

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

L.E., Appellant)	
)	
and)	Docket Nos. 08-1220 & 08-1367
)	
U.S. POSTAL SERVICE, POST OFFICE, Milton, FL, Employer)	Issued: September 3, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2008 appellant timely appealed the December 31, 2007 decision of the Office of Workers' Compensation Programs, which denied reconsideration of an October 2, 2007 schedule award for impairment of the left lower extremity.¹ Additionally, on April 8, 2008 he timely appealed the Office's March 12, 2008 decision, denying a schedule award for the right lower extremity.² 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 has greater than 19 percent impairment of the left lower extremity, for which he received a schedule award; (2) whether appellant has a ratable impairment of the right lower extremity; and (3) whether the Office properly denied appellant's October 16, 2007 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹ Docket No. 08-1220 (issued December 31, 2007). Given the timing of the appeal, the Board also has jurisdiction over the October 2, 2007 schedule award.

² Docket No. 08-1367 (issued March 12, 2008).

FACTUAL HISTORY

On January 17, 1977 appellant, then a 38-year-old rural letter carrier, was involved in an employment-related motor vehicle accident. The Office accepted his claim for herniated nucleus pulposus at L5-S1. On April 13, 1977 appellant underwent a hemilaminectomy at L5 on the left with excision of the L5 disc. He last worked for the employing establishment on April 23, 1988.

On June 30, 2003 appellant received a schedule award for three percent impairment of the left lower extremity. The Office based the award on the February 13, 2002 report of its district medical adviser, Dr. Harry L. Collins, Jr., a Board-certified orthopedic surgeon. Dr. Collins found three percent impairment of the left lower extremity due to sensory deficit involving the S1 nerve root. He relied on the March 1, 2001 examination findings of Dr. Raymond R. Fletcher, a Board-certified orthopedic surgeon and Office referral physician.

On June 7, 2007 appellant filed a claim (Form CA-7) for an additional schedule award. Dr. Kurt A. Krueger, appellant's long-time attending physician, examined him on June 11, 2007 and found 14 percent impairment of the lower extremity due to loss of function from sensory deficit, pain or discomfort.³ He also found six percent lower extremity impairment due to loss of function from decreased strength. The specific nerve branches affected were the left L2, L3, L4 and L5. Dr. Krueger identified March 19, 2007 as the date appellant reached maximum medical improvement.

In a report dated July 19, 2007, the district medical adviser, Dr. James W. Dyer, reviewed Dr. Krueger's recent report and concurred with the sensory and motor deficits identified by appellant's treating physician.⁴ Combining the 14 and 6 percent ratings found by Dr. Krueger resulted in a left lower extremity impairment of 19 percent.

By letter dated August 20, 2007, appellant asked Dr. Krueger to prepare an additional left lower extremity impairment rating for muscle atrophy. He also asked that Dr. Krueger rate his right lower extremity. Dr. Krueger's August 30, 2007 treatment notes indicated that the left leg pain was all he really had to discuss regarding appellant's impairment rating. With respect to appellant's right lower extremity, Dr. Krueger noted that he had not treated appellant for his right leg because "his complaints were primarily left side." Accordingly, he advised that he could not address the impairment issues on the right side. Appellant subsequently asked that he be allowed to change attending physicians, which the Office approved.⁵

³ Dr. Krueger is a Board-certified anesthesiologist with a subspecialty in pain medicine. He began treating appellant in August 1996. Dr. Krueger's June 11, 2007 report indicated, among other things, that appellant continued to have low back and "primarily left lower extremity pain" that was rated on average 4 to 5 on a scale of 0 to 10. His June 11, 2007 impairment rating was in response to an Office development letter dated May 14, 2007.

⁴ Dr. Dyer is a Board-certified orthopedic surgeon.

⁵ Effective December 21, 2007, the Office recognized Dr. Ronald F. Pendleton as appellant's treating physician. Dr. Pendleton is a Board-certified family practitioner.

On October 2, 2007 the Office granted an additional schedule award for 16 percent impairment of the left lower extremity.⁶ The award covered a period of 46.08 weeks from September 30, 2007 through August 17, 2008.

Appellant requested reconsideration on October 16, 2007. He argued that he was entitled to at least an additional 11 percent impairment due to muscle atrophy in the left thigh and calf. Appellant also claimed that his left leg impairment rating should have included a rating for the S1 nerve root. Lastly, he argued that he should have also been rated for his right lower extremity. In his request for reconsideration, appellant referenced various medical records dating back to 1990. However, he did not submit any additional evidence.

In a decision dated December 31, 2007, the Office denied appellant's request for reconsideration. It noted that appellant had not submitted any medical evidence relevant to his entitlement to a schedule award. Additionally, the Office explained that appellant's own belief that he was entitled to additional impairment for muscle atrophy was not sufficient. Finally, it explained that, because no formal decision had been issued regarding entitlement to a schedule award for appellant's right lower extremity, there was no right of appeal on that particular issue.

In a report dated January 3, 2008, Dr. Dyer, the district medical adviser, noted that appellant had chronic low back pain and left leg pain due to postlaminectomy syndrome and lumbar facet syndrome. He also indicated that there were no notations made of symptoms of the right leg due to myelopathy or radiculopathy. Dr. Dyer explained that there were no objective findings in the right lower extremity or any other basis upon which to assign a schedule award. Accordingly, he found zero impairment of the right lower extremity.

On January 9, 2008 appellant filed a claim for a schedule award regarding his "right leg." However, he did not submit any current medical evidence regarding permanent impairment of the right lower extremity. Appellant continued to question why Dr. Krueger declined to provide an impairment rating for his right lower extremity.

Under cover letter dated February 4, 2008, appellant submitted medical records from a July-August 1979 hospital admission at Tulane Medical Center. The discharge summary referenced pain emanating from the lower spine of the posterior thigh in the back of the leg into the left foot. There was also mention of numbness and paresthesias in the left foot. The pain was reportedly most intense when ambulating on flat surfaces. It was further noted that when driving appellant also had pain in the right lower extremity. A July 31, 1979 electromyography revealed findings compatible with mild chronic neurogenic atrophy at L5-S1 bilaterally. Appellant believed the above-noted evidence supported his claim for permanent impairment of the right lower extremity, and he asked the Office to issue a formal decision either granting or denying a schedule award.

By decision dated March 12, 2008, the Office denied appellant's claim for a schedule award for the right lower extremity.

⁶ The Office reduced the district medical adviser's recommended award of 19 percent by the 3 percent left lower extremity impairment previously awarded on June 30, 2003.

LEGAL PRECEDENT -- ISSUES 1&2

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁷ 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.⁸ The Act's list of schedule members includes the eye, arm, hand, fingers, leg, foot and toes.⁹ Additionally, the Act specifically provides for compensation for loss of hearing and loss of vision.¹⁰ By authority granted under the Act, the Secretary of Labor added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the list of schedule members.¹¹ Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.¹²

The Act does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.¹³ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).¹⁴

ANALYSIS -- ISSUES 1&2

Appellant's argument before the Board is that he is dissatisfied with his then-attending physician's June 11, 2007 impairment rating. Citing decades-old medical evidence, he believes that Dr. Krueger should have included additional impairment for S1 nerve root involvement, left thigh and calf muscle atrophy and paresthesias of the left foot. Appellant believes the muscle atrophy alone is worth an additional 11 percent impairment of the left lower extremity. In addition, he appears to fault the Office and the district medical adviser for not demanding more of Dr. Krueger. The onus is not on the Office to develop appellant's schedule award claim.¹⁵ Furthermore, the Office already wrote to Dr. Krueger on May 14, 2007 requesting that he provide an impairment rating under the A.M.A., *Guides* (5th ed. 2001). In response, it received

⁷ For a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

⁸ *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

⁹ 5 U.S.C. § 8107(c).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8107(c)(22); 20 C.F.R. § 10.404(a) (2008).

¹² 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹³ 20 C.F.R. § 10.404.

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

¹⁵ An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. *Amelia S. Jefferson*, 57 ECAB 183, 187 (2005).

the June 11, 2007 impairment rating. Appellant later questioned Dr. Krueger about what he perceived to be additional impairments affecting his left and right lower extremities. Dr. Krueger's August 30, 2007 treatment notes clearly reflect his belief that the June 11, 2007 impairment rating accurately reflected the extent of appellant's left lower extremity impairment. In addition, with respect to the right lower extremity, he noted that he had not treated appellant for his right leg because his complaints were primarily on the left side. Dr. Krueger declined to rate appellant's right lower extremity and recommended that he see another physician for this purpose.

The Office cannot force Dr. Krueger to rate appellant on matters that he feels are either unwarranted or for which he believes he is not in a position to accurately assess. In addition, contrary to appellant's contention, Dr. Krueger did not impede him from obtaining a rating elsewhere. Notwithstanding appellant's belief to the contrary, the record is devoid of any current medical evidence clearly demonstrating the existence of a permanent impairment of the right lower extremity. Beginning in August 1996, Dr. Krueger treated appellant for more than a decade and his focus was primarily on his low back and left lower extremity. The district medical adviser reviewed the record on January 3, 2008 and found that there were no objective findings in the right lower extremity or any other basis upon which to assign a schedule award. The Board finds that appellant has not demonstrated that he has a ratable impairment of the right lower extremity.

As to appellant's left lower extremity impairment, the district medical adviser identified a Grade 2 sensory deficit and a Grade 4 motor deficit affecting the left L2, L3, L4 and L5 nerve roots. The district medical adviser reportedly relied on Tables 15-15, 15-16 and 15-18, A.M.A., *Guides* 424, as the basis for his impairment rating. Tables 15-15 and 15-16 provide a classification system for impairments due to sensory and motor deficits. The classifications range from Grade 0 to 5. As noted, Dr. Dyer identified a Grade 2 sensory deficit and a Grade 4 motor deficit. The classification system is used in conjunction with Table 15-18 to determine the lower extremity impairment due to sensory loss and/or motor deficits.

Other than noting the tables he relied upon, the district medical adviser did not explain how he arrived at the overall 19 percent impairment rating of the left lower extremity. This omission is particularly troublesome given that Table 15-18 does not provide a rating for impairment involving L2 nerve root, which is one of the four affected nerve roots identified by both Dr. Krueger and the district medical adviser. While Dr. Dyer agreed with Dr. Krueger's impairment rating, it is unclear from either physician's report how they calculated a 14 percent sensory deficit and a 6 percent motor deficit. Accordingly, the Board finds that the case is not in posture for decision. The case shall be remanded to the Office in order to obtain clarification, including detailed computations from the district medical adviser regarding the basis for the 19 percent impairment rating of the left lower extremity.

The Board also notes that, while the Office reduced the latest schedule award by 3 percent, the basis for this action is not entirely clear. The Act and implementing regulations provide for the reduction of compensation for subsequent injury to the same schedule member.¹⁶ Benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of

¹⁶ 5 U.S.C. § 8108; *see* 20 C.F.R. § 10.404(c).

the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹⁷

The June 30, 2003 award of 3 percent impairment was based on sensory deficit affecting the S1 nerve root. However, the latest impairment rating does not include sensory and/or motor deficits affecting the S1 nerve root. Neither the district medical adviser nor the Office has explained why offset is appropriate in this instance. Accordingly, the district medical adviser should also address whether the latest impairment rating would in whole or in part duplicate the prior schedule award.

CONCLUSION

The Board finds that appellant failed to establish entitlement to a schedule award for his right lower extremity. As to the extent of his left lower extremity impairment, the Board finds that the case is not in posture for decision.¹⁸

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2008 decision of the Office of Workers' Compensation Programs is affirmed. The December 31 and October 2, 2007 Office decisions are set aside, and the case is remanded for further action consistent with this decision.

Issued: September 3, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁷ 20 C.F.R. § 10.404(c)(1), (2).

¹⁸ In light of the Board's disposition of the October 2, 2007 schedule award, the Office's December 31, 2007 decision denying reconsideration is rendered moot.