United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 08-1632**
	)	**Issued: May 22, 2009**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
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 May 20, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 27, 2007 merit decision concerning his entitlement to schedule award compensation and the Office's April 14, 2008 decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 36 percent permanent impairment of his right arm, a 22 percent permanent impairment of his left arm, and a 9 percent permanent impairment of his left leg due to his accepted cervical, thoracic and lumbar conditions and more than a 10 percent permanent impairment of his right arm due to his accepted carpal tunnel condition; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim.

FACTUAL HISTORY

This is the second appeal in this case. In the first appeal,[1] the Board issued a decision on February 26, 2007 setting aside the Office's August 2, 2005 decision and remanding the case to the Office for further development of the evidence with respect to appellant's entitlement to schedule award compensation. In two May 28, 2004 decisions, the Office had granted appellant schedule awards for a 10 percent impairment of his right arm due to his accepted carpal tunnel condition and for a 36 percent impairment of his right arm, a 22 percent impairment of his left arm, and a 9 percent impairment of his left leg due to his accepted cervical, thoracic and lumbar conditions.[2] It based its determination regarding schedule award entitlement on the December 24, 2002 and May 14, 2004 reports of Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon, who served as an Office district medical adviser. The Board found that additional development of the medical evidence was necessary to properly evaluate the permanent impairment of appellant's extremities because Dr. Simpson did not adequately explain his impairment ratings.

The Board noted that Dr. Simpson did not adequately explain how he derived at his impairment rating due to appellant's carpal tunnel syndrome. It appeared that he determined that appellant's right carpal tunnel condition fell within the first category discussed in section 16.5d of Chapter 16 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), *i.e.*, the category which provides that, if there are positive clinical findings of median nerve dysfunction and an electrical conduction delay, the condition is rated under the standards found earlier in Chapter 16 for evaluating sensory or motor deficits due to peripheral nerve disorders. Dr. Simpson then applied the portion of Chapter 16 which deals with sensory and motor deficits due to peripheral nerve injury and concluded that appellant had a 10 percent impairment of the right arm due to peripheral sensory deficit. Although the findings of nerve conduction testing obtained in February 2000 showed that the median nerve compression at the right wrist was moderate and the median nerve compression at the left wrist was mild, the findings of nerve conduction testing obtained in December 2000 and May 2002 showed normal results. The Board found that it was not clear why Dr. Simpson apparently concluded that appellant had an electrical conduction delay in the right median nerve and he did not discuss whether appellant still had clinical signs of carpal tunnel on the right. The Board determined, therefore, that additional evaluation was necessary to determine which of the three categories in Chapter 16 appellant falls under for determination of his impairment due to carpal tunnel syndrome.

The Board further indicated that additional clarification was also required for evaluation of any impairment rating which might be due to appellant for muscle weakness in the upper extremities. Dr. Simpson concluded that the impairment of appellant's upper extremity weakness should be determined by his grip strength deficits and granted him a 30 percent impairment rating on the right and a 20 percent impairment on the left. The Board noted, however, that grip strength ratings should only be included in the calculation of an upper extremity impairment if such a

[1] Docket No. 06-856 (issued February 26, 2007).

[2] In connection with a May 1998 claim, the Office accepted that appellant sustained an employment-related permanent aggravation of his preexisting cervical, thoracic and lumbar degenerative disc disease. In connection with a July 2000 claim, it accepted that appellant sustained employment-related bilateral carpal tunnel syndrome.

deficit has not been considered adequately by other impairment rating methods for the upper extremity. The record also contained the results of manual muscle testing for the upper extremities and it had not been explained why it would be more appropriate to use grip strength testing to evaluate appellant's upper extremity weakness. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office asked Dr. Simpson to provide further clarification of his December 24, 2002 and May 14, 2004 reports. In a June 22, 2007 report, Dr. Simpson extensively discussed the matters raised in the Board's February 22, 2007 decision, including his rationale for rating impairment due to carpal tunnel syndrome and for evaluating strength deficits. Dr. Simpson concluded that he had previously provided correct impairment ratings for appellant's extremities. He therefore found that appellant did not have more than a 36 percent permanent impairment of his right arm, a 22 percent permanent impairment of his left arm, and a 9 percent permanent impairment of his left leg due to his accepted cervical, thoracic and lumbar conditions and also did not have more than a 10 percent permanent impairment of his right arm due to his accepted carpal tunnel condition.

In a June 27, 2007 decision, the Office found that appellant did not meet his burden of proof to establish that he has more than a 36 percent permanent impairment of his right arm, a 22 percent permanent impairment of his left arm, and a 9 percent permanent impairment of his left leg due to his accepted cervical, thoracic and lumbar conditions and more than a 10 percent permanent impairment of his right arm due to his accepted carpal tunnel condition. Regarding the basis of this determination, it stated, "The files were reviewed by Dr. Simpson, who provided a comprehensive narrative report addressing the specific questions posed in the [Board] decision, and determined that the previous impairment ratings were correct."

On March 28, 2008 appellant requested reconsideration of his claim. In a March 5, 2008 statement, he argued that the Office did not assess all of his impairments, including impairment based in his neck. In an April 14, 2008 decision, the Office denied appellant's request for further review of the merits of his claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing 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 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.[5]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits, the Office is required by statute and regulation to make findings of fact.[6] Office procedure further specifies that a final decision of the Office must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."[7] These requirements are supported by Board precedent.[8]

ANALYSIS -- ISSUE 1

In two May 28, 2004 decisions, the Office had granted appellant schedule awards for a 10 percent impairment of his right arm due to his accepted carpal tunnel condition and for a 36 percent impairment of his right arm, a 22 percent impairment of his left arm, and a 9 percent impairment of his left leg due to his accepted cervical, thoracic and lumbar conditions. It based its determination regarding schedule award entitlement on the December 24, 2002 and May 14, 2004 reports of Dr. Simpson, a Board-certified orthopedic surgeon, who served as an Office district medical adviser. In a February 26, 2007 decision, the Board found that additional development of the medical evidence was necessary to properly evaluate the permanent impairment of appellant's extremities because Dr. Simpson did not adequately explain his impairment ratings. The Board provided extensive discussion of what type of clarification was needed.

On remand, Dr. Simpson produced a June 22, 2007 report in which he extensively discussed the matters raised in the Board's February 22, 2007 decision, including his rationale for rating impairment due to carpal tunnel syndrome and for evaluating strength deficits. In a June 27, 2007 decision, the Office found that appellant did not meet his burden of proof to establish that he has more than a 36 percent permanent impairment of his right arm, a 22 percent permanent impairment of his left arm, and a 9 percent permanent impairment of his left leg due to his accepted cervical, thoracic and lumbar conditions and more than a 10 percent permanent impairment of his right arm due to his accepted carpal tunnel condition. However, regarding the basis of this determination, the Office only stated, "The files were reviewed by Dr. Simpson, who provided a comprehensive narrative report addressing the specific questions posed in the [Board] decision, and determined that the previous impairment ratings were correct."

The Board finds that the Office did not provide adequate facts and findings in support of its decision. The Office did not provide any discussion of why it felt that Dr. Simpson's lengthy report accurately described the impairment of appellant's extremities. As noted above, a claimant must understand the precise defects of a claim and the kind of evidence which would tend to overcome it. Given the Office's lack of explanation, appellant would not adequately understand the defects of his claim. Therefore, the case is remanded to the Office so that it might

[6] 5 U.S.C. § 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office "shall contain findings of fact and a statement of reasons."

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

[8] *See James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

provide adequate facts and findings with respect to appellant's permanent impairment. After such development as it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture regarding whether appellant met his burden of proof to establish that he has more than a 36 percent permanent impairment of his right arm, a 22 percent permanent impairment of his left arm, and a 9 percent permanent impairment of his left leg due to his accepted cervical, thoracic and lumbar conditions and more than a 10 percent permanent impairment of his right arm due to his accepted carpal tunnel condition.[9]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 27, 2007 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 22, 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

[9] Given the Board's finding regarding the merit issue of the present case, it is not necessary for the Board to consider the nonmerit issue.