United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 10-96**
	)	**Issued: July 15, 2010**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, Reston, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 9, 2009 appellant filed a timely appeal from an April 21, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award in this case.

ISSUE

The issue is whether appellant has more than 10 percent impairment to each lower extremity.

On appeal, appellant asserts that he is entitled to an additional 63 days of compensation because an Office medical adviser stated that the date of maximum medical improvement was August 30, 2006, rather than November 2, 2006.

FACTUAL HISTORY

On April 17, 2006 appellant, then a 34-year-old federal air marshal, sustained an employment-related back injury and stopped work that day. The Office accepted the claim for thoracic or lumbosacral neuritis or radiculitis, unspecified and lumbar radiculopathy. Appellant was placed on the periodic compensation rolls. On August 18, 2006 Dr. John A. O'Connell, an attending Board-certified physiatrist, advised that he could return to full duty with no restrictions. Appellant returned to full duty on September 6, 2006. By report dated November 2, 2006, Dr. O'Connell advised that appellant's symptoms had significantly improved and that he was able to perform his civilian and military job duties without difficulty.[1]

On May 17, 2007 appellant filed a schedule award claim. In a March 20, 2007 report, Dr. George L. Rodriguez, a Board-certified physiatrist, diagnosed herniated disc at L5-S1, lumbosacral radiculopathy, erectile dysfunction and chronic pain. He advised that maximum medical improvement was achieved on August 30, 2006. Under Tables 15-15, 15-16 and 15-18 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had a seven percent lower extremity impairment. Under Table 13-21 he sustained 45 percent organ impairment due to sexual impairment.

In September 2007, the Office referred appellant to Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, for a second opinion examination and impairment evaluation. In an October 29, 2007 report, Dr. Hutter described findings on physical examination and diagnosed a herniated disc at L5-S1. He advised that appellant had reached maximum medical improvement, could perform his usual job without restrictions and had a five percent permanent impairment. In a November 15, 2007 report, Dr. Hutter advised that maximum medical improvement was reached on November 2, 2006, based on a procedure note advising that appellant was cleared to return to full duties that day.

The Office determined that a conflict in medical opinion was created between Dr. Rodriguez and Dr. Hutter regarding the degree of appellant's impairment due to lumbar radiculopathy. On July 1, 2008 it referred him to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial evaluation. In a July 14, 2008 report, Dr. Dennis reviewed the statement of accepted facts and medical records. He noted appellant's complaint of constant low back pain, intermittent groin pain and intermittent left lower extremity numbness. Dr. Dennis provided findings on physical examination and diagnosed herniated disc at L5-S1 with lumbar radiculopathy. He advised that maximum medical improvement was reached on November 2, 2006. In accordance with the fifth edition of the A.M.A., *Guides*, appellant had 20 percent lower extremity or 11 percent whole person impairment. In an October 30, 2008 supplemental report, Dr. Dennis advised that appellant had 10 percent impairment to both legs.

In a December 9, 2008 report, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and Office medical adviser, agreed that appellant had 10 percent impairment to each

[1] Appellant is an officer in the Air Force reserve and was deployed in August 2008.

[2] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

lower extremity and on March 26, 2009 advised that the date of maximum medical improvement was November 2, 2006.

By decision dated April 21, 2009, appellant was granted schedule awards for 10 percent impairment to the right and left lower extremities. The date of maximum medical improvement was November 2, 2006. The awards ran for 57.6 weeks, from November 2, 2006 to December 10, 2007 and were based on the effective pay rate of April 17, 2006, the date of injury.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[3] and its implementing federal regulations,[4] 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 claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6] For decisions issued after May 1, 2009, the sixth edition will be used.[7] Section 8107(c)(2) of the Act sets forth the compensation schedule for a leg impairment. It provides that 100 percent leg impairment would yield 288 weeks of compensation.[8]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[9] In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[10]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[11] When the case is referred to an

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id.* at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[7] FECA Bulletin No. 09-03 (issued March 15, 2008).

[8] 5 U.S.C. § 8107(c)(2).

[9] *Pamela J. Darling*, 49 ECAB 286 (1998).

[10] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[12] Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.[13]

It is well established that a schedule award cannot be paid until a claimant has reached maximum medical improvement.[14] The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[15]

Under the Act, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.[16] Section 8101(4) provides that "monthly pay" means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[17] The compensation rate for schedule awards is the same as compensation for wage loss.[18]

ANALYSIS

Appellant does not challenge the degree of impairment found to both legs. Rather, he asserts that the Office improperly determined the date of maximum medical improvement and that he is entitled to an additional 63 days of compensation. As noted, the schedule award provisions of the Act provide that 100 percent total impairment of a leg is awarded 288 weeks of compensation.[19] The medical evidence of record established that appellant had 10 percent impairment to each leg, which would entitle him to 28.8 weeks of compensation for each leg, or a total of 57.6 weeks. The April 21, 2009 awards were for a total of 57.6 weeks of compensation, to run from November 2, 2006 to December 10, 2007. Appellant is entitled to 57.6 weeks of compensation regardless of whether the date of maximum medical improvement

[12] *Manuel Gill*, 52 ECAB 282 (2001).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002); *Thomas J. Fragale*, 55 ECAB 619 (2004).

[14] *D.S.*, 60 ECAB ____ (Docket No. 08-885, issued March 17, 2009).

[15] *C.J.*, 60 ECAB ____ (Docket No. 08-2429, issued August 3, 2009).

[16] *See* 5 U.S.C. §§ 8105-8107.

[17] 5 U.S.C. § 8101(4).

[18] *See* 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

[19] *Supra* note 8.

was August 30, 2006, as asserted by appellant, or November 2, 2006, as found by the Office.[20] In order for appellant to be entitled to compensation for an additional period, he must establish greater impairment. He has not done so in the present case.

The question of when maximum medical improvement has been reached is a factual one which depends upon the medical findings in the record. The determination of such date is to be made upon the basis of the medical evidence in each case.[21] The Board has noted a reluctance to find a date of maximum medical improvement which is retroactive to a schedule award, as retroactive awards may result in payment of less compensation benefits.[22] In this case, the Office properly determined that the rate of pay was that of the date of injury, or April 21, 2006, and finding a later date of maximum medical improvement would not affect the monetary value of the schedule award.[23]

CONCLUSION

The Board finds that appellant has 10 percent impairment to his right and left legs.

[20] By report dated November 2, 2006, Dr. O'Connell advised that appellant's symptoms had significantly improved and that he was able to perform his usual job and military duty without difficulty. The Board finds it was reasonable for the Office to select November 2, 2006 as the date appellant reached maximum medical improvement. *Peter C. Belkind*, 56 ECAB 580 (2005) (Maximum medical improvement arises at the point at which an injury has stabilized and will not improve further. This determination is factual in nature and depends primarily on the medical evidence).

[21] *L.H.*, 58 ECAB 561 (2007).

[22] *D.R.*, 57 ECAB 720 (2006).

[23] A finding by the Office of maximum medical improvement does not preclude a deterioration of the condition. *E.P.*, 58 ECAB 719 (2007), and the Board has long recognized that, if a claimant's employment-related condition worsens in the future, he or she may apply for an increased schedule award. *See Robert E. Cullison*, 55 ECAB 570 (2004).

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 15, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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