United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 09-2301**
	)	**Issued: August 13, 2010**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Winter Haven, FL, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 16, 2009 appellant, through her representative, filed a timely appeal of the September 3, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration and the August 18, 2009 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than eight percent impairment to his left leg or any penile impairment causally related to his accepted back conditions; and (2) whether the Office abused its discretion in denying his request for reconsideration under section 8128(a).

On appeal appellant contends that he is entitled to a schedule award for penile impairment causally related to his accepted back conditions.

FACTUAL HISTORY

On May 6, 2004 appellant, then a 57-year-old group leader/custodian, sustained a lumbar sprain while mopping the front lobby floor. He stopped work on May 6, 2004. Appellant

returned to work on May 7, 2004 and worked light duty intermittently with no lifting over 20 pounds and no prolonged standing or sitting. On December 4, 2008 the Office accepted an aggravation of a herniated disc at L2-3 and L3-4.[1] On June 10, 2009 appellant filed a claim for a schedule award.

In a February 17, 2009 report, Dr. Frank D. Vrionis, a Board-certified neurosurgeon of professorial rank, noted pain, numbness and weakness in appellant's left lower extremity. A recent magnetic resonance imaging (MRI) scan revealed moderate to severe stenosis at L3-4 and to lesser degrees at L2-3 and L4-5. Appellant also had L3-4 lateral disc herniation. These conditions were most likely responsible for his left lower extremity radiculopathy.

On June 12, 2009 the Office asked appellant to provide a medical report addressing the issue of whether he had impairment to his lower extremities due to his accepted back conditions. It advised that Dr. Vrionis should use the 6th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) in calculating any lower extremity impairment. The Office provided a lower extremity impairment worksheet for appellant to complete and send with his report.

On July 21, 2009 Dr. Rodolfo D. Eichberg, a Board-certified physiatrist, reviewed appellant's medical history, including an MRI scan of the lumbar spine performed on December 23, 2008. He provided detailed findings on physical examination. Dr. Eichberg noted that straight-leg raising was 80 degrees on the right and 70 degrees on the left. Hamstring muscles were mildly tight on the right and moderately tight on the left. Appellant experienced pain in the sacroiliac region when the hamstring muscles were stretched. He had a 4/5 grade weakness of his left toe extensors. All other muscles in both lower extremities were 5/5. Appellant had decreased sensation to pinprick in the entire lateral left thigh and proximal left leg. He had left lower extremity pain and weakness in the L4-5 distribution and significant spinal stenosis at L3-4 and at L2-3. Appellant had impairment in the sciatic nerve distribution with mild sensory deficits in the left lateral thigh and objective atrophy of the calf. Dr. Eichberg opined that he had eight percent left leg impairment, including seven percent motor deficit and one percent sensory deficit, based on Table 16.12 at page 535 of the 6th edition of the A.M.A., *Guides*. Appellant's sexual activity had decreased since 2005 and his last erection was in 2007. Dr. Eichberg found that appellant's sexual dysfunction was neurogenic and based on the same nerve roots causing his sciatic dysfunction. He opined that he had Class 3 sexual dysfunction based on Table 13.15 at page 338 which equaled 11 percent whole person impairment.

On August 12, 2009 an Office medical adviser reported that Dr. Eichberg employed the 6th edition of the A.M.A., *Guides* and his report was thorough and objective. He noted that Dr. Eichberg found an eight percent impairment of the left lower extremity, including seven percent for motor deficit and one percent for sensory deficit, related to an L4 nerve root deficit.

[1] Appellant has three separate work-related conditions: A left shoulder and arm sprain, right carpal tunnel syndrome and degeneration of a cervical disc.

The Office medical adviser noted that appellant did not have an accepted condition involving sexual dysfunction.[2]

By decision dated August 18, 2009, the Office granted a schedule award for 23.04 weeks of compensation based on eight percent left leg impairment.[3]

On August 26, 2009 appellant requested reconsideration. He noted that Dr. Eichberg found impairment for sexual dysfunction related to the sciatic nerve root, the same nerve root causing his left leg impairment. Appellant contended that he was entitled to a schedule award for penile impairment because it was causally related to his accepted back conditions. In an August 10, 2009 report, received by the Office on August 20, 2009, Dr. William Vargas, an attending anesthesiologist, described his course of treatment of appellant's lumbosacral radiculitis. Dr. Vargas did not address the issue of permanent impairment.

By a September 3, 2009 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant further merit review.[4]

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[5] and its implementing regulations[6] 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 6th edition of the A.M.A., *Guides* has been adopted by the Office as the appropriate standard for evaluating schedule losses.[7]

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[2] *See* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

[3] The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by eight percent equals 23.04 weeks of compensation.

[4] Subsequent to the September 3, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404; FECA Bulletin No. 9-03, issued March 15, 2009 (providing for use of the 6th edition of the A.M.A., *Guides* effective May 1, 2009).

[7] *Id.*.

Neither, the Act nor the regulations provide for the payment of a schedule award for any impairment of the back.[8] The Act excludes the back from the definition of "organ."[9] A claimant may be entitled to a schedule award for permanent impairment of an extremity even though the cause of the impairment originated in the spine.[10] Section 8107 of the Act specifies bodily members or functions as the upper and lower extremities, eye or vision and loss of hearing.[11] No schedule award is payable for any member, function or organ of the body not listed in section 8107 or its implementing regulations.[12] Pursuant to the authority provided by 5 U.S.C. § 8107(c)(22), the Secretary added as organs to the compensation schedule which include the breast, kidney, larynx, lung, tongue, penis, testicle, ovary, uterus/cervix and vulva/vagina.[13]

ANALYSIS -- ISSUE 1

The Board finds that appellant has no more than eight percent left leg impairment.

Dr. Eichberg reviewed appellant's medical history and test results, including a lumbar spine MRI scan. He provided detailed findings on physical examination. Dr. Eichberg noted that straight-leg raising was 80 degrees on the right and 70 degrees on the left. Appellant felt pain in the sacroiliac region when the hamstring muscles were stretched. He had a 4/5 grade weakness of his left toe extensors. There was decreased sensation to pinprick in the lateral left thigh and proximal left leg. Appellant had left lower extremity pain and weakness in the L4-5 distribution and significant spinal stenosis at L3-4 and at L2-3. There was impairment in the sciatic nerve distribution with mild sensory deficit in the left lateral thigh and objective atrophy of the calf. Dr. Eichberg found that appellant had eight percent left leg impairment, including seven percent motor deficit and one percent sensory deficit, based on Table 16.12 at page 535 of the 6th edition of the A.M.A., *Guides*.

The Board finds that the report of Dr. Eichberg establishes that appellant has no more than eight percent impairment to his left leg. Dr. Eichberg's report is based on a review of the medical history and findings on physical examination. He based the left lower extremity impairment rating on the 6th edition of the A.M.A., *Guides* and referenced the applicable section. Dr. Eichberg's report established that appellant had no more than eight percent left leg impairment.

Dr. Eichberg noted that appellant's sexual activity had decreased since 2005 and his last erection was in 2007. He found that appellant's sexual dysfunction was caused by the same sciatic nerve roots in the spine that caused his left leg impairment. Dr. Eichberg found 11 percent whole person impairment based on a Class 3 sexual dysfunction according to Table 13-

[8] *See Tomas Martinez,* 54 ECAB 623 (2003).

[9] 5 U.S.C. § 8101(19).

[10] *See Tomas Martinez, supra* note 8.

[11] 5 U.S.C. § 8107.

[12] *See Janet C. Anderson,* 54 ECAB 394 (2003).

[13] 20 C.F.R. § 404.

15 at page 338 of the 6th edition of the A.M.A., *Guides*. The Office medical adviser erroneously rejected this rating on the basis that a sexual dysfunction condition had not been accepted. The Board notes that impairment extending from the spine to a member or organ defined under the schedule may be eligible for consideration of a schedule award.

The Board finds that further development is required on the issue of whether appellant has penile impairment causally related to his accepted back conditions, a lumbar sprain and aggravation of a herniated disc at L2-3 and L3-4. On remand the Office should refer the case record to an Office medical adviser for an opinion as to whether the medical evidence establishes that appellant's sexual dysfunction is causally related to his accepted lumbar spine conditions. If the Office medical adviser finds a work-related penile impairment, he should determine the appropriate impairment percentage using the A.M.A., *Guides*, sixth edition and the Office's procedure manual. After such further development, the Office should issue an appropriate decision on appellant's claim.[14]

In light of the resolution of the first issue, the second issue is moot.

CONCLUSION

The Board finds that appellant has no more than eight percent impairment to his left leg. The Board finds that further development of the medical evidence is required on the issue of whether he has any penile impairment.

[14] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4d(2) and 3.700, Exhibit 1: Use of the Sixth Edition of A.M.A., *Guides* (January 2010) (explaining conversion of whole person impairment to schedule organ impairment and proper usage of the sixth edition).

ORDER

IT IS HEREBY ORDERED THAT the September 3 and August 18, 2009 decisions of the Office of Workers' Compensation Programs are affirmed as to appellant's left lower extremity impairment. The case is remanded to the Office for development on the issue of penile impairment in conformance with this decision.

Issued: August 13, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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