United States Department of Labor
Employees' Compensation Appeals Board

H.J., Appellant	)	
and	)	
	)	**Docket No. 09-2366**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, TAMPA INTERNATIONAL AIRPORT, Tampa, FL, Employer	)	**Issued: June 23, 2010**

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 September 28, 2009 appellant filed a timely appeal from a September 10, 2009 decision of the Office of Workers' Compensation Programs denying her 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 this case.

ISSUE

The issue is whether appellant sustained any impairment due to her accepted lumbar strain that would entitle her to a schedule award.

On appeal appellant contends that the August 7, 2009 report of the Office medical adviser supported her claim of permanent impairment.

FACTUAL HISTORY

On January 5, 2003 appellant, then a 37-year-old transportation security screener, sustained an employment-related lumbar strain while moving suitcases at work. She stopped work on January 8, 2003. A March 17, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated bulging discs at L4-5 and L5-S1. Dr. Christian Foglar, an attending Board-certified orthopedic surgeon, reviewed the MRI scan on April 1, 2003 and advised that it showed degenerated discs at L4-5 and L5-S1. Appellant returned to limited duty from August 9, 2003 to March 31, 2004, and returned to four hours of daily restricted duty from November 1 to December 2, 2004. She has not worked since that time.

By decision dated October 13, 2005, the Office terminated appellant's compensation benefits. In an August 23, 2006 decision, an Office hearing representative found a conflict in medical evidence and remanded the case for further development. Appellant was referred to Dr. Fernando Rojas, a Board-certified orthopedic surgeon, who advised on October 8, 2006 that her lumbar strain had not resolved and that she could not work. She received wage-loss compensation from October 14, 2005 through September 30, 2006. On December 10, 2005 appellant was terminated by the employing establishment. She began receiving disability retirement on November 1, 2006.

Dr. Ronald S. Paret, Board-certified in orthopedic surgery, provided treatment notes dated from March 27, 2007 in which he listed appellant's complaint of back pain and provided findings on physical examination. A June 28, 2007 lumbar spine MRI scan was limited due to motion and body habitus but revealed degenerative disc disease at L4-5 and L5-S1 with a small central left disc protrusion at L4-5 that could be abutting the left L5 nerve root and a mild disc bulge and mild bilateral facet arthropathy at L5-S1 without obvious nerve root impingement. On July 11, 2007 Dr. Paret reviewed the MRI scan and diagnosed persistent back and right-sided leg pain in the absence of a right-sided herniated disc and a small left-sided bulge at L4-5. He advised that appellant had not been placed on any work restrictions by his office and recommended further functional capacity evaluation (FCE) and electromyographic (EMG) studies. An August 29, 2007 lower extremity EMG was interpreted as showing no electrodiagnostic evidence of neuropathy or active radiculopathy with denervation and a prolonged F-wave response on the left peroneal and tibial studies that could be due to minor nerve compression at the L4-5 and S1 levels. On October 9, 2007 Dr. Paret advised that appellant was released to limited duty at the medium activity level. On December 4, 2007 he advised that she had reached maximum medical improvement. A February 5, 2008 FCE advised that appellant was unable to tolerate or complete any of the sections of the test such that her level of work could be determined.

On February 6, 2008 appellant filed a schedule award claim. In a May 16, 2008 report, Dr. Paret reviewed the FCE and advised that, based on his findings and objective studies, he saw very little evidence of a permanent impairment based on appellant's employment injury. He concluded that she had one percent permanent impairment for loss of function of the dorsolumbar spine and had reached maximum medical improvement. In letters dated July 9, 2008 and February 25, 2009, the Office informed appellant of the medical evidence needed to support her claim of permanent impairment.

By report dated April 16, 2009, Dr. Michael J. Murphy, a Board-certified orthopedic surgeon, noted the history of injury and appellant's complaint of left buttock pain radiating down the posterior aspect of the left thigh with intermittent numbness and occasional weakness. He reviewed the June 28, 2007 MRI scan and provided physical examination findings including a positive straight leg raising on the right. Strength was graded +5/5 in all major groups of the lower extremities with the exception of the left hip flexor which was graded at +4/5, and sensation was slightly decreased in the anterior and lateral thigh on the left. Dr. Murphy diagnosed chronic leg pain, secondary to a herniated disc at L4-5 and advised that she had reached maximum medical improvement. He concluded that, since she had clinically documented radiculopathy and a small disc herniation at L4-5 seen on the MRI scan, she had a 10 percent permanent impairment of the lumbar spine as a result of the January 5, 2003 employment injury.

In an August 7, 2009 report, Dr. Barry Levine, a Board-certified internist and Office medical adviser, noted the MRI scan findings and his review of Dr. Murphy's April 16, 2009 report. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[1] under Table 17-4, appellant had a 12 percent whole person impairment. In a September 4, 2009 report, Dr. Levine advised that, under the sixth edition of the A.M.A., *Guides*, there was no provision for extremity impairment due to radiculopathy, stating:

> "My understanding of the [sixth] edition is that many of the conditions previously treated separately are now lumped and adjusted by modifiers. Therefore I cannot convert the claimant's findings as described in my [August 7, 2009] report to lower extremity impairment."

By decision dated September 10, 2009, the Office found that the medical evidence of record was insufficient to establish that appellant sustained permanent impairment to a schedule member to warrant 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 claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used

[1] A.M.A., *Guides* (6th ed. 2009).

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id.* at § 10.404(a).

to calculate schedule awards.[5] For decisions issued after May 1, 2009, the sixth edition will be used.[6]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[7] 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.[8] A schedule award is not payable for an impairment of the whole body.[9] It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[10]

ANALYSIS

The Board finds this case is not in posture for decision. Dr. Levine, an Office medical adviser, initially found that, under Table 17-4 of the sixth edition of the A.M.A., *Guides*, appellant had 12 percent whole person impairment for a lumbar herniated disc with radiculopathy. As noted, a schedule award is not payable under the Act for injury to the spine[11] or based on whole person impairment.[12] Appellant would not be entitled to impairment findings under Table 17-4. However, 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.[13]

The accepted condition in this case is lumbar strain. The record also supports that appellant had preexisting lumbar degenerative disc disease, as shown on the March 17, 2003 MRI scan. While an appellant has to establish impairment to a scheduled member caused by the accepted condition before an impairment due to a preexisting condition can be assessed,[14] it is unclear from the record at hand whether appellant has an impairment caused by her accepted lumbar strain. The Board notes that there is no specific provision for rating impairment based on

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

[6] FECA Bulletin No. 09-03 (issued March 15, 2009).

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

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

[9] *N.M.*, 58 ECAB 273 (2007).

[10] *Peter C. Belkind*, 56 ECAB 580 (2005).

[11] *Pamela J. Darling*, *supra* note 7.

[12] *N.M.*, *supra* note 9.

[13] *Thomas J. Engelhart*, *supra* note 8.

[14] *See generally Thomas P. Lavin*, 57 ECAB 353 (2006).

strains or sprains in the A.M.A., *Guides.* This does not warrant the conclusion that such an award is precluded. The Board routinely reviews schedule award claims for which the accepted condition is sprain or strain and has recognized that a sprain/strain may result in a permanent impairment.[15] Such determination is made on a case by case review of the medical evidence.

Dr. Murphy's April 16, 2009 report concluded that appellant had a 10 percent permanent impairment of the lumbar spine. This evidence is insufficient to establish entitlement to a schedule award because his rating was not in accordance with the A.M.A., *Guides*.[16] However, he described loss of motor strength in the left hip flexor and slightly diminished sensation in the anterior and lateral thigh on the left. Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[17] Section 16.4 of the sixth edition of the A.M.A., *Guides* describes the procedure to be used in assessing peripheral nerve impairments.[18]

While the claimant has the burden of establishing the extent of impairment due to an accepted injury, the Office shares responsibility in the development of the medical evidence.[19] In this case, Dr. Murphy provided a description of decreased strength and sensory deficit such that additional review by the Office medical adviser is warranted.[20] The September 10, 2009 decision will be set aside and the case remanded for the Office to forward Dr. Murphy's report to an Office medical adviser for review under the sixth edition of the A.M.A., *Guides.* Following such development the Office deems necessary, it shall issue an appropriate merit decision.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant established entitlement to a schedule award.

[15] *C.H.*, 60 ECAB ____ (Docket No. 08-2246, issued May 15, 2009).

[16] *Supra* note 5.

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

[18] A.M.A., *Guides*, *supra* note 2 at 531.

[19] *D.N.*, 59 ECAB ____ (Docket No. 07-1940, issued June 17, 2008).

[20] *See J.C.*, 58 ECAB 258 (2007).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2009 decision of the Office of Workers' Compensation Programs be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: June 23, 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