United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket Nos. 08-1351 & 08-1355**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Nashville, TN, Employer	)	**Issued: November 7, 2008**

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 timely appealed the March 12 and 25, 2008 merit decisions of the Office of Workers' Compensation Programs, which denied wage-loss compensation and a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant was disabled on or after November 28, 2007 as a result of his March 2, 2006 employment injury; and (2) whether appellant is entitled to a schedule award.

FACTUAL HISTORY

Appellant, a 59-year-old former transportation security officer, has an accepted occupational disease claim for lumbar spinal stenosis and bilateral leg sprains which arose on or

about March 2, 2006.[1] He also has an accepted traumatic injury claim for a July 29, 2005 right medial meniscus tear (06-2145871).[2] As of April 8, 2006, appellant received wage-loss compensation for temporary total disability under claim number xxxxxx871.[3] On August 3, 2006 he began working as a driver's license examiner for the Tennessee Department of Safety. The Office subsequently adjusted his wage-loss compensation based on his actual earnings as a driver's license examiner.[4]

On March 15, 2007 appellant underwent a laminectomy at L4-5, which the Office approved. The Office also authorized an April 2, 2007 L4-5 anterior inter-body fusion. Under claim number xxxxxx368, appellant received wage-loss compensation for temporary total disability beginning March 15, 2007. His back surgeon, Dr. Richard A. Berkman, released him to return to work effective August 7, 2007.[5] However, appellant did not return to work at that time. Instead, he underwent a right knee arthroscopic procedure on August 20, 2007, which the Office authorized under claim number xxxxxx871. Appellant returned to work as a driver's license examiner on August 28, 2007. Within a few days of his return to work, the Office terminated wage-loss compensation for temporary total disability under claim number xxxxxx368.

On October 14, 2007 appellant filed a claim for a schedule award. He submitted a September 21, 2007 impairment rating from Dr. Berkman, who found 28 percent whole person impairment. Dr. Berkman explained that appellant had reached maximum medical improvement for a disc problem at L4-5 that required a single level spinal fusion. He found that appellant had permanent restrictions of no lifting over 15 pounds and he was to alternate between sitting and standing, with a 2-hour maximum for each position. The Office subsequently asked Dr. Berkman to provide an impairment rating specific to appellant's lower extremities; however, he did not respond to the request.

On November 28, 2007 appellant filed a claim for compensation (Form CA-7) for lost wages beginning that same day. He explained that when he returned to work on August 28, 2007 he accepted a 90-day, light-duty assignment.[6] His 90-day appointment was scheduled to expire at the close of business on November 28, 2007 and he expected to be placed on leave-without-pay status. He further noted that his employer had yet to respond to his request to return to work

[1] Appellant attributed his March 2, 2006 injury to performing his baggage screening duties.

[2] Appellant received a schedule award on February 7, 2006 for two percent impairment of the right lower extremity.

[3] The employing establishment was no longer able to accommodate appellant's physical restrictions.

[4] The Office issued the February 9, 2007 wage-earning capacity determination under claim number xxxxxx871.

[5] Appellant's then-current back-related work restrictions included no lifting over 10 pounds and no pushing and pulling in excess of 10 pounds.

[6] An August 21, 2007 memorandum from the Tennessee Department of Safety indicated that appellant was to return to work on light-duty status wearing civilian, business attire and driving his personal vehicle. He was not permitted to drive a State-owned vehicle or administer road tests.

with permanent restrictions. Appellant asked that the Office resume payment of wage-loss compensation for total disability.

During a December 11, 2007 telephone conversation, appellant advised the Office that the Tennessee Department of Safety decided that he could not continue to work with his particular medical restrictions. He was advised to pursue his request for wage-loss compensation under claim number xxxxxx871, under which the wage-earning capacity determination was issued.

On December 27, 2007 the Office explained to appellant the process of modifying a wage-earning capacity determination. It noted that there was no medical evidence establishing that he could not perform his duties as a driver's license examiner.[7] Although appellant had been undergoing pain management therapy for his lumbar spine condition since September 2007, the treatment records from the Clarksville Pain Clinic did not address his ability to work.[8]

Regarding appellant's schedule award, the Office forwarded the case record to Dr. James W. Dyer, a Board-certified orthopedic surgeon and Office medical adviser. In a report dated December 27, 2007, Dr. Dyer noted that a schedule award could not be granted for 28 percent whole person impairment based on appellant's back injury. Dr. Dyer advised that no impairment rating had been provided addressing appellant's lower extremities. He found that appellant had no impairment of the left or right lower extremities.

In a decision dated March 12, 2008, the Office denied appellant's claim for wage-loss compensation on or after November 28, 2007. On March 25, 2008 it issued a decision denying his claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 1

A claimant has the burden of establishing the essential elements of his claim, including that the medical condition for which compensation is claimed is causally related to the claimed employment injury.[9] For wage-loss benefits, the claimant must submit medical evidence showing that the condition claimed is disabling.[10] The evidence submitted must be reliable, probative and substantial.[11]

ANALYSIS -- ISSUE 1

Appellant filed a claim for wage-loss compensation beginning November 28, 2007, because his light-duty assignment had expired and his employer was either unwilling or unable

[7] The Office's December 27, 2007 correspondence was issued under claim number xxxxxx871.

[8] Appellant was receiving treatment from Dr. Vidya R. Bethi, a Board-certified anesthesiologist.

[9] 20 C.F.R. § 10.115(e) (2008); *see Tammy L. Medley*, 55 ECAB 182, 184 (2003).

[10] 20 C.F.R. § 10.115(f).

[11] *Id*. at § 10.115.

to accommodate his permanent work restrictions. Notwithstanding the Tennessee Department of Safety's decision to deny appellant further accommodations, the medical evidence of record does not establish that his March 2, 2006 employment injury precluded him from performing his duties as a driver's license examiner. With respect to his back condition, Dr. Berkman indicated on September 21, 2007 that he had a permanent lifting restriction of 15 pounds. Dr. Berkman also stated that appellant should alternate between sitting and standing, with no more than two hours spent in any one position. It is not evident from the record how these permanent restrictions precluded his ability to operate a State-owned motor vehicle, administer road tests or perform any of his other duties as a driver's license examiner. The Board finds that appellant has not established that he was disabled on or after November 28, 2007 due to his March 2, 2006 employment injury.[12]

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[13] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[14] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[15]

ANALYSIS -- ISSUE 2

Appellant's surgeon, Dr. Berkman, rated impairment as 28 percent whole man based on appellant's L4-5 disc condition that required a lumbar laminectomy and anterior inter-body fusion. He did not address any employment-related permanent impairment involving either of appellant's lower extremities. Neither the Act nor the regulations provide for the payment of a schedule award for the loss of use of the back or the body as a whole.[16] To the extent that his accepted back injury resulted in permanent impairment to his lower extremities, an award may be appropriate under the Act. However, Dr. Berkman did not identify any impairment affecting either lower extremity. There was also no mention of impairment attributable to appellant's accepted bilateral leg sprains. Accordingly, the Board finds that the medical evidence of record

[12] The record does not indicate whether appellant pursued modification of the February 9, 2007 wage-earning capacity determination under claim number xxxxxx871.

[13] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2000).

[14] 20 C.F.R. § 10.404 (2008).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[16] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

fails to establish that appellant sustained any permanent impairment of a scheduled member. The Office, therefore, properly denied appellant's claim for a schedule award.

CONCLUSION

Appellant failed to establish that he was disabled on or after November 28, 2007 due to his March 2, 2006 employment injury. The Board also finds that appellant is not entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 25 and 12, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 7, 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