

**United States Department of Labor
Employees' Compensation Appeals Board**

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooksville, FL, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1515
Issued: July 28, 2009**

Appearances:
William Hackney, 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 May 1, 2008 appellant filed a timely appeal from the April 3, 2008 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award claim.

ISSUE

The issue is whether appellant sustained permanent impairment of his lower extremities due to his accepted back condition.

FACTUAL HISTORY

On July 18, 2001 appellant, then a 48-year-old letter carrier, experienced low back pain after pulling tubs/trays of mail and casing mail. He stopped work on July 19, 2001 and sought medical treatment. The Office accepted his claim for a lumbar strain and aggravation of lumbar degenerative disc disease and paid benefits. Appellant returned to part-time light-duty work on July 30, 2001 and full-time light-duty work on January 2, 2002. He stopped work again on August 4, 2002. By decision dated June 25, 2002, the Office terminated appellant's wage-loss

and medical benefits of that date. On June 11, 2005 appellant returned to work part time as a modified distribution retail clerk. He stopped work on June 14, 2005. The record reflects that appellant has an accepted case under file number xxxxxx556 for bilateral carpal tunnel syndrome sustained January 1, 1999, for which he is currently receiving wage-loss compensation.

On April 11, 2006 appellant filed a Form CA-7 claim for a schedule award. He submitted an October 10, 2005 report from Dr. H. Gerard Siek, a Board-certified orthopedic surgeon, who advised that he had daily radicular pain and sciatica. Dr. Siek opined that appellant had 17 percent whole person impairment based on spinal impairment with loss of motion. He converted the whole person impairment to 42 percent lower extremity impairment rating.

On May 11, 2006 an Office medical adviser advised that appellant reached maximum medical improvement on October 10, 2005. He advised that Dr. Siek did not properly apply the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).¹ The Office medical adviser noted that impairment due to radicular pain and sciatica could not be rated without objective evidence of specific nerve root impairment. He noted that additional evidence was needed to determine any impairment on the basis of radiculopathy. The Office medical adviser found that appellant had no impairment of either the right or left lower extremities.²

In a June 14, 2006 report, Dr. David Petersen, a Board-certified orthopedic surgeon, stated that appellant had impairments due to carpal tunnel syndrome as well as five percent impairment to the back.³

On June 26, 2006 appellant underwent electromyogram (EMG) of the right and left lumbar paravertebral musculature, right and left medial hamstrings, right and left vastus medialis, right and left tibialis anticus, right and left medial gastrocnemius, right and left lateral gastrocnemius and right and left peroneus longus, which were reported as normal. There was no electrophysiological evidence of a peripheral neuropathy or radiculopathy.

On November 16, 2006 an Office medical adviser reviewed the medical evidence and noted that the June 26, 2006 EMG was normal and found that the medical evidence did not establish any lower extremity impairment. He suggested that further testing would be helpful in determining impairment.

On November 20, 2006 the Office denied appellant's claim for a schedule award.

¹ A.M.A., *Guides* (5th ed. 2001).

² On May 15, 2006 the Office requested that Dr. Siek comment on the medical adviser's opinion. However, Dr. Siek passed away before he could offer a response.

³ Dr. Petersen identified this other physician as Dr. John Rayhack, who's September 29, 2004 report noted various findings and diagnoses-related primarily to the arms. Dr. Rayhack found 12 percent whole body impairment. He did not explain the basis of his impairment finding.

Appellant requested a hearing, which was held on February 12, 2008. He indicated that he was seeking a schedule award for impairment to his legs. By decision dated May 29, 2007, an Office hearing representative remanded the case to the Office for further development of the medical evidence.

The Office referred appellant, together with a revised statement of accepted facts and the medical record, to Dr. Jeffrey M. Oettinger, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 25, 2007 report, Dr. Oettinger reviewed the medical record and statement of accepted facts and presented findings on examination. He diagnosed chronic low back pain with diffuse degenerative lumbar disc disease with no evidence of radiculopathy. Dr. Oettinger opined that the accepted lumbar strain had resolved and appellant's chronic persistent pain was most likely the result of the degenerative process as the myofascial strain had resolved. He stated that there was no evidence of radiculopathy and appellant's objective findings were limited to his complaints of pain. Dr. Oettinger stated that he had mild tension signs distally on the right side without a true straight leg raise. He also noted that previous objective testing showed no evidence of lower extremity radiculopathy. Dr. Oettinger advised that appellant had five percent impairment due to the affected L4 nerve root from loss of function from sensory deficit, discomfort or pain. He found no impairment of the lower extremity due to loss of function for decreased strength.

In an August 23, 2007 report, an Office medical adviser opined that appellant reached maximum medical improvement on July 25, 2007. Based on his review of Dr. Oettinger's July 25, 2007 report, the Office medical adviser found that there was no basis for a schedule award in either lower extremity. He stated that Dr. Oettinger's findings on examination discredited any impairment based on a L4 nerve root as there was no evidence of radiculopathy in the lower extremities, appellant had full range of motion and normal motor strength of lower extremities and normal sensation to light touch in both lower extremities with no evidence of dysesthesia. Furthermore, the EMG and nerve conduction velocity studies of June 26, 2006 showed no evidence of peripheral neuropathy or radiculopathy.

By decision dated September 27, 2007, the Office denied appellant's claim for a schedule award. Determinative weight was accorded to the Office medical adviser's opinion that the medical evidence failed to establish that appellant sustained any permanent impairment to his lower extremities.

On October 2, 2007 appellant disagreed with the September 27, 2007 decision and requested a hearing before an Office hearing representative, which was held on February 12, 2008. In a September 18, 2007 report, Dr. Petersen opined that he had five to eight percent impairment of his low back. In a February 26, 2008 report, Dr. Richard Rogachefsky, a Board-certified orthopedic surgeon, provided an assessment of lumbosacral degenerative disc disease and L4-5 disc protrusion. He noted that appellant would undergo a magnetic resonance imaging scan as well as an EMG and nerve conduction study of the bilateral lower extremities.

By decision dated April 3, 2008, an Office hearing representative affirmed the September 27, 2007 decision, denying a schedule award for the lower extremities.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ 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 implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁷

It is well established that no schedule award is payable for a member, organ or function of the body not specified in the Act or in the regulations.⁸ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, neck or spine, no claimant is entitled to such an award.⁹ Indeed, the Act specifically excludes the spine from the definition of organ.¹⁰ However, the schedule award provisions of the Act include the extremities and a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of such impairment originates in the spine.¹¹

Office procedures 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 percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.¹²

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁸ *See J.Q.*, 59 ECAB __ (Docket No. 06-2152, issued March 5, 2008); *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment).

⁹ *E.g.*, *Timothy J. McGuire*, 34 ECAB 189 (1982) (back); *Robert Henry Guy*, 29 ECAB 734 (1978) (neck, esophagus, chest); *Luis Manalo*, 15 ECAB 400 (1964) (spine).

¹⁰ 5 U.S.C. § 8101(19).

¹¹ *See J.Q.*, *supra* note 8.

¹² *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

ANALYSIS

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained permanent impairment of his lower extremities due to his accepted back condition.

The Office accepted appellant's claim for a lumbar strain and aggravation of lumbar degenerative disc disease. Appellant claimed a schedule award and submitted reports from Dr. Siek and Dr. Petersen, his attending physicians. Both physicians provided impairment ratings based on spinal or back impairment. Dr. Siek opined that appellant's 17 percent whole person impairment was based on spinal impairment with loss of motion and converted to 42 percent lower extremity impairment. Dr. Petersen opined that appellant had five percent impairment to his back. In a September 18, 2007 report, he opined that appellant had five to eight percent impairment of the back. As noted, however, neither the Act nor the implementing federal regulations provide for the payment of a schedule award for the permanent loss of use of the back, neck or spine or the body as a whole. A claimant is not entitled to such a schedule award.¹³ A claimant may be entitled to a schedule award for permanent impairment to the lower extremities even though the cause of the impairment originates in the spine. However, appellant did not submit sufficient medical evidence to support any impairment to either lower extremity causally related to the accepted low back conditions.¹⁴ Additionally, Dr. Petersen did not otherwise discuss how, pursuant to the A.M.A., *Guides*, appellant had any ratable impairment to his legs.

In a July 25, 2007 report, Dr. Oettinger, the second opinion examiner, opined that appellant had no impairment of the lower extremity due to loss of function for decreased strength. He allowed five percent impairment due to sensory deficit or pain from the affected L4 nerve root. An Office medical adviser reviewed Dr. Oettinger's report but found that the physician did not support a schedule award based on pain in light of the findings on physical examination and diagnostic testing.

While Dr. Oettinger opined that appellant had five percent impairment due to sensory deficit in the distribution of the L4 nerve root, he provided an insufficient explanation for his impairment rating. The Office medical adviser reviewed Dr. Oettinger's report and advised that the findings on physical examination discredited any impairment based on the L4 nerve root. The Office medical adviser noted that Dr. Oettinger found a full range of motion, normal motor strength and normal sensation to light touch with no evidence of dysesthesia or radiculopathy in the lower extremities. The June 26, 2006 diagnostic testing showed no physiologic evidence of peripheral neuropathy or radiculopathy. The Office medical adviser provided a well-rationalized explanation for not accepting Dr. Oettinger's impairment rating based on L4 nerve root sensory loss.

Appellant argues on appeal that the Office medical adviser selected portions of Dr. Oettinger's evaluation to best suit the needs of the Office. The Board finds this is not the

¹³ See *supra* note 9; see also *Richard R. Lemay*, 56 ECAB 341 (2006).

¹⁴ See *Richard R. Lemay*, *id.*

case. Appellant relied on the findings of Dr. Oettinger and explained why his physical examination and testing did not support ratable impairment for a sensory deficit.

Appellant has not submitted any other medical evidence which conforms to the A.M.A., *Guides*, to support any impairment to his legs. For these reasons, the medical evidence does not establish that appellant is entitled to a schedule award for the lower extremities.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 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