United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 10-2172**
	)	**Issued: August 3, 2011**
U.S. POSTAL SERVICE, POST OFFICE, League City, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from a July 15, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision that affirmed a May 17, 2010 schedule award decision. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant sustained a ratable leg impairment entitling him to a schedule award.

FACTUAL HISTORY

On July 23, 2007 appellant, then a 54-year-old distribution clerk, injured his back while he was removing empty mail tubs from a cart and placing them on the ground. OWCP accepted his traumatic injury claim for lumbar sprain and herniated lumbar disc and disbursed payments

[1] 5 U.S.C. § 8101 *et seq.*

for temporary total disability.[2] Dr. Howard B. Cotler, appellant's attending physician and a Board-certified orthopedic surgeon, recommended an L4-L5 microdiscectomy, which was authorized by OWCP and performed on February 12, 2008. Appellant returned to work on May 19, 2008, but thereafter complained of increased back and left leg pain. In view of a magnetic resonance imaging (MRI) scan showing loss of hydration and annular rounding of the L4-L5 disc and an electromyogram (EMG) demonstrating subacute left L5 radiculopathy, Dr. Cotler advised lumbar spine reconstruction. OWCP authorized a repeat surgery, which Dr. Cotler performed on February 2, 2009. Appellant returned to modified duty on June 1, 2009, but stopped work on August 13, 2009. He retired effective March 5, 2010.

In a September 4, 2009 report, Dr. Benjamin B. Tiongson, a pain management practitioner, stated that appellant's low back and leg symptoms resulted from the accepted July 23, 2007 injury. On examination, he observed a left antalgic gait, tenderness on palpation of the left paravertebral region at L4-L5, limited lumbar range of motion (ROM) and a sensory deficit over the left S1 dermatomal distribution. Dr. Tiongson noted that a July 10, 2009 MRI scan showed mild L4-L5 changes while an August 19, 2009 computerized tomography (CT) scan revealed retrolisthesis of the L4-L5 and L5-S1 in prone position, a mildly-underfilled left L5 nerve root sleeve, absence of osseous continuity across the L4-L5 disc space and within the posterolateral L4-L5 fusion masses, absence of facet joint fusion, left laminotomy defects and a bone graft donor site on the right posterior ilium. In addition, an August 20, 2009 EMG study indicated chronic left L5 radiculopathy and diabetic peripheral neuropathy. Dr. Tiongson diagnosed chronic pain syndrome and left L5 radiculopathy.[3]

Appellant filed a claim for a schedule award on November 10, 2009. OWCP asked Dr. Cotler in a November 20, 2009 letter to determine whether appellant's accepted low back condition impaired one or both of his lower extremities and, if so, render an impairment rating using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[4]

In a January 28, 2010 report, Dr. Cotler related that appellant had a low back injury when he lifted a postal tote. He stated that an MRI scan obtained by an employing establishment physician revealed lumbar herniated nucleus pulposus. Following a February 12, 2008 decompression procedure, appellant reported worsening low back and left lower extremity pain. He underwent a second surgery on February 2, 2009. Appellant reported that a 2009 EMG study exhibited L5 radiculopathy. On examination, Dr. Cotler observed decreased lumbar ROM, tenderness to palpation of the lumbar paraspinal muscles and bilateral sacroiliac joints, mildly-reduced left leg strength, pain radiating into the foot, a one-centimeter gastrocnemius atrophy and positive bilateral straight leg raise and Waddell's signs. He diagnosed lumbar herniated

[2] The record contains various medical reports alluding to appellant's history of insulin-dependent diabetes mellitus, diabetic neuropathy, gastroesophageal reflux disease, cerebral infarction, cerebral thrombosis, cervical radiculopathy, brachial neuritis, carpal tunnel syndrome, hypertension, cardiac arrest, coronary disease and hypercholesterolemia. None of these conditions are presently before the Board.

[3] Dr. Tiongson's reports for the period October 12, 2009 to February 22, 2010 essentially duplicated the content of the September 4, 2009 report.

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

nucleus pulposus, sprain and radiculopathy. Referencing the A.M.A., *Guides*, Dr. Cotler categorized appellant's condition as a class 2 lumbar spine injury, assigned an 11 percent whole-person impairment rating and determined that no further adjustments were warranted.

On February 26, 2010 OWCP referred appellant to Dr. Gary C. Freeman, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 22, 2010 report, Dr. Freeman reviewed the history of injury and medical file and, on examination, observed intact reflexes, sensation, and strength and the absence of an antalgic gait or atrophy in the lower extremities. Dr. Freeman pointed out that prior symptomatology "can be due to dysfunction in distal nerves from the area of the two surgeries as well as the diabetic neuropathy." However, he advised that his examination did not show radiculopathy. Although appellant reported lower leg pain, Dr. Freeman stated that there was no objective evidence of any neurological origin of the reported pain. Dr. Freeman concluded that, with no objective physical evidence of injury or sequelae in either leg, appellant did not have ratable permanent impairment in either leg. In a May 3, 2010 report, an OWCP medical adviser reviewed Dr. Freeman's report and concurred with his opinion because that physician's examination showed no objective physical evidence of injury or sequelae to either leg and, thus, no basis for finding permanent impairment.

By decision dated May 17, 2010, OWCP denied appellant's claim, finding the evidence insufficient to demonstrate a permanent impairment of the lower extremities.

Appellant requested reconsideration on June 11, 2010 and asserted that he was entitled to a schedule award based on the medical evidence. He submitted a May 27, 2010 report from Dr. Steven M. Lovitt, a Board-certified neurologist, which related a history of left L5-S1 radiculopathy and two previous back surgeries. On examination, Dr. Lovitt observed pain in the distal left leg and asymmetrical reflexes of the left ankle. He noted that a May 2010 EMG and MRI scan did not reveal any evidence of active radiculopathy or postoperative stenotic lesions. Dr. Lovitt diagnosed thoracic and lumbar radiculopathy and peripheral neuropathy.

In a May 17, 2010 report from Dr. Tiongson, appellant complained of lower back and leg pain and numbness. On examination, Dr. Tiongson observed tenderness on palpation of the left paravertebral region at L4-L5, muscle spasms over the lumbar paraspinal musculature region, limited lumbar ROM, a sensory deficit over the left S1 dermatomal distribution and moderate left S1 paresthesia. He diagnosed chronic pain syndrome and left S1 radiculopathy. On June 15, 2010 appellant received a transforaminal epidural steroid injection at the left S1, which did not relieve his symptoms. In a June 28, 2010 report, Dr. Tiongson diagnosed lumbar radiculopathy with left L5-S1 nerve root irritation along with chronic pain syndrome and left S1 radiculopathy.[5]

On July 15, 2010 OWCP denied modification of the May 17, 2010 decision.

[5] Dr. Tiongson's May 17 and June 28, 2010 reports repeated the history of injury and diagnostic results mentioned in earlier reports. *See supra* note 3. In addition, the May 17 and June 28, 2010 reports contained identical findings on physical examination.

LEGAL PRECEDENT

The schedule award provision of FECA 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.[6] However, FECA 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 to all claimants, good administrative practice necessitates 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 implementing regulation as the appropriate standard for evaluating schedule losses.[7]

Although the A.M.A., *Guides* presents methods for estimating impairment to the spine and to the whole person,[8] FECA does not authorize schedule awards for loss of use of the back or the body as a whole.[9] Amendments to FECA, however, modified the schedule award provision to allow 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. As the schedule award provisions of FECA include the extremities, 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.[10]

ANALYSIS

Appellant filed a traumatic injury claim, which OWCP accepted for lumbar sprain and herniated lumbar disc. Following two separate lumbar surgeries on February 12, 2008 and February 2, 2009, respectively, he filed a claim for a schedule award on November 10, 2009.

After OWCP requested that Dr. Cotler provide an impairment rating for the lower extremities, appellant furnished a January 28, 2010 report from him, which categorized appellant's condition as a class 2 lumbar spine injury and assigned an 11 percent whole-person impairment rating. While Dr. Cotler noted multiple left lower extremity symptoms, including pain, sacroiliac joint tenderness and gastrocnemius muscle atrophy in his January 28, 2010 report, he did not rate any impairment of either lower extremity. He only provided a whole-person impairment rating for appellant's employment-related lumbar condition.[11] As noted,

[6] 5 U.S.C. § 8107; 20 C.F.R. § 10.404. No schedule award is payable for a member, function or organ of the body not specified under FECA or the implementing regulations. *J.Q.*, 59 ECAB 366 (2008).

[7] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[8] *See Janae J. Triplette*, 54 ECAB 792 (2003); *B.M., id.*.

[9] *J.Q., supra* note 6.

[10] *Rozella L. Skinner*, 37 ECAB 398 (1986); *W.D.*, Docket No. 10-274 (issued September 3, 2010).

[11] The Board points out that OWCP's November 20, 2009 letter to Dr. Cotler specifically asked for a lower extremity impairment rating.

FECA does not permit a schedule award for impairment of the back or the body as a whole.[12] Consequently, OWCP properly determined that Dr. Cotler's report was insufficient to establish permanent impairment of a scheduled body member.

Thereafter, OWCP referred him for a second opinion examination to Dr. Freeman, who concluded that appellant did not sustain permanent leg impairment. In his March 22, 2010 report, Dr. Freeman reviewed appellant's history of injury and medical file and conducted a thorough physical examination, during which he observed normal leg reflexes, sensation, and strength and the absence of an antalgic gait or atrophy. He found no evidence of radiculopathy and no objective basis on which to rate any impairment of either leg. In view of the lack of objective findings, Dr. Freeman opined that appellant did not sustain ratable lower extremity impairment. OWCP's medical adviser reviewed Dr. Freeman's report and concurred that appellant had no ratable impairment of either leg due to his accepted conditions. The Board finds that Dr. Freeman's March 22, 2010 report constitutes the weight of the evidence. He examined appellant, reviewed his history and found no basis on which to attribute any permanent impairment to the accepted conditions.

Appellant contends on appeal that the July 15, 2010 decision was contrary to fact and law. However, the only physician who rendered an impairment rating to a scheduled member or function of the body was Dr. Freeman, who determined that appellant did not sustain permanent impairment to either lower extremity.[13]

The Board notes that appellant submitted new evidence after issuance of the July 15, 2010 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.[14] However, appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not sustain a ratable leg impairment entitling him to a schedule award.

[12] FECA expressly defines "organ" as "a part of the body that performs a special function, and for purposes of this subchapter excludes the brain, heart, and back." 5 U.S.C. § 8101(19). Also, a description of impairment in terms of "whole person" or "whole body" is not probative as to the extent of loss of use of a specific scheduled member of the body under section 8107 of FECA. *R.I.*, Docket No. 09-1559 (issued August 23, 2010).

[13] The Board notes that medical evidence from Drs. Lovitt and Tiongson did not supply an impairment rating.

[14] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the July 15 and May 17, 2010 decisions of Office of Workers' Compensation Programs are affirmed.

Issued: August 3, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board