United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 09-2310**
	)	**Issued: July 6, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Simpsonville, SC, 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 September17, 2009 appellant filed a timely appeal from the August 4, 2009 schedule award decision of the Office of Workers' Compensation Programs which found four percent impairment of each arm. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant has more than a four percent impairment of each arm or any impairment of a lower extremity causally related to his March 7, 2003 work injury.

FACTUAL HISTORY

On March 7, 2003 appellant, then a 38-year-old rural carrier, sustained an injury in the performance of duty as a result of a motor vehicle accident. He initially reported neck and facial pain. Appellant then reported pain primarily in his neck and some mild pain down his trapezius but did not describe "true radicular pattern with regard to the pain in his arm." He was diagnosed with cervical strain.

On April 10, 2003 a magnetic resonance imaging (MRI) scan demonstrated some compression in the anterior endplates of C6 and C5-6 showed a bulge on the left. Appellant had pain in his left arm. Following a computerized tomography scan that demonstrated no fracture, Dr. Philip H. Wessinger, an attending orthopedic surgeon, reported on April 25, 2003: "I certainly feel like this is primarily muscular based." On July 3, 2003 appellant reported pain down his lumbar spine.

On October 6, 2003 the Office accepted appellant's claim for cervical strain.

On May 17, 2004 Dr. Wessinger noted that appellant was still complaining of trouble with twisting and tightness through his neck. He found that appellant had reached maximum medical improvement and released him from care. On July 15, 2004 Dr. Wessinger rated a five percent impairment of the whole person due to cervical spine impairment.

In October 2004, appellant reported problems with his lower back, not just cervical and neck problems. He related some neurological issues in his lower extremities, including numbness in his leg and possibly even sexual dysfunction. A November 30, 2004 MRI scan preliminarily found minimal disc bulges at L4-5 and L5-6 with a transitional L6 vertebral body and rudimentary L6-S1 disc. There was no spinal canal stenosis or neural foraminal impingement at any level. Disc spaces and a normal hydrated signal were maintained throughout the intervertebral discs.

On October 11, 2004 Dr. James F. Bethea, a second opinion orthopedic surgeon, read an x-ray to show advanced disc space narrowing at C5-6, consistent with degenerative disc disease, which he diagnosed. He explained that appellant's neck pain had not resolved due to continuing problems with cervical disc disease.

A December 15, 2004 MRI scan showed mild compression of the C6 vertebral body, not appreciably changed in appearance from April 2, 2003, representing a stable and likely old mild wedge compression fracture. The vertebral body heights and disc spaces were otherwise maintained. Findings included a small central disc protrusion or disc osteophyte at C4-5, "of questionable significance." There was a narrowing of the neural foramina bilaterally at C5-6, somewhat greater on the left, with a mild, diffuse disc osteophyte complex. There was no evidence of significant disc osteophyte pathology demonstrated at C6-7. A mild facet hypertrophy was suggested.

On January 25, 2005 the Office accepted aggravation of cervical arthritis at C5-6. It would subsequently refer to this as aggravation of degenerative disc disease at C5-6 or aggravation of cervical spondylosis.

Electromyogram and nerve conduction studies on September 25, 2006 provided evidence of bilateral ulnar entrapment at the elbow, left greater than right. The Office also provided evidence suggestive of early left carpal tunnel syndrome and evidence suggestive of a bilateral C6-7 nerve root compression. An MRI scan was recommended with a differential diagnosis of broad-based disc bulge versus spinal stenosis at the C6-7 level.

A November 8, 2006 MRI scan showed Schmorl's nodes at C5, C6 and C7. At C5-6 there were chronic endplate changes with ballooning of the disc due to the rather large Schmorl's

nodes. There were also hypertrophic Luschka joints or posterolateral osteophytes at this level producing minimal left and mild to moderate right C6 bony neural foraminal stenosis. There was no evidence of acute fracture or disc herniation.

A January 5, 2007 MRI scan showed mild L3-4 and L4-5 disc bulges with a developmentally small L5-S1 disc. There was no fracture or disc herniation.

Appellant filed a claim for a schedule award. He submitted whole person impairment evaluations and impairment evaluations of the cervical and lumbar spine, none of which the Office accepted. On April 20, 2009 Dr. David S. Rogers, his neurologist, rated a 10 percent whole person impairment "respective to each side," that is, with respect to each upper limb. It was his opinion that the 2003 motor vehicle accident affected both the cervical and lumbar spine. Dr. Rogers diagnosed bilateral cervical radiculitis at C6-7, low back pain with lumbar radiculopathy and cervical arthritis/spondylosis.

On May 22, 2009 an Office medical adviser reviewed Dr. Rogers' findings under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1] Noting a diagnosis of cervical spondylosis at C5-7 and the September 25, 2006 clinical study showing a bilateral C6-7 nerve root compromise, he used Table 15-20, page 434 and 435, to find a three percent bilateral upper limb impairment due to a mild sensory deficit in the brachial plexus upper trunk and a one percent bilateral upper limb impairment due to a mild sensory deficit in the brachial plexus middle truck.

On June 3, 2009 the Office asked Dr. Rogers to review the medical adviser's calculations under the sixth edition of the A.M.A., *Guides* and address whether he agreed with the rating. Dr. Rogers replied on June 15, 2009 that he was not trained in the use of the sixth edition and therefore deferred to the Office medical adviser's rating.

On August 4, 2009 the Office issued a schedule award for four percent impairment to each arm.

On appeal, appellant contends there is a discrepancy between the rating from Dr. Rogers and the rating from the Office medical adviser. He believed a higher rating should be considered due to problems such as insomnia, depression and episodic headaches. Appellant contends that the Office overlooked his lower limbs, for which Dr. Rogers also provided an impairment rating.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] provides schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. No schedule award is payable for a member, function or organ of the body not specified in the Act or regulations.[3] Because neither the Act

[1] A.M.A., *Guides* (6th ed. 2008).

[2] 5 U.S.C. § 8107.

[3] *William Edwin Muir*, 27 ECAB 579 (1976).

nor the regulations authorize a schedule award for the permanent impairment of the spine, neck or back,[4] no claimant is entitled to such an award.[5] However, because the specified members include the upper and lower limbs, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[6]

The Act does not authorize the payment of schedule awards for the permanent impairment of the "whole person."[7] The Act authorizes payment only for the permanent impairment of specified members, organs or functions of the body.

The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[8]

ANALYSIS

The Office accepted that appellant's March 7, 2003 motor vehicle accident caused an aggravation of degenerative disc disease at the C5-6 level. The Office medical adviser based his rating on an injury to the more distally located brachial plexus. He did not explain how this was consistent with the accepted medical condition or the reason he attempted to rate a nerve root compression at the C6-7 level.

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as under the Act, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.[9] The Office has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[10]

The Board will set aside the Office's August 4, 2009 schedule award and remand the case for a proper application of the A.M.A., *Guides* beginning with the proper identification of the injured nerve consistent with the accepted medical condition. Following such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to a schedule award.

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[4] The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[5] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

[6] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[7] *Ernest P. Govednick*, 27 ECAB 77 (1975).

[8] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

[9] *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition*, The Guides Newsletter (A.M.A., Chicago, Ill.), July/August 2009.

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700 (January 2010) (Exhibit 1, 5).

Appellant questioned why the Office did not utilize the ratings of Dr. Rogers. The Office could not accept the various ratings given by Dr. Rogers because no claimant may receive a schedule award for impairment to the spine or for impairment of the whole person. Effective May 1, 2009, all ratings must be based on the sixth edition of the A.M.A., *Guides*. The ratings by Dr. Rogers do not conform to the standards utilized by the Office. The Office provided Dr. Rogers a chance to comment on the medical adviser's impairment rating, but he deferred.

As for appellant's argument that the Office should consider a higher impairment rating due to such problems as insomnia, depression and episodic headaches, the Office must rate impairment according to the protocols in the A.M.A., *Guides*. To the extent that A.M.A., *Guides* allows a minor modification of the rating based on functional history (pain, symptoms, ability to perform activities of daily living), appellant's impairment rating will reflect the modification.

Appellant also notes that the Office overlooked his lower limbs. However, as of the date of the Office's August 4, 2009 decision, the Office has not accepted any injury to the lower extremities or injury to the lumbar spine. It may be that he has an impairment of one or both of his lower extremities, but he is not entitled to a schedule award unless it is established that impairment was caused by his March 7, 2003 motor vehicle accident. Absent a final decision on this matter, it is not before the Board in the present appeal. Should the accident cause a natural progression of his accepted condition and he obtain a greater impairment rating, appellant may file a claim for an increased schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: July 6, 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