United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 11-270**
	)	**Issued: August 15, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer	)	

Appearances:
Appellant, pro se
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 November 16, 2010 appellant filed a timely appeal from an August 5, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 merits of this case.

ISSUE

The issue is whether appellant has an employment-related permanent impairment entitling him to a schedule award pursuant to 5 U.S.C. § 8107.

FACTUAL HISTORY

On June 7, 2002 appellant, then a 52-year-old tractor trailer operator, filed a traumatic injury (Form CA-1) alleging that he sustained injuries in a motor vehicle accident on June 4, 2002. He indicated that he was rear-ended while in the performance of duty. OWCP

[1] 5 U.S.C. § 8101 *et seq.*

accepted the claim for cervical and lumbar strains, left knee contusion and herniated L4-5 and L5-S1 discs. Appellant stopped working and received compensation for wage loss.[2]

In a report dated April 11, 2003, Dr. Courtney Shelton, an internist, opined that appellant had 25 percent whole person impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). By report dated September 7, 2007, Dr. Harvey Leslie, a pain management specialist, provided an "addendum" to the April 11, 2003 report, and also opined that appellant had 25 percent whole person permanent impairment.

OWCP referred the evidence to its medical adviser for review. In a report dated November 26, 2007, the medical adviser noted that OWCP does not recognize whole person impairments. The medical adviser stated that the evidence did not describe motor or sensory loss and opined that appellant had no permanent impairment.

By decision dated December 3, 2007, OWCP found appellant was not entitled to a schedule award based on the medical evidence of record. On June 13, 2008 appellant submitted a Form CA-7 (claim for compensation) indicating that he was claiming a schedule award.[3] In a report dated July 3, 2008, OWCP's medical adviser stated that an impairment report must describe a sensory or motor deficit using the appropriate tables in the A.M.A., *Guides*.

In a report dated October 6, 2008, Dr. Mark Freeman, an osteopath, provided a history and results on examination. He diagnosed protruding disc of the lumbar spine and positive electromyogram (EMG) to L5-S1. Dr. Freeman opined that under the A.M.A., *Guides* appellant had 28 percent permanent impairment to the "Lower Extremity" based on sensory and motor loss. In a report dated December 15, 2008, he provided results on examination and stated that the protruding disc was directly caused by the motor vehicle accident at work.

OWCP's medical adviser, in a report dated January 14, 2009, stated that the December 15, 2008 report findings, such as decreased sensation along L5 and C5-6, were not in agreement with prior medical evidence in the record. The medical adviser recommended a second opinion evaluation.

OWCP referred appellant for a second opinion examination by Dr. Joseph Tatum, an orthopedic surgeon. By report dated March 13, 2009, Dr. Tatum provided a history and results on examination. He diagnosed multiple psychosomatic symptoms and stated that the work injury had resolved. Dr. Tatum did not discuss a permanent impairment.

In a report dated March 16, 2009, OWCP's medical adviser stated that there were no objective findings of a spinal nerve root injury and no impairment under the A.M.A., *Guides*. By

[2] The record contains a January 4, 2006 letter indicating that appellant had elected retirement benefits instead of FECA benefits.

[3] Appellant had previously submitted a Form CA-7 with regard to a schedule award on November 8, 2007.

decision dated April 24, 2009, OWCP found the medical evidence did not establish a permanent impairment to a scheduled member of the body.[4]

In a report dated May 4, 2009, Dr. Freeman indicated that an EMG and magnetic resonance imaging (MRI) scan were positive for an L5-S1 radiculopathy. By report dated June 9, 2009, he opined that a lumbar MRI scan showed nerve root impingement and this was the cause of the lower extremity impairment. In a decision dated October 15, 2009, OWCP again found appellant was not entitled to a schedule award.

The record contains a November 16, 2009 "impairment rating" performed by an occupational therapist. The report includes examination results and identifies tables from the sixth edition of the A.M.A., *Guides*. The impairment ratings were 13 percent to the upper extremity based on motor deficit, 11 percent to the lower extremity based on sciatic nerve motor deficit, and 1 percent for left knee range of motion.

On December 21, 2009 OWCP advised that appellant's claim had also been accepted for aggravation of degenerative cervical intervertebral disc. By report dated February 2, 2010, Dr. Freeman discussed appellant's permanent impairment, stating that the specific impairment rating tables were discussed in the November 16, 2009 report. He stated that he agreed with the impairment rating calculations and stated that the 13 percent impairment to the upper extremity was due to the newly accepted cervical degenerative disc disease. Dr. Freeman stated that the impairments had been documented by MRI scan results.

In a report dated February 11, 2010, OWCP's medical adviser opined that appellant did not have a permanent impairment under the A.M.A., *Guides*. The medical adviser stated that the ratings provided by Dr. Freeman were based on appellant's complaints that lacked reliability and physical examination findings. According to the medical adviser an unreliable functional history could not be used for ratings purposes under the A.M.A., *Guides*.

On May 11, 2010 appellant requested reconsideration of his claim. OWCP again referred the case to its OWCP medical adviser. In a report dated July 14, 2010, the medical adviser stated that the November 16, 2009 and February 2, 2010 reports had been carefully reviewed. The medical adviser stated that there was no documentation of a radiculopathy and radiculopathy impairment is not based on imaging studies. According to the medical adviser, appellant did have 10 percent based on loss of range of motion under Table 16-23.

In a decision dated August 5, 2010, OWCP reviewed the case on its merits and denied modification. It found the medical evidence did not establish a permanent impairment. With respect to the left knee, OWCP stated "there is no objective finding to support residuals from your right knee contusion" on June 4, 2002.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for

[4] The list of accepted conditions included chronic pain syndrome.

the permanent impairment of the scheduled member or function.[5] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] OWCP's procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides.*[7]

ANALYSIS

The medical evidence in this case contains opinions from attending physician Dr. Freeman and OWCP's medical adviser regarding a permanent impairment. With respect to the left knee, both Dr. Freeman and the medical adviser found a permanent impairment. Dr. Freeman reviewed and adopted the calculations in the November 16, 2009 report, which identified Table 16-3 and found one percent leg impairment. The medical adviser identified Table 16-23 and found 10 percent impairment based on loss of range of motion. In the August 5, 2010 decision, OWCP appears to find any left knee impairment was not employment related, but it incorrectly stated that the accepted condition was a right knee contusion. The accepted condition was a left knee contusion, and moreover the issue of causal relationship is a medical issue. Neither Dr. Freeman nor OWCP's medical adviser offered an opinion on causal relationship between the left knee impairment and the employment injuries.

In addition to the disagreement regarding the left knee impairment, Dr. Freeman and the medical adviser disagreed with respect to an impairment resulting from cervical and lumbar conditions. He found impairments to the upper and lower extremities based on nerve root impairments, while the medical adviser found that the evidence did not establish peripheral nerve impairments resulting in a permanent impairment.

FECA provides that, if there is a 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 the examination.[8] In this case, there is a disagreement between OWCP's medical adviser and an attending physician regarding the nature and extent of an employment-related permanent impairment under the sixth edition of the A.M.A., *Guides.* The case will be remanded for referral to a physician properly selected as an impartial medical examination to provide a rationalized medical opinion on the issue presented.[9] After such further development as OWCP deems necessary, it should issue an appropriate decision.

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[5] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[6] *A. George Lampo*, 45 ECAB 441 (1994).

[7] FECA Bulletin No. 09-03 (issued March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

[8] 5 U.S.C. § 8123(a).

[9] The Board notes that when a case is referred to a referee physician, it is the referee physician, not OWCP's medical adviser, who must resolve the conflict. *See Thomas J. Fragale*, 55 ECAB 619 (2004).

CONCLUSION

The Board finds there is a conflict in the medical evidence and pursuant to 5 U.S.C. § 8123(a) the case will be remanded for resolution of the conflict.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 5, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 15, 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