United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 08-1691**
	)	**Issued: February 3, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 29, 2008 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated August 9, 2007 and February 14, 2008, denying her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she is entitled to a schedule award for permanent impairment to her lower extremities.

FACTUAL HISTORY

This case has previously been before the Board. In a March 2, 2007 decision, the Board set aside the Office's April 3, 2006 decision which denied appellant's claim for a schedule award for permanent impairment under 5 U.S.C. § 8107.[1] The Board found that the medical opinion of

[1] Docket No. 06-2111 (issued March 2, 2007).

Dr. Barry A. Silver, an impartial medical specialist, that appellant sustained a five percent impairment of the whole person based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) was insufficient to resolve the conflict in the medical opinion evidence. The Board remanded the case to the Office for referral of appellant to a second impartial medical specialist to determine the extent and degree of any permanent impairment resulting from her accepted employment-related injury. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.[2] The facts as relevant to the present issue are set forth.

By letter dated May 22, 2007, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Evan S. Kovalsky, a Board-certified orthopedic surgeon, for an impartial medical examination. In a July 6, 2007 report, Dr. Kovalsky reviewed a history of appellant's accepted employment-related back injury, medical treatment and social background. He also provided a detailed review of her medical records. Dr. Kovalsky noted appellant's complaints of pain primarily in the left lower region and gluteal area going down into the left leg and heel and occasional tingling in the toes. On physical examination, he reported subtle findings of Waddell's and inappropriate illness behavior. Dr. Kovalsky stated that appellant was able to walk without a limp, list or pelvic obliquity. Appellant stood on her toes and heels without weakness. Her range of motion in the lumbar spine was checked three times. Appellant had 30, 25 and 15 degrees of forward flexion and 20, 20 and 25 degrees of extension. Both of these maneuvers caused her to complain of left low back pain and she grabbed her back with these maneuvers. Appellant also grabbed her back when standing on her toes. Dr. Kovalsky stated that lateral bending to the left was 15, 15 and 10 degrees. Lateral bending to the right was 15, 15 and 10 degrees. Appellant grabbed her back on the left after performing these tests. Dr. Kovalsky reported no evidence of any marks or deformity on her spine. A Waddell's test was positive for light axial compression on appellant's vertex with complaints of left low back pain and grabbing. Appellant had similar complaints with light gentle rotation of her pelvis. Light superficial touching in the left lumbosacral and gluteal region also caused her to complain of pain. Appellant had no palpable spasm. With deeper palpation there were some increased complaints of pain in the left lumbar and gluteal region but none on the right. Sensory testing revealed nonphysiologic, nondermatomal decrease to sharp in the entire left thigh, calf, foot and ankle regions. Sensation was intact in the right lower extremity and perineum. Deep tendon reflexes were symmetric and equal. There was no clonus. Motor testing showed no motor weakness. Appellant did have give out weakness in the left knee extensors and flexors. There was no atrophy in the legs and the calves were both 35 centimeters. Gentle log rolling on the left was positive for complaints of pain in the left low back which was nonphysiologic. Deyerle's and dangling straight leg raise testing at 90 degrees were completely negative for any sciatica, nerve irritation or back pain. In a supine position straight leg raise testing on the left at 45 degrees caused low back complaints. There was no pain radiating down the leg. Appellant demonstrated facial grimacing and grunted during these examinations. Flexion and rotation of her hips were painless. Appellant had full range of

[2] On October 15, 1998 appellant, then a 40-year-old mail processor, filed a claim for an occupational disease alleging that on July 3, 1991 she first realized her lower back condition was due to her employment duties. The Office accepted the claim for temporary exacerbation of preexisting L5-S1 degenerative disc disease.

motion of her ankles, knees and hips. There was no indication of any localizing findings in the lower extremities except for the nonphysiologic sensory loss and give out weakness.

Dr. Kovalsky determined that appellant reached maximum medical improvement on February 23, 2000. He advised that the findings on physical examination were normal with the exception of sensory findings which included tingling in the left toes. Dr. Kovalsky stated that there was significant evidence of inappropriate illness behavior and positive Waddell's. He determined that appellant had no permanent impairment of the right lower extremity as she had no subjective symptoms or abnormal findings. Dr. Kovalsky further determined that she sustained a five percent impairment of the left lower extremity. He stated that, since there was no indication of any gross motor weakness, impairment of the left lower extremity had to be determined based on sensory loss. Dr. Kovalsky related that, since the accepted abnormal disc was at L5-S1 which would typically affect the S1 nerve root, he used Table 15-15 on page 424 of the A.M.A., *Guides* to determine that appellant sustained a 50 percent sensory deficit at S1. He multiplied the 50 percent sensory impairment rating by the 5 percent maximum sensory loss under Table 15-18 on page 424 of the A.M.A., *Guides*, resulting in a 2.5 percent impairment of the left lower extremity.

In a July 30, 2007 report, Dr. Morely Slutsky, an Office medical adviser, reviewed appellant's case record. He disagreed with Dr. Kovalsky's July 6, 2007 findings and opined that appellant did not sustain any employment-related impairment of either lower extremity. Dr. Slutsky stated that Dr. Kovalsky's reporting of no objective or abnormal findings regarding the right lower extremity resulted in a zero percent impairment. Regarding the left lower extremity, he stated that Dr. Kovalsky improperly determined that appellant sustained a Grade 3 sensory deficit of the S1 nerve root. Dr. Slutsky indicated that, in order to measure such loss, appellant would have had reduced two-point discrimination and sensory loss along the S1 nerve root distribution based on Table 16-10 on page 498 of the A.M.A., *Guides*.[3] He stated that Dr. Kovalsky did not provide such findings. Dr. Slutsky further stated that Dr. Kovalsky used a magnetic resonance imaging (MRI) scan finding of abnormal degenerative L5-S1 disc disease to justify the S1 sensory loss rating. He indicated that all lumbar MRI scans to date did not show any impingement on the S1 nerve root and that simply finding degenerative disc disease was not indicative of a S1 sensory loss. Dr. Slutsky related that Dr. Kovalsky's finding that appellant's responses were nonphysiolgic meant that they did not make sense from a medical standpoint. He opined that, without objective valid findings of left S1 sensory deficits on examination, appellant had no ratable impairment of the right and left lower extremities.

By decision dated August 9, 2007, the Office denied appellant's claim for a schedule award. It accorded determinative weight to Dr. Slutsky's July 30, 2007 medical opinion. By letter dated August 14, 2007, appellant, through counsel, requested an oral hearing before an Office hearing representative.

In a February 14, 2008 decision, an Office hearing representative affirmed the August 9, 2007 decision. The hearing representative found that Dr. Slutsky's July 30, 2007 report was

[3] The Board notes that Table 16-10 is on page 482 of the A.M.A., *Guides* and not page 498 as stated by Dr. Slutsky.

sufficient to establish that appellant did not sustain any employment-related permanent impairment of the lower extremities.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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 regulations as the appropriate standard for evaluating schedule losses.[6]

Section 8123(a), in pertinent part, provides: "If there is a 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."[7] In situations where there are opposing medical reports of virtually equal weight and rationale and 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.[8]

The Board has held that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[9] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to another impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[10]

In order to properly resolve a conflict in the medical opinion evidence with respect to a schedule award, it is the referee examiner who should provide a reasoned medical opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A.,

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

[7] 5 U.S.C. § 8123(a).

[8] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[9] *Talmadge Miller*, 47 ECAB 673 (1996).

[10] *Id.*

Guides. An Office medical adviser may review the opinion, but resolution of the conflict is the responsibility of the referee examiner.[11]

ANALYSIS

The Office found that the report of Dr. Slutsky, an Office medical adviser, represented the weight of the medical evidence. The Board, however, finds that this was error on the part of the Office.

Dr. Slutsky opined that appellant did not sustain any employment-related impairment of either lower extremity. He found no objective or abnormal findings regarding the right lower extremity, resulting in a zero percent impairment. Regarding the left lower extremity, Dr. Slutsky stated that Dr. Kovalsky improperly determined that appellant sustained a Grade 3 sensory deficit of the S1 nerve root without providing a finding of reduced two-point discrimination and sensory loss along the S1 nerve root distribution based on Table 16-10 on page 498 of the A.M.A., *Guides*. He further noted that Dr. Kovalsky determined that appellant sustained an abnormal degenerative L5-S1 disc disease based on an MRI scan finding to justify the S1 sensory loss rating while all lumbar MRI scans to date did not show any impingement on the S1 nerve root. Dr. Slutsky stated that simply finding degenerative disc disease was not indicative of a S1 sensory loss. He further stated that Dr. Kovalsky's finding that appellant's responses were nonphysiologic meant that they did not make sense from a medical standpoint. Dr. Slutsky opined that, without objective valid findings of left S1 sensory deficits on examination, appellant had no ratable impairment of the right and left lower extremities. The Board notes however that his opinion cannot represent the weight of medical opinion. Since there was a conflict in the medical evidence under section 8123(a) of the Act, it is the impartial medical specialist who must resolve the conflict and provide a reasoned medical opinion under the A.M.A., *Guides*. Dr. Kovalsky did not resolve the conflict in the medical evidence.

Dr. Kovalsky reported essentially normal findings on physical examination with the exception of light superficial touching in the left lumbosacral region and significant evidence of inappropriate illness behavior. He determined that appellant did not sustain any permanent impairment of the right lower extremity as she had no subjective symptoms or abnormal findings. Dr. Kovalsky further determined that she sustained a five percent impairment of the left lower extremity. He stated that, since there was no indication of any gross motor weakness, impairment of the left lower extremity had to be determined based on sensory loss. Dr. Kovalsky related that, since the accepted abnormal disc was at L5-S1 which would typically affect the S1 nerve root, he used Table 15-15 on page 424 of the A.M.A., *Guides* to determine that appellant sustained a 50 percent sensory deficit at S1. He multiplied the 50 percent sensory impairment rating by the 5 percent maximum sensory loss under Table 15-18 on page 424 of the A.M.A., *Guides*, resulting in a 2.5 percent impairment of the left lower extremity. Under Table 15-15, a Grade 3 classification is defined as a distorted superficial tactile sensibility (diminished light touch and two-point discrimination), with some abnormal sensations or slight pain, that interferes with some activities. Dr. Kovalsky, however, did not report any findings on two-point discrimination. As he did not properly apply the tables in the A.M.A., *Guides*, his

[11] *See Richard R. LeMay*, 56 ECAB 341 (2005); *see also Thomas J. Fragale*, 55 ECAB 619 (2004).

opinion is not sufficient to resolve the conflict in the medical opinion evidence as to whether appellant sustain any permanent impairment of the lower extremities. Accordingly, the case will be remanded to the Office to properly resolve the conflict by obtaining a supplemental report from Dr. Kovalsky which comports with the provisions of the A.M.A., *Guides*.[12] On remand, the Office shall request that Dr. Kovalsky submit a supplemental report regarding whether appellant sustained permanent impairment of the left lower extremities that follows the precepts of the A.M.A., *Guides*. After this and any other development deemed necessary, the Office shall issue an appropriate decision regarding the extent of appellant's impairment.

CONCLUSION

The Board finds that the case is not in posture for decision as there is an unresolved conflict in the medical opinion evidence regarding the extent and degree of any employment-related impairment.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2008 and August 9, 2007 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with the above decision.

Issued: February 3, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[12] *L.R. (E.R.)*, 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).