United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 09-980**
	)	**Issued: January 7, 2010**
DEPARTMENT OF THE AIR FORCE, FAIRCHILD AIR FORCE BASE, Fairchild, WA, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 3, 2009 appellant filed a timely appeal of a December 10, 2008 decision of the Office of Workers' Compensation Programs affirming an August 27, 2008 denial of his schedule award claim and a February 11, 2009 decision denying his request for reconsideration without further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established permanent impairment to a schedule member due to his accepted low back injury; and (2) whether the Office properly denied appellant's reconsideration request without a merit review of the claim.

FACTUAL HISTORY

On June 23, 2006 appellant, then a 56-year-old lead firefighter, experienced lower back pain after removing his protective equipment and clothing. He stopped work that day and

returned on July 10, 2006. Appellant retired on September 30, 2006. The Office accepted his claim for aggravation of preexisting degenerative disc disease at L5-S1 and lumbosacral radiculitis.[1]

On May 23, 2006 Dr. James M. Bingham, Board-certified in family medicine, noted appellant's long-standing history of recurrent back pain for which he underwent a magnetic resonance imaging (MRI) scan in June 2005. He opined that appellant would likely continue to have at least intermittent problems. Dr. Bingham noted that it was likely that appellant's back symptoms were progressive and directly due to his employment.

On November 17, 2006 appellant filed a schedule award claim. In a December 11, 2006 report, Dr. Bingham noted that appellant's history of low back pain with radiculopathy included foot drop of the right lower extremity. An MRI scan from June 2005 revealed multilevel degenerative disc disease with foraminal stenosis at the L5-S1 level. Dr. Bingham opined that appellant had "probably" reached maximum medical improvement and was clinically stable. He advised that appellant was permanently disabled as a result of his current back condition.

On August 28, 2007 the Office referred appellant to Dr. George Harper, a Board-certified orthopedic surgeon, for a second opinion. In a September 18, 2007 report, Dr. Harper received appellant's history of injury and set forth examination findings. He noted significant tenderness in midline lumbosacral and L4-5 levels and sacroiliac joints superiorly bilaterally. Dr. Harper also found significant right foot drop. On motor examination, there was profound weakness of right extensor hallucis longus and global weakness in the ankle. Dr. Harper diagnosed lumbar degenerative disc disease with right lower extremity radiculopathy and right foot drop. Appellant's diagnosed conditions were caused or accelerated by his work and were permanent. He had continued residuals that were fixed and stable with no further medical treatment needed. In response to whether appellant had any lower extremity impairment due to his work-related conditions, Dr. Harper determined that appellant's lumbar spine was a Category III based on Table 15-3 on page 384 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) as there were significant signs of radiculopathy such as sensory loss in dermatomal distribution, loss of muscle strength and some unilateral atrophy in the thigh with clear foot drop. He rated 13 percent whole person impairment. Dr. Harper noted that appellant was stable at present but date of maximum medical improvement was unknown.

On October 9, 2007 an Office medical adviser reviewed the evidence of record and found that Dr. Harper did not rate impairment of appellant's right leg as requested but rated the lumbar spine in finding 13 percent whole body impairment. Although it would be possible to determine a right lower extremity rating based on Dr. Harper's findings, the medical adviser was reluctant to do so as right foot weakness was present before the June 23, 2006 work injury. This weakness had previously improved and might do so again and global weakness of the right ankle was not explained by the pathology at L5-S1. The medical adviser stated that complete absence of right leg atrophy was inconsistent with the degree and duration of weakness claimed. Dr. Harper's observation of a lot of pain behavior suggested that appellant was not providing full effort. The

[1] The Office doubled appellant's present case with a traumatic injury claim from 2004 (File No. xxxxxx868) that concerned appellant's back. The record does not indicate that the Office adjudicated this prior claim.

Office medical adviser determined that appellant was not at maximum medical improvement and recommended another evaluation in 6 to 12 months.

On March 19, 2008 Dr. Bingham noted persistent back discomfort with radicular symptoms including foot drop thought to be due to peroneal palsy at the knees and not so much related to nerve root compression in the lumbar spine. He assessed persistent back pain.

On April 2, 2008 the Office referred appellant with a statement of accepted facts to Dr. Chester McLaughlin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 8, 2008 report, Dr. McLaughlin reviewed the June 23, 2006 injury and also advised that appellant had a history of low back pain since the early 1980s when he was in the Army. Upon examination, appellant did not have a typical foot drop as he rotated his lower extremity at the hip and dragged his right foot across the floor. Dr. McLaughlin found some extensor function to the toes and no extensor movement to the ankle motors including anterior and posterior tibial and peroneals. He noted that it was difficult to get consistency in sensory testing as appellant appeared counseled as to what he was looking for and "seemed to have repeated instructions" in performing sensory testing. Regarding range of motion of the lumbosacral spine, Dr. McLaughlin found that appellant did not perform any lumbar flexion, did not round his back with forward flexion and was able to assume upright reversing the camptocormic stance. He further noted that appellant could not do any trunk extension and that lateral bending was approximately 10 degrees. Dr. McLaughlin also noted that appellant could easily extend each knee to zero degrees while sitting and he had no back pain or sciatic stretch complaints. He diagnosed chronic recurrent low back pain with recurrent lumbosacral strain and sprain syndrome along with preexisting degenerative changes at L5-S1. Dr. McLaughlin could not establish appellant's neurological status due to functional behavior during the examination. This affected the reliability of the neurological examination such that he could not establish the extent or presence of foot drop. Dr. McLaughlin advised that the motor and sensory evaluations were not reliable partially due to appellant's behavior during the examination. He opined that the June 23, 2006 injury appeared to be a temporary aggravation of a previous chronic recurrent low back condition. Due to appellant's functional behavior on examination, Dr. McLaughlin could not determine if appellant had radiculopathy. Dr. McLaughlin noted appellant's long history of back problems and recommended that electrodiagnostic studies be performed to establish a definitive diagnosis. He advised that the MRI scan did not correlate with an L5 lesion, which would have caused foot drop. Dr. McLaughlin advised that appellant did not have ratable impairment, based on the A.M.A., *Guides*, due to his work injury but that it was difficult to provide a current rating without electrodiagnostic studies.

The Office authorized an electromyogram (EMG) that was performed on May 27, 2008 by Dr. Keith Mackenzie, a physiatrist, who found no definitive abnormalities.

In a May 27, 2008 supplemental report, Dr. McLaughlin reviewed the diagnostic studies and found that the nerve conduction velocity (NCV) studies of the peroneal nerve were normal. He noted that NCV testing of the anterior ribialis response was brisk. There was no other denervation or definitive abnormalities. Dr. McLaughlin opined that, as the electrodiagnostic studies were within normal limits, appellant had no ratable impairment under the A.M.A., *Guides*. He found no permanent neurological residuals from the work-related injury. Dr. McLaughlin advised that the abnormal gait was due to reasons other than the work injury,

noting that the electrodiagnostic studies did not identify foot drop or other neurological lesions. He advised that appellant was at maximum medical improvement as it pertained to the work-related injury.

On July 30, 2008 another Office medical adviser reviewed the evidence of record. He agreed with Dr. McLaughlin's assessment that there was no objective evidence to establish ratable impairment to either lower extremity. The medical adviser noted that Dr. McLaughlin performed a thorough medical evaluation, specifically looking at the lower extremities and did not find consistent, reliable evidence for lower extremity radiculopathy. He advised that Dr. McLaughlin did not find objective evidence that would be consistent with the observed foot drop or the nonverifiable sensory changes that appellant exhibited.

In an August 27, 2008 decision, the Office denied appellant's schedule award claim finding the medical evidence insufficient to establish that he sustained any permanent impairment to a scheduled member due to the accepted work injury.

On September 25, 2008 appellant requested reconsideration. In a September 16, 2008 report, Dr. C. William Britt, Jr., a Board-certified neurologist, noted that appellant had no voluntary movement of the right foot or toes in dorsiflexion and very weak inversion and eversion. Dr. Britt advised that the distal right lower leg and intrinsic muscles of the foot were thin. He found normal nerve conduction studies of the right peroneal nerve as well as evidence of active and chronic denervation in the right L5 myotome. Dr. Britt opined that appellant still had significant nerve root pain for which decompression might not provide much functional recovery. On September 18, 2008 he indicated that the findings affecting the L5 root appeared to be foraminal in location. Dr. Britt attached a copy of an MRI scan taken during his September 16, 2008 examination. He opined that there had been some progression of degenerative change since the 2006 MRI scan but that it was unlikely that a nerve root decompression would result in significant functional improvement in the leg as there was probably association root infarction. Dr. Britt further opined that he could not clearly delineate the root within the foramen in lateral recess with association pathology of the facet and disc at L5-S1. Appellant also submitted several diagnostic reports as well as reports already of record.

In a December 10, 2008 decision, the Office denied modification of its August 27, 2008 decision, finding the medical evidence insufficient to establish that appellant sustained a lower extremity permanent impairment due to a work-related lower back condition.

On January 5, 2009 appellant requested reconsideration, stating that he was submitting a statement from his physician regarding his claim. He submitted a December 23, 2008 letter to Dr. Britt informing him of the denial of his claim and requesting an additional report to expand on whether his condition was permanent. No report from Dr. Britt accompanied the request.

In a February 11, 2009 decision, the Office denied appellant's reconsideration request without a merit review finding that the evidence submitted with the reconsideration request was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations 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. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sounds discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office for evaluating schedule losses and the Board has concurred in such adoption.[3]

Not all medical conditions accepted by the Office result in permanent impairment to a schedule member.[4] It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[5] Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the A.M.A., *Guides*.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained employment-related aggravation of preexisting degenerative disc disease at L5-S1 and lumbosacral radiculitis. Appellant subsequently claimed a schedule award. The Board finds the medical evidence of record insufficient to establish that his accepted low back condition caused any permanent impairment.

The December 11, 2006 report of Dr. Bingham does not support appellant's claim as he noted that appellant had permanent disability from his current back condition. Dr. Bingham did not discuss whether appellant sustained any impairment of either lower extremity or provide any impairment rating. Dr. Bingham was also equivocal regarding whether appellant had reached

[2] 5 U.S.C. §§ 8101-8193. *See* 5 U.S.C. § 8107.

[3] *See* 20 C.F.R. § 10.404; *R.D.*, 59 ECAB ___ (Docket No. 07-379, issued October 2, 2007).

[4] *Thomas P. Lavin*, 57 ECAB 353 (2006).

[5] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[6] *J.P.*, 60 ECAB ___ (Docket No. 08-832, issued November 13, 2008); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

maximum medical improvement.[7] None of his other reports address the issue of permanent impairment due to the June 23, 2006 work injury.

The September 18, 2007 report of Dr. Harper advised that appellant's date of maximum medical improvement remained unknown. As noted, a schedule award is not payable until maximum medical improvement is reached. Dr. Harper also noted on examination that appellant subjectively demonstrated pain behavior, which diminished the reliability of the examination. Moreover, he assessed a whole person impairment of the back which is not compensable under the Act.[8] On October 9, 2007 an Office medical adviser found that it was premature to rate appellant's lower extremity impairment as he had not reached maximum medical improvement. This evidence does support permanent impairment to the legs.

The Office subsequently referred appellant to Dr. McLaughlin for an opinion regarding permanent impairment due to the June 23, 2006 work injury. On May 8, 2008 Dr. McLaughlin opined that the June 23, 2006 injury was a temporary aggravation of a previous chronic recurrent low back condition that did not permanently aggravate appellant's preexisting condition. Appellant's current condition had no permanent ratable impairment. Dr. McLaughlin emphasized that appellant's functional behavior and "counseled" performance during examination made it difficult to derive consistent and reliable neurological results. Appellant's functional behavior on examination also prevented Dr. McLaughlin from determining whether he had foot drop or radiculopathy. He recommended an MRI scan to correlate the foot drop with nerve lesion. In a supplemental May 27, 2008 report, Dr. McLaughlin reviewed the diagnostic studies and found that appellant had no ratable impairment under the A.M.A., *Guides* as the studies were within normal limits. The EMG did not indicate foot drop or other neurological lesions. Dr. McLaughlin opined that appellant was at maximum medical improvement. The reports of Dr. McLaughlin do not support that the work injury resulted in any permanent impairment of a schedule member of the body. His initial report noted inconsistent findings due to functional behavior and his supplemental report, based upon review of diagnostic testing, found no neurological evidence to support impairment to either lower extremity. On July 30, 2008 an Office medical adviser concurred with Dr. McLaughlin's assessment and found no basis for rating impairment of the lower extremities due to the employment injury.

Subsequently, appellant submitted Dr. Britt's reports dated September 16 and 18, 2008. Dr. Britt noted no voluntary movement of appellant's right foot and toes. He opined that there was some progression of degenerative change since 2006, but neither report addressed the issue of permanent impairment or related any impairment of a schedule member to appellant's June 23, 2006 work injury.

[7] *J.P.*, *id.* (under Office procedures, a schedule award may be made when it can be medically determined that the claimant has reached maximum medical improvement); *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(1) (October 1990).

[8] *See D.N.*, 59 ECAB ___ (Docket No. 07-1940, issued June 17, 2008) (as neither the Act nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award); *see also N.D.*, 59 ECAB ___ (Docket No. 07-1981, issued February 1, 2008) (the Act does not authorize schedule awards for permanent impairment of the whole person).

Consequently, the medical evidence does not establish that his accepted lower back condition caused any permanent impairment entitling him to a schedule award.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) of Office regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10]

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant provided a statement noting that he was attaching a letter from his physician as well as the physician's comments. He also submitted a letter to Dr. Britt requesting an additional report regarding his permanent impairment. However, appellant did not submit any additional medical evidence. The underlying issue is medical in nature regarding whether he sustained any permanent impairment of a schedule member of the body. Therefore, appellant's statement is not relevant to the underlying medical issue and does not constitute relevant or pertinent new evidence not previously considered by the Office. He did not show that the Office erroneously applied or interpreted a point of law or advance a relevant legal argument. Consequently, the Office properly denied appellant's request for reconsideration without a merit review.

On appeal, appellant asserts that the MRI scans of record support that he has a nerve disability injury, which proves that his injury has merit. The Office has accepted an aggravation of degenerative disc disease at L5-S1. It is appellant's burden, however, to submit medical evidence to establish that this condition causes permanent impairment to either leg.

CONCLUSION

The Board finds that appellant has not established that he sustained permanent impairment due to his accepted employment injury. The Board further finds that the Office properly denied appellant's reconsideration request without a merit review.

[9] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[10] *Id*. at § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated February 11, 2009, December 10 and August 27, 2008 are affirmed.

Issued: January 7, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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