

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Albany, NY, Employer**

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**Docket No. 08-2174
Issued: March 11, 2009**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 4, 2008 appellant filed a timely appeal from an October 1, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim for a schedule award and an April 29, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant's employment injury resulted in a permanent impairment to a scheduled member entitling him to a schedule award; and (2) whether the Office properly denied appellant's request for further merit review.

FACTUAL HISTORY

On March 30, 2000 appellant, then a 44-year-old rehabilitation employee, filed a claim for an occupational disease (Form CA-2) alleging that on September 27, 1996 he became aware of multiple injuries to his neck and back, including stenosis, a herniated cervical disc, a bulging disc in his low back, pain and numbness in the legs, arms and hands and muscle spasms. He

contended that on March 23, 1998 he realized these conditions were related to his prior employment injuries.¹ By decision dated April 3, 2000, the Office accepted appellant's claim for an exacerbation of a preexisting mild C6-7 radiculopathy. In an August 6, 2001 decision, it also accepted chronic bilateral C6-7 radiculopathy.

On September 6, 2002 appellant filed a claim for a schedule award (Form CA-7). In a letter dated September 24, 2002, the Office requested that appellant provide a physician's opinion evaluating the permanent impairment to his upper extremities in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), fifth edition, 2001.

In a February 25, 2004 medical report, Dr. Matthew J. Murnane, Board-certified in clinical neurophysiology and neurology, referenced a February 5, 2004 report where he determined that appellant sustained 30 to 40 percent whole body impairment.² He addressed a right median neuropathy and a borderline median neuropathy in appellant's wrists, finding that while the conditions were of an uncertain clinical significance, they might make the overall body disability closer to 40 percent.

In a letter dated May 28, 2004, the Office notified Dr. Murnane that his evaluation of permanent impairment should only address appellant's accepted conditions of mild chronic bilateral C6-7 radiculopathy. It also noted that schedule awards may not be paid for impairment of the back. The Office requested that Dr. Murnane provide the date of appellant's maximum medical improvement.

In a June 20, 2004 medical report, Dr. Murnane opined that appellant reached maximum medical improvement on February 18, 2004, the date of his last appointment. Nerve conduction studies and electromyography did not show any objective findings of radiculopathy. Physical examination revealed normal strength, preserved deep tendon reflexes and preserved sensation in the extremities. However, a magnetic resonance imaging (MRI) scan showed a severely degenerated disc at the C6-7 disc with some remodeling of the cervical cord and foraminal stenosis of the right side and a bulging disc at C5-6. Using Table 75, at page 113 of the A.M.A., *Guides*, fourth edition, Dr. Murnane determined that appellant sustained six percent impairment for intervertebral disc "unoperated on, stable, and with medically documented injury, pain and rigidity associated with moderate to severe degenerative changes on structural tests; includes unoperated on herniated nucleus pulposus with or without radiculopathy." He added one percent impairment for multiple level involvements to account for the C5-6 disc bulging, concluding that appellant had a seven percent whole body impairment. Dr. Murnane also addressed the injury model of assessment, discussed in Table 73, at page 110 of the A.M.A., *Guides*, fourth edition. He opined that this model of evaluation would require an estimation, as the impairment would fall between two categories, and was not the most appropriate form of evaluation.

¹ Appellant previously sustained a cervical, shoulder and low back strain on May 27, 1988 in his capacity as a mail handler.

² This document is absent from the record.

On March 23, 2005 appellant was examined by a second opinion physician, Dr. Patrick J. Hughes, a Board-certified neurologist. Based on a review of appellant's medical history, Dr. Hughes determined that appellant reached maximum medical improvement six months after his September 27, 1996 injury. Physical examination revealed normal strength and reflexes and intact sensation in the upper and lower extremities. Using the A.M.A., *Guides*, fifth edition, Dr. Hughes determined that appellant did not sustain any permanent impairment related to his work injury.

The Office determined that a conflict of medical opinion arose between Drs. Hughes and Murnane, as to appellant's degree of impairment. It referred the case to an impartial medical examiner, Dr. Gabriel Aguilar, a Board-certified neurological surgeon. The Office requested that Dr. Aguilar determine whether appellant sustained any impairment of his upper extremities.

In a December 27, 2005 medical report, Dr. Aguilar discussed appellant's recent MRI scan which revealed significant cervical spondylosis throughout the cervical spine with mild to moderate canal narrowing, particularly at the C3-4, C5-6 and C6-7 levels, with multiple foraminal narrowing and a small central disc protrusion at C3-4. An electromyogram (EMG) of the upper extremities showed mild-to-moderate median neuropathy at the wrists with no evidence of cervical radiculopathy. Dr. Aguilar determined that appellant reached maximum medical improvement in 1998. He concluded that, according to Table 15-5, at page 392 of the A.M.A., *Guides*, fifth edition, appellant was between categories two and three of the diagnostic-related estimate for cervical spine impairment and provided an estimated whole person impairment of 15 percent.³

On March 2, 2006 the Office referred appellant's case to an Office medical adviser to determine the extent of permanent impairment to appellant's extremities. In a March 26, 2006 report, the Office medical adviser concluded that Dr. Aguilar did not document any objective neurological deficiency of the upper or lower extremities and assessed a zero percent permanent impairment.

In a letter dated March 24, 2006, the Office requested Dr. Aguilar to clarify whether appellant had any impairment to his extremities. It sent a second request for information on July 25, 2006. In an August 10, 2006 letter, Dr. Aguilar replied that his medical reports and neurological examination were "quite clear." On September 21, 2006 the Office made a third request for information. Dr. Aguilar failed to reply.

The Office then referred appellant to a second impartial medical examiner, Dr. Robert Mantica, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. Dr. Mantica examined appellant on March 21, 2007. Appellant presented pain and numbness in his upper extremities. Physical examination revealed a decreased range of movement in the cervical spine, but no evidence of decreased range of motion in the upper or lower extremities. Dr. Mantica further noted intact sensation, symmetrical reflexes and full muscle strength in the upper and lower extremities. He agreed with Dr. Murnane's finding of a seven percent whole

³ Dr. Aguilar referenced an October 12, 2005 letter where he described the details of appellant's physical examination. This document is not a part of the record.

body impairment based on MRI scans reporting severe degenerative disc disease at C6-7 and, to a lesser extent, at C5-6.

In a May 21, 2007 report, the Office medical adviser determined that, based on Dr. Mantica's normal neurological examination, appellant sustained a zero percent permanent impairment in the upper and lower extremities. The medical adviser noted Dr. Mantica's determination of a seven percent whole person impairment based on structural degenerative changes to the spine but opined that the Office does not provide schedule awards based on whole person impairments due to spinal conditions.

By decision dated May 22, 2007, the Office denied appellant's claim for a schedule award, finding that the evidence did not demonstrate a permanent, measurable, scheduled impairment.

On August 20, 2007 appellant filed a request for reconsideration. He provided a July 27, 2007 medical report from his treating physician, Dr. Gary Kronick, a Board-certified internist, who opined that appellant had clear symptoms of pain, stiffness and spasticity of his muscles in both arms, which is currently under control due to the use of significant narcotic analgesics. Dr. Kronick also stated that appellant was symptomatically bothered by carpal tunnel syndrome on both of his hands.

The Office referred appellant's case to an Office medical adviser to determine permanent impairment of the upper extremities. In a September 13, 2007 medical report, the Office medical adviser found that Dr. Kronick's report did not include neurological findings and that carpal tunnel syndrome is not an accepted condition. He concluded that appellant sustained a zero percent permanent impairment to the upper extremities.

By decision dated October 1, 2007, the Office denied modification of the May 22, 2007 decision, determining that medical evidence was insufficient to establish that appellant had any permanent impairment due to his accepted conditions.

On January 28, 2008 appellant requested further merit review. He submitted medical reports dated June 28, 2007 through March 21, 2008 from Dr. Kronick, who briefly described various check-up appointments, and two medical reports dated October 26, 2007 and January 24, 2008 Dr. Charles J. Buttaci, Board-certified in physical medicine and rehabilitation and pain medicine, diagnosed axial neck pain with intermittent radicular symptoms in the bilateral upper limbs and requested authorization to perform an MRI scan. The January 24, 2008 report served as a second request for MRI scan authorization and described persisting pain in appellant's neck and back.

By decision dated April 29, 2008, the Office denied further merit review, on the grounds that appellant did not submit any additional evidence relevant to the issue of whether he was entitled to a schedule award.

LEGAL PRECEDENT -- ISSUE 1

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 the 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

A schedule award is not payable for the loss, or loss of use, of a member or function of the body not specifically listed in the Act and regulations.⁷ The members and functions listed in the schedule award provision and the regulations do not include impairments of the back, brain or the body as a whole.⁸ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.

ANALYSIS -- ISSUE 1

The issue is whether appellant established that he sustained any permanent impairment of a scheduled member entitling him to a schedule award. The Board finds this case is not in posture for a decision.

The Office accepted that appellant sustained chronic bilateral C6-7 radiculopathy due to his employment. Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine.⁹ However, as the schedule award provisions of the Act include the extremities, appellant may be entitled to a schedule award for the permanent impairment to his upper or lower extremities even though the case of the impairment originates in the spine.¹⁰

In a June 20, 2004 medical report, Dr. Murnane found that appellant sustained a seven percent whole body impairment based on a spinal condition. The Office referred appellant for a second opinion with Dr. Hughes, who determined that appellant did not sustain any permanent residuals from his employment injury.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *See id.* *See also James Kennedy, Jr.*, 40 ECAB 620 (1989); *Charles Dionne*, 38 ECAB 306 (1986).

⁷ *James E. Jenkins*, 39 ECAB 860 (1988).

⁸ *See* 5 U.S.C. § 8101(19); *John Litwinka*, 41 ECAB 956 (1990).

⁹ *See George E. Williams*, 44 ECAB 530, 533 (1993).

¹⁰ *See id.*

The Office properly found that a conflict of medical opinion existed between Drs. Murnane and Hughes as to appellant's degree of permanent impairment. The case was properly referred to an impartial medical examiner, Dr. Aguilar, to resolve the conflict and determine the degree of permanent impairment to appellant's upper extremities. He determined that appellant sustained 15 percent whole person impairment based on a diagnostic evaluation of the cervical spine. The Office medical adviser found that Dr. Aguilar did not document any objective neurological deficiencies of scheduled members. The Office subsequently requested clarification from Dr. Aguilar, however, he did not provide any additional opinion.

The Office properly referred appellant's case to a second impartial medical examiner, Dr. Mantica.¹¹ In a March 21, 2007 medical report, Dr. Mantica determined that appellant sustained a seven percent whole body impairment based on his degenerative disc disease. In the May 21, 2007 report, the Office medical adviser correctly stated that whole person impairments are not compensable under the schedule award provisions of the Act and regulations.¹² However, the Office did not seek clarification from Dr. Mantica as to the permanent impairment of a scheduled member.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.¹³ If the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rational, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹⁴ Here, Dr. Mantica failed to properly evaluate appellant's degree of permanent impairment to a scheduled member and therefore his report requires further clarification.

The Board will set aside the October 1, 2007 decision and remand the case for further development. The Office should seek a supplemental report from Dr. Mantica to resolve the conflict in medical opinion. Dr. Mantica should be asked to apply Chapter 16 of the A.M.A., *Guides* addressing whether appellant sustained an impairment of his upper extremities due to his accepted cervical condition. If he is unavailable or unwilling to clarify his opinion, the case should be referred to another impartial medical specialist.¹⁵ After such further development as the Office deems necessary, an appropriate decision should be issued regarding this matter.

¹¹ See *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹² See *supra* note 9.

¹³ *Raymond A. Fondots*, 53 ECAB 637 (2002); *April Ann Erickson*, 28 ECAB 336 (1977).

¹⁴ *Harold Travis*, 30 ECAB 1071 (1979).

¹⁵ *Id.*; see also *Guiseppe Aversa*, *supra* note 11.

CONCLUSION

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2008 and October 1, 2007 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this opinion.¹⁶

Issued: March 11, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ In light of the Board's determination on the first issue, the second issue is moot.