United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
and	)	**Docket No. 11-985**
	)	**Issued: December 19, 2011**
U.S. POSTAL SERVICE, SOUTHERN MARYLAND BULK MAIL CENTER, Capital Heights, MD, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 March 11, 2011 appellant, through his attorney, timely appealed the March 3, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which granted a schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 greater than seven percent impairment of each lower extremity.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 61-year-old mail handler, has an accepted claim for cervical radiculitis and herniated disc, which arose on or about December 27, 1989.[2] On April 11, 1990 he underwent an anterior cervical discectomy with fusion at C4-5. Appellant underwent a similar procedure at C3-4 on December 3, 2003. He filed a claim for a schedule award (Form CA-7) on May 29, 2009, which OWCP denied by decision dated May 19, 2010.

Counsel subsequently filed a request for reconsideration. Dr. Donald Saltzman, a Board-certified orthopedic surgeon, examined appellant on November 1, 2010 and diagnosed status post C3-4 and C4-5 anterior cervical fusion with myelopathy. He found 12 percent impairment of the upper extremities due to mild sensory and motor deficits at the C5-6 level. As to the lower extremity, Dr. Saltzman found 15 percent impairment bilaterally due to movement and gait disorders.[3]

In a report dated December 10, 2010, Dr. Martin Fritzhand, a Board-certified urologist, advised that the effects of appellant's cervical myelopathy on his lower extremities could be translated to a L4 nerve root impairment, which corresponded to two percent impairment of the left lower extremity and seven percent impairment of the right lower extremity based on mild motor and sensory deficits. He also found that appellant had a neurogenic bladder based on his cervical myelopathy, which represented an additional six percent impairment of each lower extremity, assuming OWCP recognized such impairment.

In a report dated February 7, 2011, the district medical adviser (DMA), Dr. Christopher R. Brigham, Board-certified in occupational medicine, found seven percent impairment of both lower extremities based on station and gait disorders.[4]

In a decision dated March 3, 2011, OWCP granted a schedule award for seven percent impairment of each lower extremity in accordance with the DMA's findings.[5]

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[6] FECA,

[2] The Board notes that the January 20, 2011 statement of accepted facts incorrectly identified "Lumbar Herniated Disc" as an accepted condition.

[3] Dr. Saltzman apportioned 10 percent impairment to appellant's cervical condition and 5 percent to lumbar degenerative changes at L5-S1.

[4] Dr. Brigham did not specifically address whether appellant had upper extremity impairment as noted by Dr. Saltzman.

[5] The award was pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008). OWCP also issued a separate March 3, 2011 decision vacating its May 19, 2010 schedule award decision.

[6] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[7] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[8]

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.[9] Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[10]

FECA provides that if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[11] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[12] The DMA, acting on behalf of OWCP, may create a conflict in medical opinion.[13]

ANALYSIS

The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.[14] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.[15] The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[16] Dr. Saltzman applied this methodology with respect to the upper extremities and Dr. Fritzhand applied the same methodology with respect to the lower extremities. However, Dr. Saltzman and Dr. Brigham, the DMAs applied a different methodology -- station and gait disorders -- with respect to the lower extremities. OWCP awarded benefits based on

[7] 20 C.F.R. § 10.404 (2011).

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *Id.* at Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[9] *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

[10] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[11] *Id*. at § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[12] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[13] 20 C.F.R. §10.321(b).

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[15] *Id.*

[16] *Id*.

Dr. Brigham's finding of a bilateral lower extremity station and gait disorder. Neither the DMA nor the senior claims examiner offered an explanation why the station and gait disorder impairment rating pursuant to Table 13-12, A.M.A., *Guides* 336 (6th ed. 2008) was the appropriate measure of appellant's lower extremity impairment under FECA.

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion. The DMA disagreed with appellant's physicians, Dr. Fritzhand and Dr. Saltzman.[17] He, acting on behalf of OWCP, may create a conflict in medical opinion.[18] For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.[19] The Board finds the reports of Dr. Brigham, Dr. Fritzhand and Dr. Saltzman of virtually equal weight and rationale. Because there is an unresolved conflict in medical opinion, the case will be remanded to OWCP for referral to an impartial medical examiner. On remand, OWCP should also address whether appellant has an employment-related impairment of the upper extremities as noted by Dr. Saltzman. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that the case is not in posture for decision.

[17] Counsel questioned whether the DMA authored the February 4, 2011 report which bears his signature. However, he has not submitted evidence to support his contention that the impairment rating was prepared by someone other than the DMA.

[18] 20 C.F.R. §10.321(b).

[19] *Darlene R. Kennedy*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2011 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: December 19, 2011
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