United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 08-1733**
	)	**Issued: January 28, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, 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 June 3, 2008 appellant filed a timely appeal of a May 16, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for an increased 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 more than 11 percent impairment to his left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On January 17, 2006 appellant, then a 47-year-old clerk, injured his back when his chair rolled out from under him and he fell to the floor. He stopped work on January 17, 2006 and returned on January 25, 2006. The Office accepted the claim for displacement of a lumbar intervertebral disc without myelopathy and spinal stenosis of the lumbar region. On August 8, 2006 appellant underwent a left L5-S1 lumbar laminectomy and disc/excision/reexploration.

The operative report indicated complete decompression of the L5 nerve root was achieved. He returned to limited-duty work in February 2007. Under a separate claim, number xxxxxx799, appellant has an accepted lumbosacral strain and herniated disc at L4-5, for which he underwent surgery on July 7, 2001. He previously received a schedule award for 11 percent permanent impairment of the left leg.

On August 20, 2007 appellant filed a request for an increased schedule award. In an August 29, 2007 letter, the Office provided appellant a copy of a lower extremity impairment rating form to give to his physician to determine the extent and degree of any impairment related to his accepted conditions.

In a November 30, 2007 report, Dr. Desmond Erasmus, a Board-certified neurologist, reviewed the history of injuries to appellant's back, surgeries and postoperative course. He noted subjective complaints of back pain at the end of the workday with shooting pain radiating to the left posterior thigh and calf with occasional tingling and paresthesias in the left leg and foot. Physical examination revealed limitation in forward flexion of the lumbar spine with negative straight leg raising to 90 degrees bilaterally and complete ability to heel and toe walk. A slight antalgia on the left side was demonstrated. Dr. Erasmus diagnosed left traumatic L5 radiculitis; L4-5 lumbar disc herniation; and postlaminectomy low back pain syndrome with residual left sciatic pain were provided. Using the diagnosis-related estimate (DRE) method in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), Dr. Erasmus placed appellant in a DRE lumbar category III and found 13 percent impairment of the whole person. He added 2 percent residual pain impairment, for a total impairment of 15 percent. Dr. Eramus stated that this was a four percent increase in disability from appellant's previous impairment rating. On the lower extremity form supplied by the Office, he advised that appellant had reached maximum medical improvement on September 26, 2007. Dr. Eramus found the L5 nerve root was affected and appellant had severe pain. He also noted that appellant had active movement against gravity with full resistance. Progress reports on appellant's conditions were also submitted.

In a May 6, 2008 report, an Office medical adviser reviewed the statement of accepted facts provided by the Office as well as the report of Dr. Erasmus. He agreed that appellant reached maximum medical improvement on September 26, 2007. Using the fifth edition of the A.M.A., *Guides*, the medical adviser opined that appellant had a five percent permanent impairment of the left lower extremity. Utilizing Tables 15-15 and 15-18, page 424, he graded appellant's severe pain as 100 percent of the maximum 5 percent for the L5 nerve root to calculate a 5 percent impairment of the left lower extremity for pain. The medical adviser noted that the records did not indicate any left lower extremity atrophy or weakness; thus, no impairment was provided. He further noted the records did not indicate any loss of hip, knee, ankle, subtalar or toe range of motion or document any right lower extremity symptomatology; thus, no impairment was provided. The medical adviser concluded that appellant's current ratable impairment, 5 percent, was less than the 11 percent previously awarded.

By decision dated May 16, 2008, the Office denied appellant's claim for an increased schedule award, finding that the evidence did not demonstrate greater impairment than that already paid.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.404 of the implementing federal regulations,[2] 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*[3] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

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.[5] 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. 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 originates in the spine.[6] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[7]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes a method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of the maximum impairment due to nerve dysfunction applying Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[8]

Office procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

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

[4] *See Joseph Lawrence, Jr., supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

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

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

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

[8] A.M.A., *Guides*, *supra* note 3 at 423.

percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[9]

ANALYSIS

Appellant asserts that he has more than 11 percent impairment of his left leg for which he received a schedule award under claim number xxxxxx799. The Board finds that the Office's May 16, 2008 decision denying his request for an increased schedule award should be affirmed. The Office accepted appellant's current claim for lumbar disc displacement and lumbar spinal stenosis. On August 8, 2006 he underwent a lumbar laminectomy with disc excision with microdissection and a complete decompression of the L5 nerve root was achieved.

On November 30, 2007 Dr. Erasmus stated that, under the A.M.A., *Guides*, appellant's symptoms were most consistent with DRE lumbar category III, which represented a 13 percent impairment of the whole person.[10] The Board notes, however, that neither the Act nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.[11] Dr. Erasmus also opined that appellant had an additional two percent residual pain impairment but did not provide a detailed evaluation of the sensory impairment of appellant's lower extremities under the relevant standards of the A.M.A., *Guides*. Thus, his impairment rating is of diminished probative value regarding appellant's left leg under the relevant standards of the A.M.A., *Guides*.[12]

On May 6, 2008 the Office medical adviser properly applied the A.M.A., *Guides* to the information provided by Dr. Erasmus. As the Act does not provide for whole person impairment ratings,[13] the medical adviser correctly provided an impairment rating using the clinical descriptions provided by Dr. Erasmus. Based on Dr. Erasmus' description of appellant's severe pain, the medical adviser properly determined that appellant had a 100 percent pain grade (Grade 0) for sensory loss associated with the L5 nerve in the left leg and multiplied this value by the 5 percent maximum for sensory loss associated with that nerve to get a 5 percent impairment in the left leg.[14] He also correctly found that the record did not indicate any left lower extremity atrophy or weakness, any right lower extremity symptomatology, or any loss of hip, knee, ankle, subtalar or toe range of motion.

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[9] *See Thomas J. Fragale*, 55 ECAB 619 (2004); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

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

[11] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[12] *See Linda Beale*, 57 ECAB 429 (2006) (when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician).

[13] *See Tommy R. Martin*, 56 ECAB 273 (2005).

[14] A.M.A., *Guides* 424, Tables 15-15 and 15-18. Table 15-15 indicates that a Grade 0 is appropriate when severe pain prevents all activity.

The Board finds that the medical adviser properly applied the appropriate tables and figures contained in the A.M.A., *Guides* in determining that appellant had no more than five percent impairment of his left leg. As appellant previously received a schedule award for an 11 percent permanent impairment of the left leg, he did not establish greater impairment of his left leg. Therefore, appellant is not entitled to an increased schedule award.[15]

CONCLUSION

The Board finds that appellant has no more than an 11 percent left lower extremity impairment, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2008 is affirmed.

Issued: January 28, 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

[15] The Office procedures provide that any previous impairment to a member under consideration is included in calculating the percentage of loss. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(2) (August 2002).