United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
	)	
and	)	**Docket No. 08-1349**
	)	**Issued: November 24, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Dubuque, IA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 7, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' June 25, 2007 merit decision and a January 16, 2008 decision denying further 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 an employment-related permanent impairment to a scheduled member or function of the body entitling him to a schedule award; and (2) whether the Office properly determined appellant's application for reconsideration was insufficient to warrant merit review of the claim pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

FACTUAL HISTORY

On November 24, 2003 appellant, then a 53-year-old letter carrier, sustained a low back injury when he turned to open the side door of the employing establishment vehicle. The Office

accepted the claim for lumbar strain and L4-5 bulging discs. On March 21, 2006 appellant filed a claim a schedule award.

In a report dated June 19, 2006, Dr. David Field, an orthopedic surgeon, noted that a December 2003 magnetic resonance imaging (MRI) scan had shown an L4-5 disc herniation and that appellant had a lumbar laminectomy on June 11, 2004. He stated that appellant was treated on May 4, 2006 for back pain and a new MRI scan had shown degenerative disc disease. Dr. Field opined that, under Table 15-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 12 percent whole person impairment. An Office medical adviser, in a report dated July 15, 2006, noted that whole person impairments were not appropriate under the Federal Employees' Compensation Act and recommended a second opinion examination.

The Office prepared a statement of accepted facts and referred appellant to Dr. Peggy Mulderig, an orthopedic surgeon. A December 5, 2006 letter from an Office medical adviser noted the appropriate tables under the A.M.A., *Guides* regarding sensory deficit/pain and weakness, and also noted that any use of Chapter 18 for pain should be accompanied by a detailed explanation.

By report dated January 9, 2007, Dr. Mulderig provided a history and results on examination. She noted that appellant reported mild leg pain while sitting, and heaviness in the legs after walking. Dr. Mulderig indicated motor strength was 5/5 and sensation was intact for all dermatomes of the lower extremities. She noted lateral hip pain, which she indicated was caused by a trochanteric bursitis unrelated to work. Dr. Mulderig stated that appellant "has no impairment in terms of sensory loss, loss of power, and motor deficits, or unilateral spinal nerve impairment." She advised that appellant appeared to have pain at the lumbosacral spine, but this was not ratable according to the Office medical adviser's directions. As to leg symptoms, Dr. Mulderig stated that it appeared appellant's leg complaints were unrelated to the back injury. In a report dated January 17, 2007, an Office medical adviser concurred with Dr. Mulderig that no ratable permanent impairment was established.

In a decision dated February 5, 2007, the Office denied the claim for a schedule award.[1] It found the medical evidence was insufficient to establish a ratable permanent impairment to a scheduled member of the body.

Appellant requested reconsideration on May 5, 2007. On May 8, 2007 he submitted a report dated February 26, 2007 from Dr. Timothy Miller, an anesthesiologist, who opined "most postsurgical patients would fit into a category where they have a roughly 13 [to] 15 percent impairment and [appellant] would probably fall somewhere in there or close to the 12 percent Dr. Field has given [him]." In a report dated April 5, 2007, Dr. Martin Bagby, an osteopath, noted appellant had diabetes but indicated it would be an unusual presentation for leg symptoms to be related to diabetic neuropathy. In a report dated May 1, 2007, Dr. Field stated the rating he had provided was adequate.

[1] The Office stated that an L4-5 herniated disc was an accepted condition.

An Office medical adviser reviewed the evidence in a May 26, 2007 report. He opined that none of the reports were sufficient to establish a ratable impairment under the A.M.A., *Guides.*

By decision dated June 25, 2007, the Office reviewed the case on its merits and denied modification of the prior decision. On November 7, 2007 appellant again requested reconsideration. He submitted a November 8, 2007 report from Dr. Field, who acknowledged the Office did not recognize whole body impairments. Dr. Field stated it was "therefore somewhat of a challenge" from his experience to identify a significant impairment. He stated that the A.M.A. *Guides* did address the sciatic nerve and the impairment rating equated to at least a 30 percent impairment of the lower extremities due to the nature of appellant's sciatica, radiculopathy, history of back pain and MRI scan findings. By decision dated January 16, 2008, the Office determined that the application was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[2] and its implementing regulation[3] 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 regulation as the appropriate standard for evaluating schedule losses.[4]

ANALYSIS -- ISSUE 1

Appellant initially submitted a June 19, 2006 report from Dr. Field stating that appellant had a 12 percent whole body impairment based on Table 15-3. This table provides impairment ratings for the whole body due to lumbar spine injuries.[5] It is well established, however, that neither the Act nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.[6] Dr. Field's June 19, 2006 report is therefore of diminished probative value of the permanent impairment arising from appellant's accepted injury.

The second opinion physician, Dr. Mulderig, provided a report with a detailed history and results on examination. She found no basis for an impairment voting under the A.M.A., *Guides.* There was no impairment based on motor or sensory deficit. Dr. Mulderig noted lumbosacral

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id*.

[5] A.M.A., *Guides* 384, Table 15-3.

[6] *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

spine pain, but the back is not a scheduled member of the body, as noted above. She found that any leg symptoms were not employment related. The Board finds that Dr. Mulderig provided a rationalized medical opinion, based on a complete factual and medical background, on the issue presented.[7]

The additional medical reports from appellant submitted with the May 5, 2007 application for reconsideration did not provide a rationalized medical opinion on the schedule award issue. Dr. Field reiterated his prior opinion, and neither Dr. Miller nor Dr. Bagby provided a rationalized opinion as to the degree of permanent impairment to a schedule member of the body under the A.M.A., *Guides.*

The Board therefore finds that the second opinion physician represents the weight of the medical evidence. Dr. Mulderig provided probative medical evidence indicating that appellant did not have a ratable permanent impairment to a scheduled member or function of the body under 5 U.S.C. § 8107 or the implementing regulations.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[8] The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[9] An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office.[10]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11]

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[7] The factors that comprise the evaluation of medical evidence include the thoroughness of the physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion. *See Anna M. Delaney*, 53 ECAB 384 (2002).

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.605 (1999).

[10] *Id*. at § 10.606(b)(2).

[11] *Id*. at § 10.608.

ANALYSIS -- ISSUE 2

On reconsideration appellant submitted a November 8, 2007 report from Dr. Field. While he does not have to submit evidence sufficient to establish the claim, the evidence must be new evidence that is relevant and pertinent to the issue presented. Dr. Field acknowledges that a whole body impairment is not appropriate under the Act, but he offers only a general statement that appellant had at least 30 percent leg impairments. He did not provide pertinent evidence on causal relationship between leg symptoms and the employment injury, or identify any relevant tables in the A.M.A., *Guides*. Dr. Field's report does not provide relevant and pertinent evidence on the issue of an employment-related permanent impairment to a scheduled member under the A.M.A. *Guides.* In addition, the November 7, 2007 application for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2), and therefore the Office properly declined to reopen the case for merit review.

CONCLUSION

The weight of the medical evidence does not establish entitlement to a schedule award under the Act. The evidence submitted on reconsideration does not meet the requirements of 20 C.F.R. § 10.606(b)(2) and the Office properly denied the application without merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 16, 2008 and June 25, 2007 are affirmed.

Issued: November 24, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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