United States Department of Labor
Employees' Compensation Appeals Board

W.V., Appellant	)	
	)	**Docket No. 08-2528**
and	)	**Issued: July 24, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Eagleville, 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:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 24, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 12, 2008 in which the hearing representative affirmed a July 25, 2007 decision granting him four percent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than four percent permanent impairment of the left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On December 7, 2005 appellant, then a 44-year-old letter carrier, filed an occupational disease claim for a lower lumbar sprain and bulging lumbar disc due to performing his work duties which included repetitive twisting, turning and pulling while casing mail and loading mail

trays. The Office accepted his claim for lumbar sprain and left displaced lumbar intervertebral disc. Appellant stopped work on October 12, 2005 and returned on November 1, 2005.

In support of his claim, appellant submitted a magnetic resonance imaging (MRI) scan of the lumbar spine dated November 16, 2005 which revealed early degenerative spondylotic changes and mild multilevel bulging at L1-2 and L2-3 and L4-5 and L5-S1. He was treated by Dr. Evan Kovalsky, a Board-certified orthopedist, on November 23, 2005 for low back and left leg pain that started in 1997. Dr. Kovalsky noted motor strength was good in all muscle groups, intact sensation, except for deceased light touch along the left lateral thigh, with positive straight leg raises on the left. He diagnosed lumbosacral sprain and strain, aggravation of underlying lumbar spondylosis, a new annular tear and a small herniated disc at L4-5. In reports dated December 21, 2005 to June 2, 2006, Dr. Kovalsky noted appellant's continuing complaints of persistent back and leg pain. A January 20, 2006 electromyogram (EMG) revealed denervation of the left L5-S1 innervated myotomes and paraspinous musculature indicative of left L5-S1 radiculopathy.

Appellant submitted a report from Dr. David Weiss, an osteopath, dated August 1, 2006, who noted that appellant reached maximum medical improvement on August 1, 2006. Physical examination of the lumbar spine revealed paravertebral muscle spasm, and tenderness to the left of midline, posterior superior iliac spine tenderness on the left. Range of motion was restricted in forward flexion and backward extension, sitting root sign was positive on the left producing radicular pain down the left lower extremity. Straight leg raising was positive on the left and negative on the right. Sensory examination revealed perceived sensory deficit to pinwheel sensation of the S1 dermatome involving the right and left lower extremities. There was normal manual muscle strength and hip flexors, bilaterally, while gastrocnemius circumference measured 39 centimeters on the right and 40 on the left. Dr. Weiss noted that appellant complained of daily lumbar spine pain and stiffness that waxed and waned, and radicular pain and numbness. He diagnosed chronic post-traumatic lumbosacral strain and sprain, herniated nucleus pulposus at L4-5, bulging lumbar disc at L5-S1 and left L5-S1 radiculopathy. Dr. Weiss noted that based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[1] (A.M.A., *Guides*) that appellant had 4 percent impairment on the right for Grade 2 sensory deficit of the S1 nerve root,[2] and 8 percent for right calf atrophy[3] for 12 percent impairment of the right lower extremity. With regard to the left lower extremity appellant would receive four percent impairment on the left for Grade 2 sensory deficit of the left S1 nerve root.[4]

On December 4, 2006 appellant filed a claim for a schedule award. He submitted reports from Dr. Kovalsky dated August 2, 2006 to May 7, 2007, who treated appellant for persistent back pain and numbness radiating down his anterior thighs and left leg. Appellant submitted an addendum report from Dr. Weiss dated February 2, 2007, who noted his August 1, 2006 report,

[1] A.M.A., *Guides* (5th ed. 2001).

[2] *Id.* at 424, Table 15-15, 15-18.

[3] *Id.* at 530, Table 17-6.

[4] *Id.* at 424, Table 15-15, 15-18.

had a typographical error as the report should have reflected that gastrocnemius circumference was measured at 40 centimeters on the right and 39 centimeters on the left. The revised impairment rating would be 12 percent impairment of the left leg and 4 percent impairment of the right leg.

In a July 1, 2007 report, an Office medical adviser reviewed Dr. Weiss's reports and his recommendation of 12 percent impairment of the left leg for sensory loss of the S1 nerve root and atrophy and 4 percent impairment of the right leg for sensory loss. The Office medical adviser noted that pursuant to Table 17-2, page 526 of the A.M.A., *Guides*, Guide to Appropriate Combination of Evaluation Methods, muscle atrophy cannot be combined with peripheral nerve injury. He further noted that Dr. Weiss recommended a Grade 2 sensory deficit for the left and right lower extremities; however, appellant's symptoms as described by Dr. Weiss represent a Grade 3 or 4 sensory deficit as he noted pain and stiffness on a daily basis which waxed and wanes, radicular pain with numbness and some limitations of activities of daily living. A Grade 2 deficit as described in the A.M.A., *Guides* is decreased superficial cutaneous pain and tactile sensibility decreased protective sensibility with abnormal sensations or moderate pain which may prevent some activities. Although the Office medical adviser believed the Grade 2 sensory finding by Dr. Weiss was excessive he recommended accepting his finding. He noted that appellant had four percent impairment for Grade 2 sensory deficits of the S1 nerve root of the left and right lower extremities for a four percent impairment of the left and right lower extremities.[5] The Office medical adviser noted that the date of maximum medical improvement was August 1, 2006.

In a decision dated July 25, 2007, the Office granted appellant a schedule award for four percent impairment of the left and right lower extremity. The period of the award was from August 1, 2006 to January 9, 2007.

On July 31, 2007 appellant requested an oral hearing which was held on November 29, 2007.

In a decision dated February 12, 2008, the hearing representative affirmed the July 25, 2007 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] 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

[5] *Id.* at 424, Table 17-15.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

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.[8]

ANALYSIS

On appeal, appellant believes that he is entitled to a schedule award greater than four percent permanent impairment of the left lower extremity. He asserts through his attorney that there is a medical conflict between the Office medical adviser and Dr. Weiss with regard to the impairment to his left lower extremity. The Office accepted appellant's claim for lumbar sprain and left displaced lumbar intervertebral disc. The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Weiss, appellant's treating physician.

The Office medical adviser, who in a report dated July 1, 2007, advised that based on Dr. Weiss' reports appellant had four percent impairment of the left lower extremity. He noted that appellant would be entitled to four percent impairment of the left lower extremity for sensory deficit or pain in the distribution of the S1 nerve root, under Table 15-15 of the A.M.A., *Guides*.[9] By contrast, Dr. Weiss in his reports dated August 1, 2006 and February 2, 2007 also applied the A.M.A., *Guides* and found that appellant sustained a 4 percent impairment on the left for Grade 2 sensory deficit of the S1 nerve root,[10] and 8 percent for left calf atrophy,[11] for 12 percent impairment of the left lower extremity. The Board notes that Table 17-2 of the A.M.A., *Guides*, provides that the evaluator is not permitted to combine peripheral nerve deficit with muscle atrophy;[12] however, there is no prohibition on rating impairment solely on muscle atrophy, instead of sensory deficit. In this case, Dr. Weiss determined that appellant sustained eight percent impairment based on left calf atrophy under Table 17-6 which would provide him with greater impairment than that determined by the Office medical adviser. He supported an increased impairment rating of the left lower extremity, while the Office medical adviser opined that appellant sustained no more than a four percent permanent impairment of the left lower extremity.

Section 8123(a) of the Act provides in pertinent part: "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."[13] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[14] The Board finds that the Office should have referred appellant to an impartial

[8] *See id*.; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] *Id.* at 424, Table 15-15.

[10] A.M.A., *Guides*, 424, Table 15-15, 15-18.

[11] *Id.* at 530, Table 17-6.

[12] *Id.* at 526, Table 17-2.

[13] 5 U.S.C. § 8123(a).

[14] *William C. Bush*, 40 ECAB 1064 (1989).

medical specialist to resolve the medical conflict regarding the extent of permanent impairment arising from appellant's accepted employment injury.

Therefore, in order to resolve the conflict in the medical opinions the case will be remanded to the Office for referral of the case record, including a statement of accepted facts, and, if necessary, appellant, to an impartial medical specialist for a determination regarding the extent of appellant's left lower extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*.[15] After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's left lower extremity impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: July 24, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[15] *See Harold Travis*, 30 ECAB 1071, 1078-79 (1979).