United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 10-774**
	)	**Issued: December 7, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
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 January 27, 2010 appellant filed a timely appeal from the October 26, 2009 decision of the Office of Workers' Compensation Programs denying his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established any permanent impairment for schedule award purposes.

On appeal, appellant states that the Office's decision was issued before he reached maximum medical improvement and was denied due to this fact.

FACTUAL HISTORY

On December 17, 2005 appellant filed a traumatic injury claim alleging that on that day he injured his lower back after he fell on a step delivering phone books. On February 28, 2006 the Office accepted his claim for fracture sacrum/coccyx, closed and displaced lumbar intervert

disc. The claim was also accepted for sprain/strain of lumbar region and lumbar radiculopathy. The Office paid compensation benefits. On January 16, 2007 appellant had a left L4-5 laminectomy with decompression of nerve roots including partial facetectomy, foraminotomy and/or excision of herniated disc performed.

In a March 31, 2009 report, Dr. William C. Watters, III, appellant's treating Board-certified orthopedic surgeon, stated that appellant had an impairment rating to the whole body of 18 percent.[1] However, he noted that appellant was about to undergo a spinal cord stimulator implant and so he was not at maximum medical improvement.

On June 1, 2009 appellant had a laminectomy for implantation of neural stimulator electrodes and insertion or placement of spinal neural stimulator pulse generator.

On June 4, 2009 appellant filed a claim for a schedule award.

The Office medical adviser reviewed appellant's case for an opinion with regards to permanent impairment. In a report dated August 22, 2009, he noted that the Office does not award impairment due to abnormalities of the spine or radiculopathy and that therefore the award does not conform to the Office's requirements and procedures. The Office medical adviser further noted that instead of radiculopathy, awards can be based on peripheral nerves. He recommended that the Office ask Dr. Watters to calculate the impairment of the lower extremities using the peripheral nerves instead of the nerve roots.

By letter dated September 1, 2009, the Office asked Dr. Watters to render an opinion with regards to appellant's permanent impairment pursuant to the A.M.A., *Guides* (6th ed. 2009). In a September 30, 2009 report, Dr. Watters noted that appellant had not yet reached maximum medical improvement. He noted that appellant had implantation of a neural stimulator on June 1, 2009 and that adjustments are being made and his leg pain was decreasing.

In a decision dated October 23, 2009, corrected and reissued on October 26, 2009, the Office denied appellant's claim as he had not met the requirements of showing entitlement to a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing federal regulations,[3] 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 for all

[1] An unsigned impairment rating of the same date indicates that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* A.M.A., *Guides* (6th ed. 2009) were applied and that appellant had a final lower extremity impairment of 18 percent.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4] For decisions issued after May 1, 2009, the sixth edition will be used.[5]

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. The Board has defined maximum medical improvement as meaning that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[6]

Office procedures provide that maximum medical improvement must be reached before a schedule award is made.[7] After obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for a rationalized opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*.[8]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award based on an employment-related impairment. Dr. Watters, appellant's treating orthopedic surgeon, opined on September 30, 2009 that appellant had not reached maximum medical improvement. In fact, he noted that appellant had a neural stimulator implanted on June 1, 2009, that adjustments were still being made and that his leg pain was decreasing. There is no other medical evidence of record prior to the October 23, 2009 decision that indicates that appellant had reached maximum medical improvement. Accordingly, as appellant had not yet reached maximum medical improvement when the Office issued its decision, a schedule award was not appropriate at that time.[9]

[4] *Id.* at § 10.404(a).

[5] FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[6] *Mark A. Holloway*, 55 ECAB 321 (2004).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(1) (October 1990).

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[9] *Supra* note 6.

CONCLUSION

The Board finds that appellant was not at maximum medical impairment and had not established any permanent impairment for schedule award purposes.[10]

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 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

[10] The Board notes that the record on appeal contains evidence which the Office received after its October 23, 2009 decision. The Board lacks jurisdiction to review this evidence for the first time on appeal. 5 U.S.C. § 501.2(c). This, however, does not preclude appellant from having such evidence considered by the Office as part of a formal written request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.