United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant	)	
and	)	**Docket No. 09-1561**
	)	**Issued: March 16, 2010**
DEPARTMENT OF THE NAVY,	)	
Colts Neck, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2009 appellant filed a timely appeal from July 10, 2008 and February 24, 2009 decisions of the Office of Workers' Compensation Programs adjudicating his 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 has more than eight percent impairment to his right lower extremity for which he received a schedule award.

FACTUAL HISTORY

On October 22, 1999 appellant, then a 46-year-old motor vehicle operator, filed a claim for a traumatic injury on October 21, 1999 when he experienced sharp pain in his lower back radiating to both legs when his tractor-trailer seat bounced up and down while he was driving. The Office accepted his claim for aggravation of preexisting spondylolisthesis and preexisting

spondylosis. Appellant underwent lumbar spine surgery in April 2000. On September 15, 2004 he filed a claim for a schedule award.[1]

In a May 24, 2004 report, Dr. David Weiss, an osteopathic physician specializing in orthopedic medicine, reviewed appellant's medical history and provided findings on physical examination. Appellant described low back pain and stiffness on a daily basis with radicular pain in his right lower extremity. He had numbness and pins and needles sensations in his right lower extremity. Appellant had difficulty with prolonged sitting, repetitive bending or lifting weights greater than 35. He described his pain as ranging from 5 to 8 on a scale of 0 to 10. Findings on physical examination included lumbar spine range of motion of 35 degrees forward flexion, 15 degrees extension, left lateral flexion of 15 degrees and right lateral flexion of 15 degrees. All ranges of motion were carried through with pain at the extremes. The sitting root sign was positive on the right at 35 degrees, producing radicular pain down the right lower extremity. Straight leg raising was positive at 75 degrees above the horizontal and produced midline low back pain on the right. The extensor hallucis longus muscle was graded at 5/5 bilaterally. Manual muscle strength testing of the lower extremities revealed the gastrocnemius musculature at 4/5 on the right and hip flexor muscles at 3+/5. Sensory examination revealed a perceived sensory deficit over the L4, L5 and S1 dermatomes involving the right lower extremity. Deep tendon reflexes were +2 and symmetrical. The gastrocnemius circumferential measurements were 37.5 centimeters (cm) on the right and left. Dr. Weiss found that appellant had 37 percent impairment of the right lower extremity for pain, including 4 percent each, or 12 percent total, for sensory deficit of the L4, L5 and S1 nerve roots, based on Table 15-15 and 15-18 at page 424 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*); 17 percent for Grade 4 motor strength deficit of the gastrocnemius muscle (ankle plantar flexion) and 10 percent for Grade 3 motor strength deficit of the hip flexors, based on Table 17-8 at page 532, and 3 percent for pain-related impairment based on Figure 18-1 at page 574. Dr. Weiss noted that appellant reported that he could not perform his previous employment as a truck driver and could not perform repetitive bending or lift more than 35 pounds.

On June 1, 2005 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and an Office medical adviser, reviewed Dr. Weiss' report and found that the findings on physical examination reflected 32 percent right lower extremity impairment. He found 3 percent impairment for sensory deficit each of the L4, L5 and S1 nerve roots based on a Grade 3 deficit from Table 15-15 (60 percent for Grade 3 multiplied by 5 percent maximum for each nerve root from Table 15-18) equals 3 percent, or a total of 9 percent for sensory deficit. Dr. Magliato noted that Dr. Weiss had not indicated a grade for sensory deficit from Table 15-15. He agreed with the 17 percent and 10 percent impairment Dr. Weiss found for muscle weakness of the gastrocnemius and hip flexor muscles, respectively. Dr. Magliato did not include three percent for pain as Dr. Weiss did. He combined the impairment percentages according to the Combined Values Chart at page 604 of the A.M.A., *Guides* in finding 32 percent total impairment (17

[1] The earlier portion of the case record, in paper form, was lost en route to the Board and has not yet been reconstructed by the Office. However, the imaged portion of the record contains all evidence relevant to adjudication of appellant's schedule award claim.

percent combined with 10 percent constitutes a 25 percent impairment based on the chart, 25 percent combined with 9 percent constitutes a 32 percent impairment).

The Office found a conflict in the medical opinion evidence between Dr. Weiss and Dr. Magliato. On June 6, 2007 it referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Ian Fries, a Board-certified orthopedic surgeon, for an examination and an independent evaluation of his left upper extremity impairment.

In an August 6, 2007 report, Dr. Fries reviewed appellant's medical history and provided findings on physical examination. He found 11 percent impairment to appellant's right lower extremity, including 5 percent for Grade 4 right hip flexor weakness, based on Table 17-18 at page 532 of the A.M.A., *Guides* and 3 percent for pain. Dr. Fries opined that appellant did not have gastrocnemius muscle weakness as found by Dr. Weiss because Dr. Weiss noted a normal gait, normal tip-toe walking and no decreased gastrocnemius on the right.[2] On April 17, 2008 Dr. Andrew A. Merola, an Office medical consultant, agreed with the impairment rating of Dr. Fries but noted a mathematical error in Dr. Fries' report. He stated that 5 percent combined with 3 percent constitutes 8 percent impairment, not 11 percent.

By decision dated July 10, 2008, the Office granted appellant a schedule award based on eight percent impairment of the right lower extremity for 23.04 weeks, from April 12 to September 19, 2001.[3] Appellant requested a hearing before an Office hearing representative that was held, *via* video conference, on December 17, 2008. Following the hearing, appellant, through his attorney, submitted a written statement arguing that the Office should not have found a conflict between Dr. Weiss and Dr. Magliato because the difference between their impairment ratings was insignificant.

By decision dated February 24, 2009, an Office hearing representative affirmed the July 10, 2008 decision on the grounds that the evidence established that appellant had no more than eight percent impairment to his right lower extremity.

LEGAL PRECEDENT

Section 8107 of the Act[4] authorizes the payment of 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. The Office evaluates the degree of permanent impairment according to

[2] In his report, Dr. Weiss did not state that appellant's gait was normal. He stated that appellant ambulated with a right lower extremity list. It was only calcaneal (heel walking) and equinus (toe walking) that Dr. Weiss reported as normal.

[3] The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss of use of the lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by eight percent for the right lower extremity equals 23.04 weeks of compensation.

[4] 5 U.S.C. § 8107.

the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides*).[5]

The A.M.A., *Guides* provides for three separate methods for calculating the lower extremity permanent impairment of an individual: anatomic, functional and diagnosis based.[6] The anatomic method involves noting changes, including muscle atrophy, nerve impairment and vascular derangement, as found during physical examination.[7] The diagnosis-based method may be used to evaluate impairments caused by specific fractures and deformities, as well as ligamentous instability, bursitis and various surgical procedures, including joint replacements and meniscectomies.[8] The functional method is used for conditions when anatomic changes are difficult to categorize, or when functional implications have been documented, and includes range of motion, gait derangement and muscle strength.[9] The evaluating physician must determine which method best describes the impairment of a specific individual based on patient history and physical examination.[10] When uncertain about which method to use, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating.[11] If more than one method can be used, the method that provides the higher impairment rating should be adopted.[12]

ANALYSIS

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is necessary. The Board finds that the Office erred in finding that a conflict existed between Dr. Weiss and Dr. Magliato as to appellant's right lower extremity impairment.

Dr. Weiss found that appellant had 37 percent impairment of the right lower extremity, including 4 percent each, or 12 percent total, for sensory deficit of the L4, L5 and S1 nerve roots, based on Table 15-15 and 15-18 at page 424 of the fifth edition of the A.M.A., *Guides*. However, he did not specify the grade he used in applying these tables. Based upon the history of complaints in his report, Dr. Weiss may have been applying Grade 2. He then found 17 percent for Grade 4 motor strength deficit of the gastrocnemius muscle and 10 percent for Grade 3 motor strength deficit of the hip flexors, based on Table 17-8 at page 532, and 3 percent for pain-related impairment based on Figure 18-1 at page 574.

[5] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[6] A.M.A., *Guides* 525.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 525, Table 17-1.

[10] *Id.* at 548, 555.

[11] *Id.* at 526.

[12] *Id.* at 527, 555.

Dr. Magliato found that the findings on physical examination reported by Dr. Weiss reflected 32 percent right lower extremity impairment. He found three percent impairment for sensory deficit each of the L4, L5 and S1 nerve roots based on a Grade 3 deficit from Table 15-15. Dr. Magliato noted that Dr. Weiss had not indicated a grade for sensory deficit from Table 15-15 but would have used a Grade 2, or 80 percent sensory loss, to find 4 percent impairment. He agreed with the 17 percent and 10 percent impairment Dr. Weiss found for muscle weakness of the gastrocnemius and hip flexor muscles, respectively. Dr. Magliato did not include three percent for pain as Dr. Weiss did. He combined the impairment percentages according to the Combined Values Chart at page 604 of the A.M.A., *Guides* in finding 32 percent total impairment (17 percent combined with 10 percent constitutes a 25 percent impairment based on the chart, 25 percent combined with 9 percent constitutes a 32 percent impairment).

Dr. Weiss and Dr. Magliato agreed that appellant had 17 percent impairment for muscle weakness of the gastrocnemius and hip flexor muscles, respectively. Dr. Magliato properly discounted three percent for pain from Dr. Weiss' impairment rating. The A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters.[13] Moreover, as the A.M.A., *Guides* explains: "The impairment ratings in the body organ system chapters make allowance for expected accompanying pain."[14] Dr. Weiss did not adequately explain why appellant's condition could not be rated in other chapters of the A.M.A., *Guides* or how his condition falls within one of the several situations identified under section 18.3a (When This Chapter Should Be Used to Evaluate Pain-Related Impairment).[15] He did not explain why appellant's right lower extremity pain could not be evaluated using the chapter on lower extremity impairment, Chapter 17. Therefore, Dr. Magliato properly discounted three percent for pain. The only remaining difference between the impairment ratings of Dr. Weiss and Dr. Magliato was in the choice of a grade for sensory deficit of the L4, L5 and S1 nerve roots. Dr. Weiss did not assign a grade but must have used Grade 2 in order to find 4 percent impairment for each nerve root, or a total of 12 percent. Dr. Magliato assigned Grade 3 based on the reported physician findings, for a total of nine percent for sensory deficit of the nerve roots. Applying the impairment percentages of Dr. Magliato to the Combined Values Chart at page 604 of the A.M.A., *Guides*, constitutes 32 percent right lower extremity impairment (17 percent for gastrocnemius muscle weakness combined with 10 percent for hip flexor weakness constitutes 25 percent; 25 percent combined with 9 percent for sensory deficit constitutes 32 percent). The impairment percentages found by Dr. Weiss constitute a 34 percent right lower extremity impairment based on the Combined Values Chart (17 percent for gastrocnemius muscle weakness combined with 12 percent for sensory deficit constitutes 27 percent; 27 percent combined with 10 percent for hip flexor weakness constitutes 34 percent right lower extremity impairment). As Dr. Weiss did not specify the grade he used in applying the tables and Dr. Magliato did not explain why he applied Grade 3 or whey there was a resulting difference, the Office should have further developed the medical evidence and asked Dr. Weiss

[13] *Id.* at 571.

[14] *Id*. at 20.

[15] *Id*. at 570-71.

and Dr. Magliato to provide an explanation for the sensory deficit grade each used, and then determine the appropriate schedule award.[16] This is especially important since Dr. Magliato relied on the findings from Dr. Weiss' physical examination and report without any explanation why Dr. Weiss' calculations were in error as directed by the Office in its June 1, 2005 referral to Dr. Magliato. Accordingly, it was premature for the Office to find a conflict in the medical evidence, and the report of Dr. Fries is not entitled to special weight.

CONCLUSION

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is necessary. On remand the Office should obtain additional information from Dr. Weiss and Dr. Magliato regarding their choice of sensory deficit grade. After such further development as the Office deems necessary, it should issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 24, 2009 and July 10, 2008 are set aside and the case is remanded for further action consistent with this decision.

Issued: March 16, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[16] The Board notes that neither physician explained his choice of grade for sensory deficit.