United States Department of Labor
Employees' Compensation Appeals Board

C.T., Appellant	)	
and	)	**Docket No. 10-517**
	)	**Issued: January 3, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2009 appellant filed a timely appeal from a September 30, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than 25 percent permanent impairment of the left leg and whether he has ratable permanent impairment of the right leg.

FACTUAL HISTORY

On April 27, 1999 appellant, then a 42-year-old laborer and custodian, injured his back when he was jolted from his seat while driving equipment at work. The Office accepted his claim for aggravation of lumbar strain and expanded his claim to include aggravation of lumbar disc displacement and authorized lumbar surgery on June 15, 1999 and March 28, 2000.[1]

[1] Appellant was initially treated with back pain, diagnosed with a recurrent disc herniation at L5-S1. The record indicates that appellant underwent nonwork-related lumbar decompression surgery, performed January 21, 1999.

Appellant stopped work on April 27, 1999 and returned to part-time light duty on July 3, 2000 and full-time limited duty on June 20, 2007.

Appellant was treated by Dr. Robert A. Ruggiero, Jr., a Board-certified orthopedist, who on March 28, 2000 performed a decompression discectomy at L5-S1, laminectomy at L4-5, posterior lumbar fusion at L5-S1 and posterolateral transverse process fusion at L5-S1. Dr. Ruggiero diagnosed spondylolisthesis at L5-S1 with discogenic pain at L5-S1 and lumbar radiculopathy at L5-S1. In subsequent reports, he noted that appellant was progressing well and diagnosed status post lumbar fusion, left L5 chronic radiculopathy and neuropathic pain.

On September 16, 2008 appellant filed a claim for a schedule award. He submitted an April 3, 2008 report from Dr. David Weiss, an osteopath, who found appellant had reached maximum medical improvement on April 3, 2008. Dr. Weiss noted that lumbar spine examination revealed a well-healed surgical scar over the posterior midline and a surgical scar over the right posterior superior iliac spine. Range of motion was restricted on forward flexion, backward extension, left lateral flexion and right lateral flexion. The sitting root sign was positive on the left at 35 degrees and straight leg raising was positive on the left at 65 degrees, with both producing radicular pain down the left leg. The extensor hallucis longus was normal on the right and 3/5 on the left. Manual muscle testing of the legs revealed quadriceps and gastrocnemius were measured at 4/5 on the left and 5/5 on the right, sensory examination revealed sensory deficit over the L5 and S1 dermatomes of the left leg and gastrocnemius circumferential measurements revealed 43 centimeters on the right and 40 centimeters on the left. Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain and sprain, recurrent herniated nucleus pulposus at L5-S1, lumbar radiculopathy, post-traumatic facet joint syndrome, aggravation of preexisting lumbar spine pathology, herniated nucleus pulposus at L5-S1 with prior surgeries, spondylolisthesis at L5 over S1 with discogenic pain at L5-S1 and status post pain management with facet joint injections.

Dr. Weiss noted that, based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*) appellant had combined left leg impairment of 35 percent comprised of 8 percent impairment on the left for Grade 4 motor strength deficit of the left quadriceps muscle,[3] 5 percent impairment on the left for Grade 4 motor strength deficit of the left gastrocnemius muscle,[4] 18 percent impairment on the left for Grade 3 motor strength deficit of the left extensor hallucis longus,[5] 4 percent impairment for Grade 2 sensory deficit of the left L5 nerve root,[6] and 4 percent impairment for Grade 2 sensory

[2] A.M.A., *Guides* (5th ed. 2001).

[3] *Id.* at 424, Table 15-16, Table 15-18.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 424, Table 15-15, 15-18.

deficit of the left S1 nerve root.[7] Dr. Weiss also found three percent pain-related impairment of the right lower extremity.[8]

On October 17, 2008 appellant was treated by Dr. Ruggiero in follow-up for low back pain status post L5-S1 lumbar fusion. Dr. Ruggiero noted findings upon physical examination of pain with forward flexion, normal range of motion of the hips, weak left extensor hallucis longus and negative straight leg raises. He diagnosed status post L5-S1 fusion and continued permanent light-duty work.

The Office referred Dr. Weiss' report to an Office medical adviser who, in a December 27, 2008 report, found that appellant had 25 percent impairment of the left leg. The Office medical adviser noted that Dr. Weiss' recommendation for the left leg was based on weakness of the quadriceps, gastrocnemius, left extensor hallucis longus and sensory deficit of the left L5 and S1 nerve root. However, he found that Dr. Ruggiero's October 17, 2008 examination, which documented weakness only to the left extensor hallucis longus, was the weight of the evidence as he was the operating physician. The medical adviser further noted that the quadriceps muscle would not be involved because only L5 and S1 nerve roots were affected, not the L4 nerve root. He further noted that pain-related impairment of three percent was not appropriate based on section 18.3a, page 570 of the A.M.A., *Guides.* The medical adviser calculated a four percent impairment for a Grade 2 sensory deficit or pain in the distribution of the L5 nerve of the left lower extremity,[9] four percent impairment for a Grade 2 sensory deficit or pain in the distribution of the S1 nerve of the left lower extremity,[10] and 18 percent impairment for Grade 3 motor deficit of the L5 nerve.[11] He stated that pursuant to the Combined Values Chart appellant had 25 percent impairment of the left lower extremity in accordance with the A.M.A., *Guides.*[12] The medical adviser noted the date of maximum medical improvement was April 3, 2008.

By decision dated March 4, 2009, the Office granted appellant a schedule award for 25 percent permanent impairment of the left lower extremity. The period of the award was from April 3, 2008 to August 19, 2009.

On March 9, 2009 appellant requested an oral hearing which was held on July 21, 2009.

In a decision dated September 30, 2009, the hearing representative affirmed the Office decision dated March 4, 2009.

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[7] *Id.*

[8] *Id.* at 574, Figure 18-1.

[9] *Id.* at 424, Table 15-15, 15-18.

[10] *Id.*

[11] *Id.* at 424, Table 15-16, 15-18.

[12] *Id.* at 604.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[13] and its implementing regulations[14] 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 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 regulations as the appropriate standard for evaluating schedule losses.[15]

ANALYSIS

On appeal, appellant contends that he is entitled to a schedule award for 35 percent impairment of the left leg and three percent impairment of the right leg. He asserts through his attorney that there is a medical conflict between the medical adviser and Dr. Weiss with regard to the impairment to his left and right lower extremities. The Office accepted appellant's claim for aggravation of lumbar strain and expanded his claim to include aggravation of lumbar disc displacement and authorized lumbar surgery on June 15, 1999 and March 28, 2000. The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Weiss, appellant's treating physician, with regard to appellant's left leg impairment.

The Office medical adviser, in a report dated December 27, 2008, advised that based on the A.M.A., *Guides* appellant had 25 percent impairment of the left lower extremity. He noted appellant was not eligible for impairment for the left leg based on weakness of the quadriceps and gastrocnemius based on the most recent report from appellant's surgeon, Dr. Ruggiero, in a report dated October 17, 2008, found weakness only to the left extensor hallucis longus. The medical adviser calculated that appellant had four percent impairment for a Grade 2 sensory deficit or pain in the distribution of the L5 nerve of the left lower extremity,[16] four percent impairment for a Grade 2 sensory deficit or pain in the distribution of the S1 nerve of the left lower extremity,[17] and 18 percent impairment for Grade 3 motor deficit of the L5 nerve.[18] By contrast, Dr. Weiss in his report dated April 3, 2008 also applied the A.M.A., *Guides* and found that appellant sustained 35 percent impairment rating for the left lower extremity. He determined that appellant would receive 8 percent impairment for Grade 4 motor strength deficit of the left quadriceps muscle,[19] 5 percent impairment for Grade 4 motor strength deficit of the

[13] 5 U.S.C. § 8107.

[14] 20 C.F.R. § 10.404.

[15] *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[16] *Id.* at 424, Table 15-15, 15-18.

[17] *Id.*

[18] *Id.* at 424, Table 15-16, 15-18.

[19] *Id.*

left gastrocnemius muscle,[20] 18 percent impairment for Grade 3 motor strength deficit of the left extensor hallucis longus,[21] 4 percent impairment for Grade 2 sensory deficit of the left L5 nerve root,[22] and 4 percent impairment for Grade 2 sensory deficit of the left S1 nerve root.[23] Dr. Weiss determined that the work-related injury of April 27, 1999 was the competent producing factor for appellant's subjective and objective findings. He supported an increased impairment rating of the left leg, noting the basis of his rating under the A.M.A., *Guides*, while the Office medical adviser opined that appellant sustained no more than 25 percent permanent impairment of the left leg pursuant to the A.M.A., *Guides*.

Section 8123(a) of the Act provides in pertinent part: "If there is 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 an examination."[24] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[25] The Board finds that the Office should have referred appellant to an impartial medical specialist to resolve the medical conflict regarding the extent of permanent impairment arising from appellant's accepted employment injury.

With regard to the right leg, the Board finds that the medical evidence is insufficient to establish that appellant has three percent impairment for pain under Chapter 18 of the A.M.A., *Guides*. Dr. Weiss found three percent pain-related impairment of the right leg under Figure 18-1 of the A.M.A., *Guides*.[26] The Office medical adviser opined that this was not warranted under the A.M.A., *Guides*. The Board finds that Dr. Weiss did not sufficiently explain why appellant would be entitled to pain impairment under Chapter 18 in view of the language of the A.M.A., *Guides* and Board precedent. 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.[27] Dr. Weiss did not explain why appellant's right leg pain could not be appropriately rated under another chapter of the A.M.A., *Guides*. The text of Chapter 18 of the A.M.A., *Guides* states that an explanation should be provided in writing whenever the organ and body rating systems of the other chapters are not adequate to rate actual impairment.[28] Dr. Weiss offered no specific explanation in his

[20] *Id.*

[21] *Id.*

[22] *Id.* at 424, Table 15-15, 15-18.

[23] *Id.*

[24] 5 U.S.C. § 8123(a).

[25] *William C. Bush*, 40 ECAB 1064 (1989).

[26] A.M.A., *Guides* 574, Figure 18-1.

[27] *Id.* at 571. *See K.W.*, 59 ECAB 284 (2007).

[28] *Id.* at 570. *See A.K.*, 61 ECAB ___ (Docket No. 09-1328, issued January 11, 2010); *K.H.*, 61 ECAB ___ (Docket No. 09-341, issued December 30, 2009).

report regarding why he believed that Chapter 18 was applicable to appellant's right leg pain. Without such explanation, Dr. Weiss' report is insufficient to establish right leg impairment due to pain under Chapter 18 of the A.M.A., *Guides.* Due to this deficiency, it is also insufficient to create a medical conflict with the opinion of the Office medical adviser regarding the right leg.

To resolve the conflict in the medical opinion regarding the left leg, the case will be remanded to the Office for referral of appellant to an impartial medical specialist for a determination regarding the extent of appellant's left leg impairment in accordance with the relevant standards of the A.M.A., *Guides*. After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's left leg impairment.

CONCLUSION

The Board finds that the case is not in posture for decision with regard to appellant's left leg impairment as there is a conflict in the medical evidence. The Board further finds that appellant has not established permanent impairment in his right leg.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part set aside in part and the case is remanded for further action consistent with this decision.

Issued: January 3, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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