United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 09-1789**
	)	**Issued: June 10, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Racine, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2009 appellant filed a timely appeal of a February 17, 2009 decision of the Office of Workers' Compensation Programs denying his claim for an increased schedule award and an April 28, 2009 decision denying his request for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than two percent permanent impairment of the left lower extremity for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On January 14, 2004 appellant, then a 35-year-old letter carrier, injured his low back and left leg after slipping on ice while delivering mail. He stopped work on January 15, 2004 and

returned to part-time light duty on March 1, 2004. The Office accepted appellant's claim for lumbar strain.

In reports dated January 26 and February 9, 2004, Dr. Robert Brown, Board-certified in family medicine, diagnosed lower back strain, sciatica and herniated L5-S1 disc.

In reports dated February 10 and 24, 2004, Dr. S. Marshall Cushman, a Board-certified neurosurgeon, diagnosed herniated discs at L4 and L5 with radiculopathy. He also noted pain in appellant's lower back shooting down his leg and left foot numbness. Dr. Cushman recommended surgery. On March 12 and April 2, 2004 he noted resolving symptomology regarding appellant's herniated lumbar discs. Dr. Cushman found that appellant's gait, muscle strength and back mobility were normal. In a June 25, 2004 treatment note, a nurse indicated that appellant had left S1 radiculopathy, secondary to left lateral disc herniation at L5 and S1 and recommended left L5 microsurgical discectomy. On a July 12, 2004 an Office medical adviser stated that appellant's lumbar condition was temporally related to his work injury and he recommended L5-S1 discectomy.

On July 16, 2008 appellant underwent a repeat discectomy at L5-S1 for a recurrent herniated disc. Dr. James Hollowell, a Board-certified neurosurgeon, performed the surgery using a microsurgical technique. The Office authorized the surgery.[1]

On September 10, 2008 appellant filed a schedule award claim.

In September 30, 2008 letters, the Office advised appellant and Dr. Hollowell of the medical evidence needed to establish a schedule award claim. It requested that he provide an opinion on permanent impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

In a September 10, 2008 report, Dr. Hollowell, a Board-certified neurosurgeon, determined that appellant had reached maximum medical improvement that day. He noted that appellant's S1 nerve root had been affected. Dr. Hollowell also noted low back pain with no atrophy or weakness as well as decreased sensation at the sole of the foot. He found six percent permanent impairment.

On November 15, 2008 an Office medical adviser reviewed Dr. Hollowell's report and noted that the claim was not ready for an impairment determination as there was an insufficient description of clinical findings as to appellant's impairment. The medical adviser stated that additional information was needed in order to note impairment under the A.M.A., *Guides*.

On December 10, 2008 the Office advised appellant that the medical evidence was insufficient to support a schedule award. It requested that he obtain another report from his physician.

[1] Appellant reinjured his herniated disc condition in February 2008. The Office adjudicated this under claim File No. xxxxxx017 and accepted the claim for aggravated herniated disc at L5-S1. On June 8, 2008 it combined the two claims.

In a December 17, 2008 report, a physician's assistant in Dr. Hollowell's office found normal causal gait and full motor strength. She noted that appellant could not elicit a left Achilles jerk. The physician's assistant also noted that the postoperative symptoms were largely consistent with decompression of the S1 root but that dermatomes were not exact and there could be overlapping sensory changes. She found no atrophy or complaint of low back pain. The physician's assistant also found loss of ankle reflex and residual numbness involving the plantar aspect of the left foot consistent with prior surgery and S1 root compression. She determined that, based on state guidelines, appellant had five percent impairment for repeat surgery and one percent impairment for residual sensory loss.

In a report dated February 4, 2009, the Office medical adviser reviewed the December 17, 2008 report and disagreed with the impairment finding. The medical adviser found that examination noted decreased sensation on the plantar aspect of the left foot in the S1 distribution without evidence of any weakness or loss of motion. The description of impairment was not based on the A.M.A., *Guides* and the Federal Employees' Compensation Act did not award impairment to the spine or back. The Office medical adviser determined that appellant had two percent left lower extremity permanent for sensory loss pursuant to the A.M.A., *Guides*. He noted that the S1 nerve root was affected, for which a five percent maximum impairment for sensory loss was allowed under Table 15-18. The Office medical adviser found that appellant had a Grade 3, 40 percent, sensory deficit under Table 15-15. He multiplied the 40 percent deficit by the 5 percent maximum impairment value for the S1 nerve root to total at 2 percent sensory impairment of the leg.[2] The Office medical adviser determined that appellant reached maximum medical improvement on December 17, 2008.

In a February 17, 2009 decision, the Office granted appellant a schedule award for two percent impairment for the left lower extremity. It paid him compensation for 5.76 weeks from December 17, 2008 to January 26, 2009.

On March 11, 2009 appellant requested reconsideration. He submitted an article on schedule awards and a guide on how to evaluate disability under Wisconsin workers' compensation law. Appellant also submitted a March 31, 2009 report from Dr. Hollowell containing diagnostic test results of his blood and urine.

In a decision dated April 28, 2009, the Office denied appellant's reconsideration request without further merit review finding that the evidence submitted did not address the issue of his impairment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[3] 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

[2] A.M.A., *Guides* 424 (5th ed. 2001).

[3] 5 U.S.C. §§ 8101-8193. *See* 5 U.S.C. § 8107.

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.[4]

Neither, the Act nor Office regulations provide for a schedule award for loss of use of the back or to the body as a whole. The schedule award provisions of the Act include the extremities and a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of such impairment originates in the spine.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar strain, an aggravated herniated disc at L5-S1 and authorized two surgical discectomies. Appellant subsequently received a schedule award for two percent permanent impairment of the left leg based on the evaluation by an Office medical adviser of reports from Dr. Hollowell and a physician's assistant from the physician's office. The Board finds that the Office medical adviser properly determined appellant's impairment rating.

In a September 10, 2008 report, Dr. Hollowell found six percent impairment of appellant's left leg. He noted that appellant's S1 nerve root had been affected which caused low back pain with no atrophy or weakness. Dr. Hollowell noted decreased sensation to the sole of appellant's left foot. However, he did not address how he applied the A.M.A., *Guides* to rate six percent impairment. Dr. Hollowell did not cite to any of the tables or figures used in rating appellant's impairment. As he failed to provide an adequate explanation of how he made rated impairment under the A.M.A., *Guides*, his opinion is of reduced probative value.[6]

After the Office requested additional information, appellant submitted a December 17, 2008 report from a physician's assistant from Dr. Hollowell's office. The physician's assistant noted examination findings and determined that, based on state guidelines, appellant had five percent impairment for repeat surgery and one percent impairment for residual sensory loss. The Board has noted that a physician's assistant is not a physician as defined under the statute. Therefore, a report from such individual does not constitute competent medical evidence unless it is reviewed by a qualified physician.[7] The opinion of the physician's assistant on appellant's permanent impairment does not constitute competent medical evidence, as there is no evidence Dr. Hollowell reviewed the report and approved the findings.

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

[5] *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008).

[6] *See Tommy R. Martin*, 56 ECAB 273 (2005) (where the Board found that a physician's impairment calculation not sufficiently supported by the A.M.A., *Guides* is of diminished probative value).

[7] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act). *George H. Clark*, 56 ECAB 162 (2004). *See also* 5 U.S.C. § 8101(2).

On February 4, 2008 the Office medical adviser reviewed the medical evidence of record to rate appellant's permanent impairment.[8] He disagreed that appellant had six percent impairment as this estimate was not based on the A.M.A., *Guides*. The medical adviser found that appellant had two percent impairment to the left leg. Based on findings of decreased sensation in the left foot in the S1 nerve root distribution, he referenced Table 15-18 on page 424 of the A.M.A., *Guides* which provides a five percent maximum impairment value for S1 sensory loss. Under Table 15-15 on page 424 of the A.M.A., *Guides*, the Office medical adviser determined that appellant had a Grade 3 sensory deficit of 40 percent. In accordance with the procedure outlined in Table 15-15(b) on page 424 of the A.M.A., *Guides*, he properly multiplied the 40 percent deficit by the 5 percent maximum impairment value for S1 sensory loss to total 2 percent impairment of the left lower extremity. The Office medical adviser did not note any other basis on which to rate additional impairment. The Board finds that the Office medical adviser applied the A.M.A., *Guides* and properly evaluated appellant's impairment.[9] There is no medical evidence, consistent with the A.M.A., *Guides*, to establish that appellant has more than two percent impairment of the left leg.

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.[10] 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.[11]

ANALYSIS -- ISSUE 2

Appellant's reconsideration request did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office.

Appellant submitted an article on schedule awards and a guide on how to evaluate disability under Wisconsin workers' compensation law. The Board notes that the underlying

[8] While the physician's assistant cannot render a medical opinion, a nonphysician may provide findings that a physician, such as an Office medical adviser, may use if that physician determines that such findings are accurate. *See Jerre A. Rinehart*, 45 ECAB 518, 521 (1994) (measurements by an occupational therapist may be used by in rating impairment if deemed accurate by appellant's physician or an Office medical adviser); *Joshua A. Holmes*, 42 ECAB 231, 236 (1990) (an Office medical adviser may review any audiogram in a case record if deemed accurate).

[9] *J.Q.*, *supra* note 5 (when the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, the Office may rely on the impairment rating provided by an Office medical adviser).

[10] *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[11] *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

issue concerns appellant's claim for permanent impairment due to his federal employment. The Office, as noted, evaluates impairment with reference to the A.M.A., *Guides*. The evidence does not pertain to the standards adopted by the Office for evaluating permanent impairment.[12] For this reason, it did not warrant further review.

The March 31, 2009 diagnostic report from Dr. Hollowell is not relevant to the issue as it does not address permanent impairment of the left leg but only listed test results. Evidence that is not relevant to the particular issue involved does not warrant a reopening of a case for merit review.[13]

On appeal, appellant asserts that the Office did not address the fact that he had back surgery from which his foot numbness derived. He further asserts that the Office determined two percent impairment for his foot only and ignored impairment of his back. As noted, the impairment schedule does not list the back or spine as a member of the body under the Act, for which schedule award compensation is allowed.[14] The Office considered the medical evidence and properly determined that appellant's accepted back condition resulted in two percent impairment of his left leg.

CONCLUSION

The Board finds that appellant does not have greater than two percent permanent impairment of the left lower extremity for which he received a schedule award. The Board also finds that the Office properly denied appellant's reconsideration request without a merit review.

[12] *See supra* note 4. *See also S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009) (scientific studies, like medical literature, have probative value only to the extent they are interpreted by a physician).

[13] *See E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009) (Evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

[14] *See Jesse Mendoza*, 54 ECAB 802 (2003).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated April 28 and February 17, 2009 are affirmed.

Issued: June 10, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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