

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

J.S., Appellant)
and) Docket No. 09-1448
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Anniston, AL, Employer)
Issued: April 21, 2010

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2009 appellant filed a timely appeal from the November 21, 2008 decision of the Office of Workers' Compensation Programs. Under 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 a three percent permanent impairment to his right lower extremity.

FACTUAL HISTORY

On September 23, 1997 appellant, a 68-year-old pipe fitter, injured his low back while pulling a heating coil. He filed a claim for benefits on September 24, 1997, which the Office

accepted for lumbosacral sprain and temporary aggravation of lumbar degenerative disc disease.¹ On May 7, 2008 appellant filed a Form CA-7 claim for a schedule award.

In a report dated July 10, 2007, Dr. Duane Tippets, a specialist in orthopedic surgery, reviewed the results of a July 10, 2007 functional capacity evaluation (FCE) and found that appellant had eight percent whole person impairment based on loss of motion in his right hip, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition.²

In a report dated August 8, 2007, an Office medical adviser stated that there was no basis for an impairment rating given the fact that Dr. Tippet provided a rating based on a whole person impairment. He noted that Dr. Tippet calculated his impairment based on loss of motion in appellant's right hip, despite the fact that the Office did not accept any condition for the right hip.

In an August 28, 2007 report, Dr. John R. Payne, Board-certified in orthopedic surgery, stated that appellant had a nine percent whole person impairment rating.

By decision dated September 26, 2007, the Office denied appellant's claim for a schedule award. It found that he failed to submit sufficient medical evidence to establish that he had any permanent impairment due to his accepted low back condition.

On December 5, 2007 appellant requested reconsideration of the September 26, 2007 decision.

In a treatment note dated November 14, 2007, received by the Office on December 12, 2007, Dr. Payne found that appellant had a 19 percent impairment of the lower extremity based on the following findings: a 5 percent impairment for loss of hip flexion, related to the lower back; a 5 percent impairment for loss of lower back extension related to the lower back; a 5 percent impairment for loss of abduction related to the lower back; and a 5 percent impairment for loss of adduction related to the lower back, which totaled a 19 percent lower extremity impairment pursuant to the Combined Values Chart at page 604 of the A.M.A., *Guides*.

In a January 11, 2008 report, the Office medical adviser found that there was no factual basis for an impairment rating. He reiterated that hip dysfunction was not part of the accepted lower back injury and therefore did not provide a basis for any schedule award.

By decision dated January 16, 2008, the Office denied modification of the September 26, 2007 decision.

¹ The claim form is not contained in the instant record.

² Dr. Tippets based his impairment rating for loss of motion of the right hip on the following findings: 95 degrees flexion, for a two percent whole person impairment; 18 degrees extension, for a two percent whole person impairment; 10 degrees abduction, for a two percent whole person impairment; and 20 degrees adduction, for a two percent whole person impairment.

On March 5, 2008 appellant requested reconsideration.

In a February 20, 2008 report, Dr. Payne reviewed the history of injury and noted that a July 20, 2006 magnetic resonance imaging (MRI) scan indicated degenerative or damaged discs at L4-5 and L5-S1, with mild relative stenosis. He noted that appellant had stiffness in his right hip as shown by the FCE, possibly caused by arthritis.

By decision dated May 30, 2008, the Office denied modification of the September 26, 2007 decision.

Dr. Payne had appellant undergo nerve conduction studies on June 19, 2008. The results included a mild right L5 and S1 radiculopathy and a mild left S1 radiculopathy.

On September 4, 2008 appellant requested reconsideration.

In order to determine whether appellant sustained any permanent impairment related to his accepted lower back condition, the Office referred him to Dr. Alexander Doman, Board-certified in orthopedic surgery, for a second opinion examination. In an October 23, 2008 report, Dr. Doman noted that x-rays of the lumbar spine showed that appellant had degenerative disc disease at the L4-5 level. He opined, however, that appellant did not sustain a permanent aggravation of his lumbar degenerative disc disease. Dr. Doman noted that the claim had been accepted for a temporary aggravation of lumbar degenerative disc disease, but that this was at most a mild, temporary aggravation of six months' duration which had long since ceased. He found that appellant's subjective complaints were disproportionate to the objective findings and opined that he was exaggerating his complaints during the examination.

In a report dated November 14, 2008, the Office medical adviser reviewed the results of the June 19, 2008 nerve conduction study (NCS) and found that appellant had a three percent impairment of his right lower extremity. He stated that the NCS results indicated a right-sided Grade 4 sensory deficit at L5-S1, which yielded a three percent right lower extremity impairment pursuant to Tables 15-15 and 15-18 at page 424 of the A.M.A., *Guides*.

On November 21, 2008 the Office granted appellant a schedule award for a three percent permanent impairment to his right lower extremity for the period July 10 to September 8, 2007, for a total of 8.64 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For

³ 5 U.S.C. §§ 8101-8193; see 5 U.S.C. § 8107(c).

⁴ *Id.* at § 8107(c)(19).

consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* fifth edition as the standard to be used for evaluating schedule losses.⁵ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁶

ANALYSIS

In the instant case, the Office accepted a claim for lumbosacral sprain and temporary aggravation of lumbar degenerative disc disease. The Office medical adviser determined that appellant had a three percent permanent impairment of the right lower extremity based on the June 19, 2008 NCS, which showed right-sided L5-S1 lumbar radiculopathy stemming from appellant's accepted conditions. He noted that the nerve conduction findings demonstrated moderate sensory loss at the L5 and S1 nerve roots and applied this to the relevant tables and charts of the A.M.A., *Guides*. The Office medical adviser advised that appellant had a 25 percent sensory deficit maximum 25 percent allowable for sensory deficit pursuant to Table 15-15, page 424 of the A.M.A., *Guides*; he relied on Table 15-18, page 424 of the A.M.A., *Guides* to derive a 5 percent impairment for sensory deficit at the L5 level and a 5 percent impairment for the S1 level. He found that the L5 and S1 impairments, were each 5 percent, which he then multiplied by 25 percent for a total 2.5 percent impairment; rounded off, this amounted to a three percent right lower extremity impairment. The Office properly relied on the Office medical adviser's opinion in granting appellant an award for a three percent right lower extremity impairment.

The reports from Dr. Payne do not establish that appellant had a ratable impairment causally related to an accepted condition. His ratings for an impairment based on loss of motion in the right hip are not sufficient to establish impairment because they are not based on an accepted condition. Dr. Payne's reports do not conform to the A.M.A., *Guides*, as he failed to sufficiently explain how a right hip impairment was related to appellant's accepted lumbosacral sprain and temporary aggravation of lumbar degenerative disc disease. In addition, both Dr. Payne and Dr. Tippet provided impairment ratings for a whole person impairment of the lumbar spine; however, the Board has long held that a schedule award is not payable for an impairment of the whole person.⁷ Lastly, the Office referred appellant for a second opinion impairment evaluation with Dr. Doman, who examined him and found no basis for a ratable impairment.

As appellant did not submit any medical evidence to support an additional schedule award greater than the three percent impairment for the right lower extremity already awarded, the Board will affirm the Office's November 21, 2008 decision.

As there is no other medical evidence establishing that appellant sustained any additional permanent impairment, the Office properly found that he was not entitled to more than the three percent impairment of the right lower extremity already awarded.

⁵ 20 C.F.R. § 10.404.

⁶ *Veronica Williams*, 56 ECAB 367, 370 (2005).

⁷ *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

CONCLUSION

The Board finds that appellant has no more than a three percent additional impairment of the right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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