United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 08-2292**
	)	**Issued: June 5, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Danville, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal from January 28 and July 31, 2008 decisions of the Office of Workers' Compensation Programs, adjudicating 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 more than seven percent permanent impairment of the left lower extremity and one percent for the right lower extremity for which she received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case.[1] By decision dated January 25, 2007, the Board affirmed December 13, 2005 and June 19, 2006 decisions that initially denied appellant's claim for a back injury. The facts of the previous Board decision are incorporated herein by reference.

On October 20 2005 appellant, then a 57-year-old registered nurse, filed a claim for a traumatic injury alleging that, on October 13, 2005 she felt pain in her back and down her left leg when a patient pushed and pulled against her as she was assisting in turning him on his side. On November 11, 2005 appellant underwent back surgery consisting of decompressive laminectomies with bilateral facetectomies and foraminotomies at L2-3, L3-4, L4-5 and a left L5-S1 decompressive laminotomy with discectomy and arthrodesis at L4-5. On July 10, 2007 the Office accepted her claim for aggravation of lumbar spinal stenosis at L2-5, aggravation of spondylolisthesis at L4-5 and a herniated lumbar disc at L5-S1 with left S1 radiculopathy. On September 14, 2007 appellant filed a claim for a schedule award.

On September 19, 2007 the Office asked appellant to provide an impairment rating from her attending physician based on the fifth edition of the of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a report dated December 6, 2007, Dr. David J. Fletcher, a Board-certified specialist in preventive medicine, reviewed appellant's medical history and provided findings on physical examination. He calculated six percent impairment of the whole person for diagnosis related estimates (DRE) method Lumbar Category II, based on Table 15-3 at page 384 of Chapter 15 (The Spine) of the fifth edition of the A.M.A., *Guides*.

On January 18, 2008 Dr. Robert Wysocki, a physician specializing in internal medicine and orthopedic surgery and an Office medical adviser, reviewed Dr. Fletcher's report and the fifth edition of the A.M.A., *Guides*. He noted that the Federal Employees' Compensation Act does not provide for impairment based on the whole person. Dr. Wysocki calculated seven percent impairment of appellant's left lower extremity, including three percent for Grade 3 pain or sensory deficit of the L5 nerve root, based on Tables 15-16 and 15-18 at page 424 from Chapter 15 and four percent for Grade 4 motor deficit of the L5 nerve root. He calculated one percent impairment of the right lower extremity for Grade 5 motor deficit of the L5 nerve root based on the same tables in Chapter 15.[2]

[1] *See* Docket No. 06-1737 (issued January 25, 2007).

[2] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (October 2005) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

By decision dated January 28, 2008, the Office granted appellant a schedule award based on seven percent impairment of the left lower extremity and one percent impairment of the right lower extremity for 23.04 weeks, from December 6, 2007 to May 15, 2008.[3]

Appellant requested an oral hearing before an Office hearing representative that was held on May 15, 2008. She submitted additional medical evidence. In form reports dated March 25, June 12 and 19, 2008, Dr. Robert K. Hurford, an attending orthopedic surgeon, provided work restrictions and recommended cervical and thoracic spine magnetic resonance imaging (MRI) scans. In a June 19, 2008 report, he provided findings on physical examination and stated that appellant had some difficulties with balance following her 2005 lumbar spine surgery. Dr. Hurford offered to refer her to a neurologist but she declined. He read the MRI scans, and found they revealed cervical and thoracic spine problems which were not serious enough to be the cause of appellant's balance problem. He provided work restrictions.

By decision dated July 31, 2008, the Office hearing representative affirmed the January 28, 2008 decision.[4]

LEGAL PRECEDENT

Section 8107 of the Act[5] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[6]

The A.M.A., *Guides* provides for three separate methods for calculating the lower extremity permanent impairment of an individual: anatomic, functional and diagnosis based.[7] The anatomic method involves noting changes, including muscle atrophy, nerve impairment and vascular derangement, as found during physical examination.[8] The diagnosis-based method may be used to evaluate impairments caused by specific fractures and deformities, as well as ligamentous instability, bursitis and various surgical procedures, including joint replacements

[3] The Act provides for 288 weeks of compensation for 100 percent loss or loss of use of the lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by eight percent total for the left and right lower extremities equals 23.04 weeks of compensation.

[4] Subsequent to the July 31, 2008 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal. The Board notes an error at page 5 of the July 31, 2008 decision. The hearing representative incorrectly stated that the Office medical adviser calculated five percent impairment of appellant's left upper extremity.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001).

[7] A.M.A., *Guides* 525.

[8] *Id.*

and meniscectomies.[9] The functional method is used for conditions when anatomic changes are difficult to categorize, or when functional implications have been documented and includes range of motion, gait derangement and muscle strength.[10] The evaluating physician must determine which method best describes the impairment of a specific individual based on patient history and physical examination.[11] When uncertain about which method to use, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating.[12] If more than one method can be used, the method that provides the higher impairment rating should be adopted.[13]

ANALYSIS

On December 6, 2007 Dr. Fletcher calculated six percent impairment of the whole person for DRE Lumbar Category II, based on Table 15-3 at page 384 of Chapter 15 of the fifth edition of the A.M.A., *Guides*. His impairment rating for appellant was based on impairment of the whole person due to lumbar spine impairment. Under the Act, a schedule award is not payable for the loss or loss of use of any member of the body or function that is not specifically enumerated in section 8107 of the Act or its implementing regulations.[14] The spine, or back, is specifically excluded from coverage of the schedule award provisions of the Act.[15] Although a schedule award may not be issued for an impairment to the back under the Act, such an award may be payable for permanent impairment of the lower extremities that is due to an employment-related back condition.[16] Chapter 15 provides for determination of impairment based on the "whole person." However, the Act does not provide for a schedule award based on permanent impairment of the whole person.[17] Therefore, Dr. Fletcher's impairment rating is not based on correct application of the Act and the A.M.A., *Guides*. It not sufficient to determine whether appellant has any impairment of her lower extremities causally related to her accepted lumbar

[9] *Id.*

[10] *Id.* at 525, Table 17-1.

[11] *Id.* at 548, 555.

[12] *Id.* at 526.

[13] *Id.* at 527, 555.

[14] *See Leroy M. Terska*, 53 ECAB 247 (2001).

[15] 5 U.S.C. § 8101(19); *see also Vanessa Young*, 55 ECAB 575 (2004).

[16] *Vanessa Young, supra* note 15; *Gordon G. McNeill,* 42 ECAB 140 (1990).

[17] *Tania R. Keka*, 55 ECAB 354 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

spine conditions.[18] Dr. Fletcher should have used Chapter 17 in determining whether appellant had any lower extremity impairment.[19]

Dr. Wysocki reviewed Dr. Fletcher's report and the fifth edition of the A.M.A., *Guides* and correctly noted that the Act does not provide for impairment based on the whole person. Dr. Wysocki, however, calculated appellant's impairment of her lower extremities based on Chapter 15 which involves impairment of the spine. As noted, Chapter 17 should be applied to a lower extremity impairment rating, not Chapter 15.

The Board finds that the impairment ratings of Dr. Fletcher and Dr. Wysocki are not sufficient to establish appellant's left and right lower extremity impairment. On remand, the Office should refer appellant for a thorough physical examination and evaluation by a physician experienced in the use of the fifth edition of the A.M.A., *Guides.* The evaluating physician should provide an impairment rating of appellant's left and right lower extremities based on application of the appropriate rating methods in Chapter 17 of the fifth edition of the A.M.A, *Guides* which yield the highest percentage of impairment. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should obtain an impairment rating of appellant's lower extremities based on correct application of the A.M.A., *Guides*. After such further development as the Office deems necessary, it should issue an appropriate decision.

[18] *Guiseppe Aversa*, *supra* note 17 (the Board found that a physician improperly used Chapter 15 in evaluating lower extremity impairment caused by a spinal injury).

[19] The introduction to Chapter 17 at page 523 states that this chapter provides criteria for evaluating permanent impairment of the lower extremities. A.M.A., *Guides*, 523, 525; *see also* 555, 17.3, Lower Extremity Impairment Evaluation Procedure Summary and Examples.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 31 and January 28, 2008 are set aside and the case is remanded for further action consistent with this decision.

Issued: June 5, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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