United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 08-789**
	)	**Issued: November 5, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, 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 January 14, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' schedule award decision dated January 7, 2008. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award decision.

ISSUE

The issue is whether appellant has more than a three percent permanent impairment to his right lower extremity and three percent impairment for the left lower extremity.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, a 57-year-old mail processor, injured his neck, right shoulder, lower back, both knees, both wrists, both hips and left ankle when he slipped on a wet floor on October 23, 2000. He filed a claim for benefits on October 26, 2000, which the Office accepted for lumbar sprain, right knee sprain and right leg sprain.

On February 7, 2006 appellant filed a Form CA-7 claim for a schedule award. By decision dated June 1, 2006, the Office denied appellant's claim. Appellant requested reconsideration and submitted a May 19, 2006 report from Dr. George L. Rodriguez, Board-certified in physical and rehabilitative medicine, who found that appellant had a 15 percent bilateral lower extremity impairment pursuant to Table 16-11, at page 484 and 17-37 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*), page 556, and a 15 percent deficit for motor nerve impairment at Tables 16-11 and 17-37. Dr. Rodriguez based his rating on a superior gluteal impairment, which yielded a 62 percent deficit and resultant 15 percent lower extremity impairment. With regard to the left side, he advised that appellant experienced bilateral buttock pain, particularly when he attempted to perform activities in the standing position. Dr. Rodriguez stated that appellant had difficulty walking and exhibited bilateral antalgia with bilateral Trendelenburg stances, which represented weakness in the gluteus medius muscles bilaterally.

In a report dated November 8, 2006, an Office medical adviser found that appellant had a three percent impairment of his right lower extremity and a three impairment of his left lower extremity based on the A.M.A., *Guides*. He relied on Dr. Rodriguez's examination findings for L5 and S1 nerve root involvement and sensory deficit or pain to derive a three percent bilateral impairment. However, the Office medical adviser rejected Dr. Rodriguez's impairment rating based on a superior gluteal nerve injury, stating that there was no evidence in the record that appellant had sustained such an injury causally related to employment factors.

On November 28, 2006 the Office granted appellant a schedule award for a three percent permanent impairment of the right lower extremity and a three percent impairment of the left lower extremity. In a December 10, 2007 decision,[1] the Board set aside the Office's November 28, 2006 decision. The Board found that the Office medical adviser properly rated a three percent bilateral impairment rating for the lower extremity based on Dr. Rodriguez's examination findings of L5 and S1 nerve root involvement and sensory deficit or pain. The Board found, however, that the Office medical adviser did not properly evaluate appellant's lower extremity impairments due to his gluteal nerve injury. The Board noted that a gluteal nerve injury is evaluated pursuant to Table 37, of the A.M.A., *Guides*[2] which evaluates lower extremity impairments caused by nerve deficits.[3] The Board further noted that, in determining entitlement to a schedule award, preexisting impairments to the scheduled member are to be included in the permanent impairment evaluation. The Board therefore set aside the Office's November 28, 2006 decision and remanded for the Office to ask the Office medical adviser to clarify whether appellant is entitled to an additional schedule award for the gluteal nerve injury, if preexisting impairments are to be included in the evaluation of impairment. The complete facts of this case are set forth in the Board's December 10, 2007 decision and are herein incorporated by reference.

[1] Docket No. 07-464 (issued December 10, 2007).

[2] A.M.A., *Guides* 552.

[3] *Michael C. Milner*, 53 ECAB 446 (2002).

In a December 13, 2007 report, the Office medical adviser rejected any additional impairment based on the superior gluteal nerve. He stated:

> "[D]isc abnormalities have no effect on the superior gluteal nerve. Disc abnormalities only have pressure on the nerve roots. The superior gluteal nerve innervates various hip abductors which have no relationship to the disc abnormality in this claimant. [Appellant] had no abnormality of his hip abductors and no abnormality of the superior gluteal nerve.
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> "The superior gluteal nerve is a nerve that was deeply imbedded in the hip musculature and is not related to the lumbar spine. Although the superior gluteal nerve is made up of multiple nerve roots of the lumbar spine, it has no relationship to any direct pressure by any disc herniation or disc abnormality on the nerve root. Therefore, it was totally incorrect for Dr. Rodriguez to have recommended an award in regard to the superior gluteal nerve since the only possible award would be in relationship to the nerve roots."

The Office medical adviser noted that he had found in his November 8, 2006 report that appellant had objective findings of S1 nerve root Grade 4 sensory loss and L5 nerve root compression. He opined, however, that pain in the buttock is referred pain from the lumbar spine related to the L5 disc and is not related to the superior gluteal nerve which is a total motor nerve involving the hip musculature and is not related to pain or sensory loss. The Office medical adviser stated:

> "Table 17-37, Impairments Due to Nerve Deficit, page 552, under superior gluteal nerve, states zero percent for sensory and zero percent for dysesthesias. This is because there is no sensory component to this nerve, and therefore, cannot be related to pain. There is also no motor loss involving the hip musculature that would justify the superior gluteal nerve.
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> "Therefore, the superior gluteal nerve innervates the gluteus medius hip muscle and has no relationship to the disc abnormalities or pressure on the nerve roots. In addition, the superior gluteal nerve has no relationship to any pathology involving this claimant."

By decision dated January 7, 2008, the Office denied modification of the November 28, 2006 decision, finding that appellant was not entitled to an award for additional impairment to his left lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of

[4] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

compensation is paid in proportion to the percentage loss of use.[5] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[6]

ANALYSIS

The Board finds that the case is not in posture for decision.

The Board in its December 10, 2007 decision instructed the Office to ask the Office medical adviser to further evaluate appellant's lower extremity impairment, including his gluteal nerve impairment, if in fact his gluteal nerve impairment preexisted the accepted injury. The Office medical adviser in his December 13, 2007 report rejected any additional impairment based on superior gluteal nerve. He evaluated whether appellant could be accorded an impairment of the superior gluteal nerve by focusing on nerve roots of the lumbar spine, in conjunction with disc herniation and disc abnormality on the nerve root. The Office medical adviser also emphasized that the superior gluteal nerve innervates various hip abductors which have no relationship to the disc abnormality in appellant. He concluded that an award regarding the superior gluteal nerve was incorrect because the only possible award would be in relationship to the nerve roots. The Office medical adviser noted that, while appellant had objective findings of S1 nerve root Grade 4 sensory loss and L5 nerve root compression, pain in the buttock is referred pain from the lumbar spine related to the L5 disc and is not related to the superior gluteal nerve which is a totally motor nerve involving the hip musculature and is not related to pain or sensory loss. He indicated that Table 17-37, *Impairments Due to Nerve Deficit*, page 552, for superior gluteal nerve, yields zero percent for sensory deficit and zero percent for dysesthesias because there is no sensory component to this nerve, which therefore cannot be related to pain. The Office medical adviser further stated that there was also no motor loss involving the hip musculature which warranted an impairment rating for the superior gluteal nerve. However, he did not specifically address the issue presented by the Board on prior appeal, which is whether any impairment of the lower extremities caused by the superior gluteal nerve was a preexisting impairment, which should have been factored into the schedule award.

The Board notes that at subsection 17.2l of the A.M.A., *Guides*,[7] governing peripheral nerve injuries, states that peripheral nerve injuries are divided into two components: motor deficits and sensory deficits. Dr. Rodriguez stated in his May 2006 report that appellant had bilateral buttock pain which was especially apparent when he attempted to perform activities in the standing position; appellant also showed difficulty walking with bilateral antalgia/bilateral Trendelenburg stances. Given these findings on examination, Dr. Rodriguez appeared to be basing his impairment rating for superior gluteal nerve on a motor deficit, not a sensory deficit. Thus the Office medical adviser was incorrect in characterizing Dr. Rodriguez' impairment

[5] 5 U.S.C. § 8107(c)(19).

[6] 20 C.F.R. § 10.404.

[7] A.M.A., *Guides* 552.

rating as necessarily relying on impairment of nerve roots of the lumbar spine, in conjunction with disc herniation and disc abnormality on the nerve root. Further, there is nothing in the A.M.A., *Guides* which stipulates, as the Office medical adviser stated, that any impairment for motor loss for the superior gluteal nerve must necessarily involve the hip musculature. The Board therefore sets aside the January 7, 2008 Office decision and remands for referral of appellant, the case record and a statement of accepted facts to an appropriate medical specialist to evaluate the appropriate percentage of impairment in appellant's left lower extremity based on his gluteal nerve injury. On remand, the Office should instruct the impartial medical specialist to clearly indicate the specific background and protocols of the A.M.A., *Guides* upon which he based his opinion. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2008 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: November 5, 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