of S1 radiculopathy. He was granted schedule awards for bilateral lower extremity impairment based on the report of his attending physician, Dr. Salomon, a Board-certified general surgeon. In the prior appeal, the Board noted that the reports of Dr. Salomon described impairment of the S1 nerve root. He applied the tables of Chapter 15 to rate impairment as nine percent of the right leg and eight percent of the left leg. An Office medical adviser reviewed the reports of Dr. Salomon and found seven percent impairment to the right leg and six percent impairment of the left leg based on bilateral S1 sensory and strength deficits. Based on this conflict in medical opinion, the case was remanded for referral to an impartial medical specialist.

The report of Dr. Dzwinyk establishes that appellant does not have greater impairment of his lower extremities than that awarded on July 1, 2006. On January 12, 2007 Dr. Dzwinyk examined appellant and noted that his complaints of pain were located in the lower end of the lumbar spine. He did not find any distal radiation of pain into the knees or any neurological symptoms, such as numbness or loss of sensation, or atrophy to the lower extremities. Based on the absence of physical findings to support evidence of impairment along the S1 nerve distribution, Dr. Dzwinyk found that there was no lower extremity impairment. He noted the prior impairment ratings of record and commented that there was nothing to support a change in the rating already awarded. The medical evidence was subsequently reviewed by an Office medical adviser who, on November 30, 2007, noted that the prior impairment rating had been based on impairment in the distribution of the S1 nerve. However, the recent report of the impartial medical specialist did not find evidence to support new impairment to the S1 nerve beyond that already awarded. He advised that the prior schedule award and date of maximum medical improvement should remain unchanged.

The Board finds that the report of Dr. Dzwinyk, the impartial medical specialist, is based upon an accurate factual and medical history and a thorough examination of appellant. He reviewed the medical reports of record, noting the prior schedule award granted for permanent impairment along the S1 nerve distribution. However, the medical referee advised that there were no findings on examination to support additional impairment. For this reason, appellant has not established that he has greater than seven percent impairment to his right leg and six percent impairment to his left leg.

CONCLUSION

The Board finds that appellant has no more than seven percent impairment to his right lower extremity and six percent impairment to his left lower extremity.

[10] *See John D. Jackson*, 55 ECAB 465 (2004); *Robert D. Reynolds*, 49 ECAB 561 (1998).

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 13, 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