United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 08-470**
	)	**Issued: September 24, 2008**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Mountainside, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 5, 2007 appellant timely appealed the July 20, 2007 merit decision of the Office of Workers' Compensation Programs, which affirmed his schedule award for permanent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether appellant has greater than 21 percent permanent impairment of the left lower extremity.

FACTUAL HISTORY

Appellant, a 69-year-old retired internal revenue agent, was involved in an employment-related motor vehicle accident on November 5, 1998. The Office initially accepted the claim for lumbosacral sprain and later expanded his claim to include aggravation of preexisting

degenerative disc disease at L5-S1. Appellant received appropriate wage-loss compensation and ultimately resumed his full-time duties on February 10, 2003.[1]

On July 22, 2003 appellant filed a claim for a schedule award. He submitted an April 2, 2003 impairment rating from Dr. David Weiss, a Board-certified orthopedist, who found 27 percent permanent impairment of the left lower extremity. The overall rating was a combination of impairments due to pain (3 percent) under Chapter 18, L5 nerve root sensory deficit or pain (4 percent) under Chapter 15, muscle weakness -- hip flexors (5 percent) and muscle weakness -- (gastrocnemius) ankle plantar flexion (17 percent).

Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and Office medical adviser, reviewed Dr. Weiss' April 2, 2003 report and disagreed with the 27 percent impairment rating. In a September 9, 2003 report, Dr. Magliato explained that the 17 percent impairment Dr. Weiss assigned for left gastrocnemius muscle weakness was excessive. He noted that "4+/5 gastrocnemius weakness without any calf atrophy" was really a minimal impairment.[2] Dr. Magliato further explained that a 17 percent rating was for "4/5 weakness" of all plantar flexors of the ankle and "not just isolated gastroc[nemius]." He found that five percent was a "more accurate" representation of appellant's impairment due to left ankle plantar flexion muscle weakness. Dr. Magliato otherwise concurred with the remainder of Dr. Weiss' impairment rating (12 percent). In contrast to Dr. Weiss' 27 percent rating, Dr. Magliato found only a 17 percent permanent impairment of the left lower extremity.

By decision dated September 19, 2003, the Office granted a schedule award for 17 percent impairment of the left lower extremity. The award covered a period of 48.96 weeks from April 2, 2003 to March 9, 2004.[3]

Appellant requested an oral hearing, which was held on August 10, 2004. In a decision dated November 5, 2004, the Office hearing representative found an unresolved conflict of medical opinion between Dr. Magliato and Dr. Weiss. The case was remanded to the Office so that appellant could be referred to an impartial medical examiner.

---

[1] Before resuming full-time work, appellant had received periodic payments for wage-loss compensation pursuant to an October 23, 2002 formal wage-earning capacity determination. He had been working part time (30 hours a week), limited duty since July 29, 2001. When appellant resumed full-time employment effective February 10, 2003, the Office removed him from the periodic compensation rolls. Appellant retired in January 2005. He informed the Office in June 2005 that he was receiving a regular (nondisability) retirement annuity (CSA No. 4232461) from the Office of Personnel Management (OPM).

[2] In his April 2, 2003 report, Dr. Weiss noted on physical examination that "[m]anual muscle strength testing reveale[d] ... the gastrocnemius [were] 5/5 on the right and **4+/5** on the left." (Emphasis added). He also noted that the "gastrocnemius circumferential (sic) measurements reveal[ed] 43 cm bilaterally." In the latter part of his report where he calculated appellant's impairment, Dr. Weiss noted "**4/5** motor strength deficit left gastrocnemius (ankle plantar-flexion) = 17 percent." (Emphasis added).

[3] While appellant had not received any wage-loss compensation since resuming his full-time duties on February 10, 2003, the Office commenced payment of wage-loss compensation following the March 9, 2004 expiration of appellant's schedule award. Appellant reported receiving $86,610.00 from the employing establishment for calendar year 2004. He retired in January 2005 and continued to receive wage-loss compensation through January 20, 2007. The record also indicates that there were periods following appellant's January 2005 retirement when he simultaneously received wage-loss compensation and a retirement annuity from OPM.

Dr. Robert Dennis, a Board-certified orthopedic surgeon and impartial medical examiner, examined appellant on August 8, 2005. Based on his evaluation, he found 17 percent permanent impairment of the left lower extremity. Dr. Dennis agreed with Dr. Magliato and Dr. Weiss regarding the combined 12 percent impairment attributable to pain, L5 nerve root sensory deficit, and left hip flexors muscle weakness. However, with respect to left ankle muscle weakness, he noted that his physical examination revealed only "a slightly different contour of the [left calf] muscle, without true atrophy or weakness." Based on this information, Dr. Dennis indicated that he would have to agree with Dr. Magliato that appellant's examination was "far more consistent with a normal gastroc[nemius] muscle." He further explained that giving appellant the "maximal benefit of the doubt," he would agree with a 5 percent loss, "but certainly [could not] justify a 4/5 strength loss or a 17 percent loss of ankle strength" based on his clinical examination.

Dr. John J. Duggan, a Board-certified orthopedic surgeon and Office medical adviser, reviewed the file on September 5, 2005 and concurred with the 17 percent impairment rating provided by Dr. Dennis and Dr. Magliato.

The Office issued a September 7, 2005 decision finding that appellant had not established entitlement to a schedule award in excess of the previous award of 17 percent impairment of the left lower extremity. The September 7, 2005 decision was subsequently affirmed by an Office hearing representative on May 31, 2006.

Appellant requested reconsideration on June 26, 2006. He submitted a June 6, 2006 report from Dr. Weiss, who reiterated his earlier finding of 27 percent permanent impairment of the left lower extremity. Dr. Weiss had reviewed his April 2, 2003 report as well as Dr. Dennis' August 8, 2005 report and the Office medical adviser's September 5, 2005 report. He stated that "[a]ccording to [his] findings on April 2, 2003 ... when evaluating muscle testing [appellant] was found to have a [G]rade 4/5 motor strength deficit in the left gastrocnemius muscle...." Dr. Weiss also stated that based on appellant's history and the April 2, 2003 physical examination findings, he remained convinced that there was a 27 percent impairment of the left lower extremity.

On November 25, 2006 Dr. Magliato, the Office medical adviser, reviewed the medical evidence. As a "compromise," he recommended increasing the award for left gastrocnemius muscle weakness from five to nine percent. Dr. Magliato noted that Dr. Weiss' April 2, 2003 report "clearly" identified a "4+/5" grade whereas the June 6, 2006 report noted a "4/5" grade. He explained that the 9 percent rating was about 50 percent of the maximum deficit of 17 percent for a 4/5 motor strength grade. Dr. Magliato also surmised that "this compromise should settle the matter."

On January 17, 2007 the Office awarded appellant an additional 4 percent impairment of the left lower extremity. The schedule award covered 11.52 weeks from January 21 to April 11, 2007. By decision dated July 20, 2007, an Office hearing representative affirmed the January 17, 2007 schedule award.

LEGAL PRECEDENT

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.[4] 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.[5] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[6]

ANALYSIS

The examining and reviewing physicians found that appellant had permanent impairment of 12 percent based on L5 nerve root sensory deficit (4 percent), left hip flexor motor strength deficit (5 percent) and pain (3 percent). The variance in medical opinions arose from the percentage impairment attributable to appellant's left gastrocnemius muscle weakness. The issue among the varying physicians is what grade classification best describes appellant's lower extremity muscle function.[7] The classification range is from 0 to 5, with Grade 0 representing the greatest limitation and Grade 5 representing normal muscle function.[8] Once the appropriate grade has been assigned, the examiner then refers to Table 17-8, A.M.A., *Guides* 532 to determine the extent of impairment due to lower extremity muscle weakness. In this instance, the associated impairment involves the ankle muscle group; specifically, ankle flexion (plantar flexion). Under Table 17-8, a Grade 0 classification represents 37 percent impairment of the lower extremity whereas a Grade 4 classification represents 17 percent impairment.[9] A Grade 5 classification represents zero percent impairment.[10]

Dr. Dennis, the impartial medical examiner, previously found 17 percent permanent impairment of the left lower extremity. He concurred with the 12 percent impairment attributable to pain (3 percent), L5 nerve root sensory deficit (4 percent), and left hip flexors muscle weakness (5 percent). Dr. Dennis, however, disagreed with Dr. Weiss' April 2, 2003 rating of 17 percent impairment for left ankle muscle weakness and instead found only 5 percent

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

[5] 20 C.F.R. § 10.404 (2008).

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

[7] A.M.A., *Guides* 531, Table 17-7.

[8] *Id.*

[9] *Id.* at 532, Table 17-8.

[10] Grade 5 muscle function is represented by "Active movement against gravity with full resistance." A.M.A., *Guides* 531, Table 17-7.

impairment. Dr. Dennis' physical examination revealed only "a slightly different contour of the [left calf] muscle, without true atrophy or weakness," which was "far more consistent with a normal gastroc[nemius] muscle." Giving appellant the benefit of the doubt, Dr. Dennis agreed that a 5 percent rating for left ankle muscle weakness was appropriate. He further explained that there was certainly no justification for "a 4/5 strength loss or a 17 percent loss of ankle strength."

Appellant relies on Dr. Weiss' June 6, 2006 supplemental report in support of his claim for a left lower extremity impairment of 27 percent. The Office's latest award increased appellant's left lower extremity impairment from 17 percent, as supported by the impartial medical examiner's August 8, 2005 report, to 21 percent. The four percent increase was based on Dr. Magliato's November 25, 2006 "compromise" rating.

Dr. Weiss did not reexamine appellant in June 2006, but merely reviewed his April 2, 2003 examination findings. He also reportedly reviewed the impartial examiner's August 8, 2005 report as well as Dr. Duggan's September 5, 2005 report, which concurred with Dr. Dennis' and Dr. Magliato's 17 percent impairment ratings.[11] In the June 6, 2006 supplemental report, Dr. Weiss reiterated his earlier finding of 27 percent permanent impairment. He stated that "[a]ccording to [his] findings on April 2, 2003 ... when evaluating muscle testing [appellant] was found to have a [G]rade 4/5 motor strength deficit in the left gastrocnemius muscle...." This latter statement is incorrect. As noted, Dr. Weiss' April 2, 2003 physical examination findings revealed "4+/5 on the left." Dr. Weiss' supplemental report does not acknowledge the discrepancy between his "4+/5" physical finding and his impairment rating for "4/5 motor strength deficit."

The Board has long held that an Office medical adviser may create a conflict in medical opinion with an examining physician.[12] Where the case is referred to an impartial medical specialist to resolve the conflict concerning a schedule award, the case is not to be referred back to the medical adviser who participated in creating the conflict. The Office procedure manual provides that "[w]here a referee examination was arranged to resolve a conflict created by a [district medical adviser] with respect to a schedule award issue, that [district medical adviser] should not review the referee specialist's report. Rather, another [district medical adviser] or consultant should review the file."[13]

Dr. Dennis, the impartial medical specialist, resolved the issue as to the loss of strength involving the gastrocnemius muscle. Dr. Weiss did not perform any new evaluation of appellant. Rather, he merely referred to his prior physical findings and repeated his prior rating. The Office, on receiving this report, should not have sent it to Dr. Magliato. In doing so, he recommended a "compromise" impairment rating that in effect overrode the opinion of the impartial medical specialist. Rather, having found the conflict, the Office should have forwarded

[11] Dr. Duggan was the Office medical adviser assigned to review the case record after it had been referred to Dr. Dennis to resolve the conflict between Dr. Weiss and Dr. Magliato.

[12] *See Harold Travis*, 30 ECAB 1071 (1979).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(d) (April 1993).

the report to Dr. Dennis for a supplemental opinion or to a new medical adviser. Because of this procedural error, the July 20, 2007 decision will be set aside.

The Board further notes that the reviewing and examining physicians found that appellant was entitled to an award of three percent impairment for pain under Chapter 18. None of the physicians addressed why the separate pain assessment was a necessary component to the overall rating of the sensory loss to appellant's left lower extremity, under Chapter 15, as allowed by Dr. Weiss. The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, then pain-related impairments should not be assessed using Chapter 18.[14] On remand, the Office should request an explanation from Dr. Dennis as to the impairment rating for pain.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: September 24, 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

[14] A.M.A., *Guides* 571, section 18.3b.