United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 08-578**
	)	**Issued: February 13, 2009**
U.S. POSTAL SERVICE, AMPC ALHAMBRA, City of Industry, CA, 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 18, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated July 20 and November 15, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a 17 percent impairment of each lower extremity for which he received a schedule award; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 12, 1988 appellant, then a 35-year-old clerk, sustained employment-related injuries when his postal vehicle was rear-ended. The claim was accepted for cervical strain, post-traumatic headache and herniated lumbar disc. Appellant worked intermittently until August 4, 1998. He came under the care of Dr. Fredric L. Edelman, a Board-certified

neurosurgeon, who diagnosed employment-related disc herniations at L3-S1 and recommended surgery. Surgery was authorized on December 1, 1998; however, appellant declined surgery.[1]

On February 23, 2006 appellant filed a schedule award claim for his lower extremities. By letter dated February 23, 2006, the Office asked that Dr. Edelman provide an impairment rating in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[2] In a March 15, 2006 report, Dr. Edelman advised that, under Tables 17-5, 17-6 and 17-8 of the A.M.A., *Guides*, appellant had a 12 percent whole body impairment due to gait derangement, right thigh atrophy and weakness in extension of the big toe. By report dated June 6, 2006, an Office medical adviser reviewed Dr. Edelman's report and advised that, due to sensory deficit and pain, under Tables 15-18, 16-10 and 16-11 of the A.M.A., *Guides*, appellant had 17 percent right lower extremity impairment and a 9 percent impairment on the left. She opined that maximum medical improvement was reached on March 15, 2006.

On August 31, 2006 the Office referred appellant to Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, for a second opinion evaluation.[3] By report dated September 18, 2006, Dr. Sophon reviewed the record, the history of injury and appellant's complaint of constant, sharp low back pain radiating into the left leg. He noted that appellant stood and walked in a crouched position. Dr. Sophon provided physical findings, including diminished range of motion of the lumbar spine and negative straight-leg raising bilaterally. Motor strength was within normal limits, and sensory examination demonstrated an impairment on the dorsum and outer edge of the left foot. Dr. Sophon advised that appellant no longer had residuals of the accepted cervical strain or post-traumatic headaches. He diagnosed L3-4, L4-5 and L5-S1 degenerative disc disease and left lumbar nerve root radiculopathy which was due to the December 12, 1998 motor vehicle accident. Dr. Sophon agreed with the recommendation for surgery and opined that the prognosis was poor because appellant declined surgery. He concluded that appellant was totally disabled and that maximum medical improvement was reached on June 28, 2002. Regarding an impairment rating, Dr. Sophon advised that the S2 and left L5 nerve roots were involved, and that appellant had moderate pain and no motor weakness or atrophy.

In an October 10, 2006 report, Dr. Edelman noted his review of Dr. Sophon's report. He advised that the option of surgery was discussed with appellant, who was "still thinking about it." On November 22, 2006 Dr. Sophon advised that appellant did not have any permanent loss of use of the right lower extremity and had no weakness of the left lower extremity.

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[1] In February 1997 and February 1998, the Office referred appellant for second opinion evaluations to Dr. Hose Kim, a Board-certified orthopedic surgeon, and Dr. Robert Moore, a Board-certified neurosurgeon. In October 1998, appellant was referred to Dr. M. Michael Mahdad, Board-certified in orthopedic surgery, for an impartial evaluation regarding whether he was totally disabled and required surgery. By decision dated May 27, 1998, the Office determined that appellant was not entitled to total disability for the period August 17 to September 18, 1997. By order dated April 29, 1999, Docket No. 98-2142, the Board dismissed appellant's appeal at his request.

[2] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[3] Dr. Sophon is also known as Dr. Thanasophon.

The Office found a conflict in medical opinion arose between Dr. Sophon and Dr. Edelman regarding the degree of impairment to appellant's lower extremities. On April 23, 2007 appellant was referred to Dr. Daniel S. Gobaud, a Board-certified orthopedic surgeon, for an impartial evaluation. In a May 14, 2007 report, Dr. Gobaud noted his review of the record, appellant's complaint of low back pain with radiation to both lower extremities. He reported intermittent tingling of the left thigh and intermittent numbness of both feet, left worse than right, and that appellant had an abnormal gait, walking in a bent position. Dr. Gobaud reported physical examination findings including painful limited range of motion of the lumbar spine and no thigh or calf atrophy or leg length discrepancy. Motor examination was normal, and appellant demonstrated hypesthesia in the L5-S1 root distribution bilaterally. Dr. Gobaud diagnosed post-traumatic aggravation of degenerative disc disease of the lumbar spine with radiculopathy of both lower extremities. Although appellant had a degree of degenerative disc disease at the time of the December 12, 1998 motor vehicle accident, the condition was aggravated as a result of trauma to his lower back and had worsened over time. Dr. Gobaud agreed with the recommended surgery and stated that appellant's prognosis was guarded. He advised that, in accordance with page 384 of the fifth edition of the A.M.A., *Guides*, appellant had a category III diagnosis-related impairment of the lumbar spine which equaled 13 percent whole person impairment. In an attached work capacity evaluation, Dr. Gobaud advised that appellant was totally disabled.

In a June 26, 2007 report, Dr. Edelman noted his review of Dr. Gobaud's report and provided physical examination findings. He again recommended surgery for appellant's ruptured degenerated discs.

The Office referred Dr. Gobaud's report to an Office medical adviser. In a July 11, 2007 report, the Office medical adviser advised that appellant had no impairment due to loss of range of motion or motor impairment. The medical adviser stated that maximum medical improvement was reached on May 14, 2007 and that, for each lower extremity, Dr. Gobaud had identified sensory deficit of the L5 and S1 nerve roots. The medical adviser found that, under Table 16-10 of the A.M.A., *Guides*, appellant had a Grade 4, 25 percent impairment deficit, and that, under Table 15-18, the maximum sensory impairment based on the L5 and S1 nerves was 67 percent. She then multiplied the 25 percent by the 67 percent to find 17 percent impairment to each lower extremity.

On July 20, 2007 appellant was granted schedule awards for 17 percent impairment to each lower extremity, or 97.92 weeks of compensation, to run from July 8, 2007 to May 23, 2009. On August 30, 2007 he elected a lump-sum payment.

On September 18, 2007 appellant requested reconsideration, stating that he had a complaint about Dr. Gobaud's examination. He submitted an amended stipulation and decision of the Medical Board of California, dated October 2, 1990, effective February 10, 1991, that had placed Dr. Gobaud on probation for five years. Appellant also provided documentation indicating that Dr. Gobaud had been charged with excessive billing. By decision dated November 15, 2007, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.404 of the implementing federal regulations,[5] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[6] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[7]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[8] In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[9] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized,[10] and schedule awards for permanent impairment of the whole person are not authorized under the Act.[11]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[12] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13] Office procedures indicate that referral to an Office medical adviser is

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] A.M.A., *Guides*, *supra* note 2.

[7] *See Joseph Lawrence, Jr.*, *supra* note 2; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[8] *Pamela J. Darling*, 49 ECAB 286 (1998).

[9] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[10] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[11] *D.J.*, 59 ECAB ____ (Docket No. 08-725, issued July 9, 2008).

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[13] *Manuel Gill*, 52 ECAB 282 (2001).

appropriate when a detailed description of the impairment from the attending physician is obtained. Where a medical conflict is present, to properly resolve the conflict, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides.* An Office medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[14]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. The Office found that a conflict in medical opinion arose between appellant's attending neurosurgeon, Dr. Edelman, and Dr. Sophon who provided a second opinion evaluation for the Office. Appellant was properly referred to Dr. Gobaud for an impartial evaluation. In a May 14, 2007 report, Dr. Gobaud provided examination findings and advised that in accordance with page 384 of the fifth edition of the A.M.A., *Guides*, appellant had a category III diagnosis-related impairment of the lumbar spine which equaled a 13 percent whole person impairment. The Office subsequently referred Dr. Gobaud's report to an Office medical adviser for an opinion regarding appellant's permanent impairment.

Dr. Gobaud referred to page 384 of the A.M.A., *Guides* to determine that appellant had a 13 percent whole person impairment due to his employment injury. However, a claimant may not receive a schedule award for permanent impairment of the whole person.[15] Moreover, a claimant is not entitled to a schedule award for a spinal injury under the Act.[16]

The Office medical adviser reviewed Dr. Gobaud's report to find that appellant had 17 percent impairment of each lower extremity. However, in so doing, the medical adviser substituted her judgment for that of the impartial specialist.[17] The role of the medical adviser is to verify the correct application of the A.M.A., *Guides*. It is the impartial medical specialist, however, who must resolve the conflict on the degree of permanent impairment in accordance with the A.M.A., *Guides*.[18] Although Dr. Gobaud provided an opinion under the A.M.A., *Guides*, he did not properly correlate his findings to provide an impairment estimate of appellant's lower extremities. The conflict in medical evidence remains unresolved and the case will be remanded to the Office to secure a supplemental report from Dr. Gobaud regarding the extent of appellant's permanent impairment. If Dr. Gobaud is unable to provide an appropriate opinion, the Office should then refer the case to another impartial medical examiner.[19] After

[14] *Thomas J. Fragale*, 55 ECAB 619 (2004).

[15] *D.J.*, *supra* note 11.

[16] *Pamela J. Darling*, *supra* note 8.

[17] *See I.H.*, 60 ECAB ___ (Docket No. 08-1352, issued December 24, 2008).

[18] *See Richard R. LeMay*, 56 ECAB 341 (2005). *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

[19] *See Nancy Keenan*, 56 ECAB 687 (2005).

such further development as the Office deems necessary, it should issue a *de novo* decision as to the extent of appellant's permanent impairment due to the accepted injury.

Due to the Board's resolution of the first issue regarding the schedule award, the second issue regarding appellant's reconsideration request is moot.[20]

CONCLUSION

The Board finds this case is not in posture for decision as the conflict in medical evidence regarding appellant's degree of permanent impairment was not properly resolved.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 15 and July 20, 2007 be set aside and the case remanded to the Office for further development consistent with this opinion of the Board.

Issued: February 13, 2009
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

[20] The Board notes that Dr. Gobaud's license to practice medicine was not revoked and, based on the evidence submitted by appellant, he was no longer on probation at the time of the May 2007 impartial evaluation.