United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
and	)	**Docket No. 08-1983**
	)	**Issued: March 20, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Tulsa, OK, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 14, 2008 appellant filed an appeal of a September 7, 2007 merit decision of the Office of Workers' Compensation Programs, denying his claim for a schedule award and November 15, 2007 and July 7, 2008 nonmerit decisions denying his requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has employment-related permanent impairment of a scheduled member entitling him to a schedule award; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 17, 2003 appellant filed an occupational disease claim alleging that he sustained injuries to his neck due to employment activities. The Office accepted the claim for cervical

sprain and aggravation of cervical degenerative disc disease. On July 14, 2006 it accepted appellant's claim for a recurrence of disability and subsequently authorized cervical fusion.[1] On March 1, 2007 appellant requested a schedule award.

On March 13, 2007 the Office asked appellant's treating physician, Dr. John Marouk, a Board-certified osteopath, specializing in neurological surgery, for an opinion as to whether appellant had a permanent impairment related to his accepted conditions and, if so, the degree of impairment. It also asked Dr. Marouk whether he believed that appellant had reached maximum medical improvement and, if so, when.

In a report dated April 19, 2007, Dr. Marouk provided an impairment rating relating to appellant's cervical injury.[2] Noting appellant's history of injury and treatment, he stated that appellant had residual symptoms related to his accepted conditions, including decreased range of motion of the cervical spine and persistent radicular pain and weakness involving the bicep and tricep muscles on the right side. Dr. Marouk indicated that appellant had numbness and tingling into the radial three digits on both hands. He opined that appellant reached maximum medical improvement (MMI) on February 7, 2007. Referring to Table 15-7, at page 404 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), Dr. Marouk concluded that, for his two-level decompression and arthrodesis, with residual signs and symptoms, appellant should receive a 10 percent impairment rating for the first level and a 1 percent impairment rating for the additional level; for his decreased range of motion of the cervical spine and flexion and extension, he should receive an additional 5 percent impairment rating; for decreased range of motion in rotation and side bending, an additional 5 percent rating; and for numbness into the hands (C6-7 distribution), he should receive an additional 5 percent impairment to the cervical spine, for a total impairment rating for the cervical spine of 26 percent.

The Office asked the district medical adviser (DMA) to review a statement of accepted facts and the entire medical record, including Dr. Marouk's March 19, 2007 report and to provide an opinion as to the degree of appellant's permanent impairment related to his accepted conditions. In a June 15, 2007 report, the medical adviser noted that, while Dr. Marouk had provided a whole person impairment based on the A.M.A., *Guides*' range of motion model, he had not evaluated appellant's upper extremity impairment. He recommended that the Office refer appellant for a second opinion examination with a Board-certified specialist. The medical adviser advised the Office to request an evaluation of upper extremity impairment caused by appellant's job-related cervical spine pathology under the nerve root and/or spinal cord section of the A.M.A., *Guides* at pages 423-24, Tables 15-15, 15-16 and 15-17.

The Office referred appellant to Dr. William D. Smith, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to whether appellant had any

[1] The Office accepted appellant's October 16, 2003 occupational disease claim for right carpal tunnel syndrome (CTS) and cervical radiculopathy. (File No. xxxxxx165). Appellant underwent right CTS release surgery on September 15, 2003. On June 8, 2007 his claims were combined, with File No. xxxxxx160 serving as the master file.

[2] He specifically stated that, as he did not treat appellant for his CTS, he would not address whether he had any permanent impairment related to that condition.

permanent impairment of his upper extremities under the fifth edition of the A.M.A., *Guides*. It specifically asked him to provide objective findings on examination, subjective complaints and his diagnosis of the conditions affecting the upper extremities; the percentage of impairment of one or both of the upper extremities, with an explanation of how he calculated it using applicable tables; and an opinion as to whether maximum medical improvement had occurred and, if so, the approximate date. Noting that, in addition to the cervical disorder, the Office was interested in an evaluation of any impairment of the upper extremities that was caused by and/or was a result of, the job-related cervical spine pathology, the Office directed Dr. Smith to the Nerve Root and/or Spinal Cord section of the A.M.A., *Guides* (Tables 15-15 and 15-17, pages 423 and 424).

In an August 7, 2007 report, Dr. Smith stated that he had reviewed the statement of accepted facts provided by the Office and the entire medical record. On examination, he found no right upper extremity weakness; mildly decreased range of motion; and subjective hypesthesia involving the right hand and fingertips. Neurologically, Dr. Smith observed no reflex impairment and there were no localized or lateralizing signs. He noted that radiographs of the cervical spine revealed a solid-appearing C5-7 fusion, with metal hardware in place. Dr. Smith opined that appellant had no permanent impairment related to his upper extremities and had reached MMI on February 2, 2007. He noted that appellant experienced chronic cervical and right shoulder pain, following successful cervical arthrodesis. Referring to Tables 15-7, 15-12 and 15-18 of the A.M.A., *Guides*, he assigned an 11 percent impairment rating to the body as a whole for the 2-level cervical fusion and a 10 percent impairment rating for residual limitation of cervical motion and chronic right shoulder pain, for a combined whole body impairment rating of 21 percent.

The Office forwarded Dr. Smith's August 7, 2007 report to the DMA for review. Based upon Dr. Smith's report, the medical adviser concluded that appellant had a zero percent impairment of his upper extremities. Noting that the spine is not a scheduled member of the body, he stated that Dr. Smith's whole body impairment ratings were not probative, because they did not conform to Office procedure. The medical adviser indicated that calculation of impairment of an extremity due to radiculopathy requires the use of Tables 15-15, 15-16 and 15-18 at page 424 of the fifth edition of the A.M.A., *Guides*.

In a decision dated September 7, 2007, the Office denied appellant's schedule award claim on the grounds that the medical evidence was insufficient to establish that he sustained permanent impairment to a scheduled member.

On October 1, 2007 appellant requested reconsideration, contending that the Office's second opinion physician did not follow Office procedures. By decision dated November 15, 2007, the Office denied his request for merit review.

On April 8, 2008 appellant again requested reconsideration. He submitted medical reports for the period November 21, 2007 through May 23, 2008, from Dr. Don R. Barney, a treating physician, who treated appellant for continuing neck pain, with radicular pain to his shoulder, arms and forearms and numbness and tingling in his arms and fingers. On April 9, 2008 Dr. Barney found loss of motion and strength in the upper extremities.

Appellant submitted additional medical evidence, including: follow-up reports from Dr. Denny E. Krout, a treating; a report of a January 3, 2008 functional capacity examination; a report of a December 31, 2007 magnetic resonance imaging scan of the cervical spine; and a December 27, 2007 report of an electromyogram and nerve conduction study. In a decision dated July 7, 2008, the Office again denied appellant's reconsideration request, finding that the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing federal regulations[4] 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[5] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[6]

No schedule award is payable for a member, function, or organ of the body that is not specified in the Act or in the implementing regulations. The Act identifies members such as the arm, leg, hand, foot, thumb and finger, functions such as loss of hearing and loss of vision and organs to include the eye.[7] Section 8107(c)(22) provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor. The Secretary of Labor has made such a determination and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.[8]

A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.[9]

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[10] While the claimant has the responsibility to establish entitlement to compensation, the

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[7] *See supra* note 3.

[8] 20 C.F.R. § 10.404; *Henry B. Ford, III*, 52 ECAB 220 (2001).

[9] *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215, 219 (1991).

[10] *Vanessa Young*, 55 ECAB 575 (2004).

Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[11] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[12]

ANALYSIS

Dr. Marouk, appellant's treating physician, found that appellant had reached maximum medical improvement on February 7, 2007 and also provided physical findings relating to his whole body impairment. Although he did not provide an opinion as to the degree of upper extremity impairment, his examination revealed radicular symptoms relating to his accepted condition, including pain and weakness involving bicep and tricep muscles on the right and numbness and tingling in his hands bilaterally. The DNA noted that Dr. Marouk's report was deficient in that it provided a whole body impairment rating, rather than an upper extremity assessment. He advised the Office to request an evaluation of upper extremity impairment caused by appellant's job-related cervical spine pathology under the nerve root and/or spinal cord section of the A.M.A., *Guides* at pages 423-24, Tables 15-15, 15-16 and 15-17.

The Office undertook further development of the medical evidence and referred appellant to Dr. Smith for a second opinion evaluation. Dr. Smith found no right upper extremity weakness; mildly decreased range of motion; and subjective hypesthesia involving the right hand and fingertips. He observed no reflex impairment and no localized or lateralizing signs. Dr. Smith opined that appellant had no permanent impairment related to his upper extremities and had reached MMI on February 2, 2007. He noted that appellant experienced chronic cervical and right shoulder pain, following successful cervical arthrodesis. Referring to Tables 15-7, 15-12 and 15-18 of the A.M.A., *Guides*, Dr. Smith assigned an 11 percent impairment rating to the body as a whole for the 2-level cervical fusion and a 10 percent impairment rating for residual limitation of cervical motion and chronic right shoulder pain, for a combined whole body impairment rating of 21 percent.

In reviewing Dr. Smith's August 7, 2007 report, the DMA concluded that appellant had a zero percent impairment of his upper extremities. Noting that the spine is not a scheduled member of the body, he stated that Dr. Smith's whole body impairment ratings were not probative, because they did not conform to Office procedure. He indicated that calculation of impairment of an extremity due to radiculopathy requires the use of Tables 15-15, 15-16 and 15-18 at page 424 of the fifth edition of the A.M.A., *Guides*. The Board finds that Dr. Smith's report does not provide sufficient information on which a determination can be made as to the extent of any permanent impairment to appellant's upper extremities. Dr. Smith provided general conclusions regarding range of motion, weakness and pain, rather than objective findings on examination, as requested by the Office. Further, he failed to follow the Office's direction to provide an impairment evaluation of any impairment of the upper extremities under the Nerve Root and/or Spinal Cord section of the A.M.A., *Guides* or to address appellant's radicular symptoms in his neck. Rather, Dr. Smith provided a whole body impairment rating, which does

[11] *Richard E. Simpson*, 55 ECAB 490 (2004).

[12] *Melvin James*, 55 ECAB 406 (2004).

not conform to Office procedures and, thus, is of diminished probative value[13] and insufficient to resolve the issue of the extent of any permanent impairment of appellant's upper extremities.

The Office undertook development of the medical evidence by referring appellant to Dr. Smith for a second opinion examination. Therefore, it has an obligation to secure a report adequately addressing the relevant issue of the extent of appellant's left lower extremity impairment.[14] The case will be remanded for the Office to obtain clarification of Dr. Smith's opinion on the extent of appellant's permanent impairment in accordance with the A.M.A., *Guides*. If the Office is unable to obtain such clarification, then appellant should be referred to another Board-certified specialist for an examination and an opinion on the issue of his permanent impairment.

CONCLUSION

The Board finds that the case is not in posture for decision. The case shall be remanded for further development of the medical evidence, to be followed by an appropriate merit decision.

[13] *Mary L. Henninger*, 52 ECAB 408 (2001).

[14] *See Peter C. Belkind*, 56 ECAB 580 (2005) (where the opinion of the Office's second opinion physician was unclear on whether the claimant had any permanent impairment due to his accepted employment injury, the Board found that the Office should secure a report adequately addressing the relevant issue). *See also Melvin James*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 7, 2007 is set aside and the case is remanded for further proceedings consistent with this decision by the Board.[15]

Issued: March 20, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[15] In light of the Board's ruling on the first issue, the second issue is moot.