United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 10-1173**
	)	**Issued: January 26, 2011**
DEPARTMENT OF VETERANS AFFAIRS, HEFNER VETERANS MEDICAL CENTER, Salisbury, NC, Employer	)	

Appearances:
Humphrey S. Cummings, Esq., for the appellant
Hans K. Wild, Esq., for the Director

Oral Argument September 8, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 24, 2010 appellant filed a timely appeal from a February 23, 2010 merit decision of the Office of Workers' Compensation Programs denying his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof to establish employment-related permanent impairment.

FACTUAL HISTORY

This case was previously before the Board. In a February 24, 2010 decision,[1] the Board reversed a January 9, 2009 Office decision which terminated appellant's compensation benefits

[1] Docket No. 09-1484 (issued February 24, 2010).

effective May 9, 2008. The Board found that the opinion of an Office referral physician was insufficiently rationalized to meet the Office's burden of proof to show that appellant's employment-related conditions had resolved without residual. The facts of the case as set forth in the Board's decision are incorporated herein by reference. The relevant facts are set forth.

The Office accepted that on January 24, 2007 appellant, a 50-year-old nursing assistant, sustained a lumbar and cervical strain when he was pressed between a door and a wall while attempting to keep a patient on the ward. Appellant returned to full-time limited-duty work on June 27, 2007 and received compensation. Under claim number xxxxxx128, the Office accepted the conditions of cervical sprain, closed fracture of right ribs, intervertebral disc disorder with myelopathy, lumbar region, intervertebral disc disorder with myelopathy, thoracic region as a result of a December 15, 2005 work injury. On May 31, 2007 the Office combined the present claim with claim number xxxxxx128.

On November 19, 2007 appellant filed a claim for a schedule award. In a November 26, 2007 letter, the Office advised him of the medical evidence necessary to support his claim under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (hereinafter A.M.A., *Guides*).

In a June 13, 2007 report, Dr. Andrew Sumich, a Board-certified physiatrist, provided an impression of right-sided thoracic and lumbar pain, mostly myofascial/soft tissue; degenerative changes in the thoracic and lumbar spine with small disc herniations/protrusions on the right at T8-T9 and T9-T10 with no thoracic or lumbar radicular symptoms and normal neurologic examination. He advised that appellant reached maximum medical improvement. Dr. Sumich opined that appellant had two percent impairment based on the claim from 2005 and 2007 where he had original rib injuries as well as the small disc herniations and protrusions.

In an October 7, 2007 report, Dr. T. Kern Carlton, a Board-certified physiatrist, reported appellant's status and noted examination findings. He diagnosed lumbar strain, thoracic strain, mild congenital canal narrowing and small disc herniations at T7-T8 and T8-T9, congenital canal narrowing and mild spondylosis at L3-L4 and L4-L5, and cervical strain. Dr. Carlton opined that appellant reached maximum medical improvement and had six percent impairment of his back.

In a March 13, 2008 decision, the Office denied the schedule award claim finding insufficient medical evidence to support permanent impairment of a scheduled member.

On April 7, 2008 appellant requested an oral hearing, which was held on December 30, 2008. Prior to the hearing, the Office received a December 14, 2007 report from Dr. Carlton who stated that there appeared to be mild weakness in plantar flexion on the right. Based on the A.M.A., *Guides*, Table 17-8, Dr. Carlton assigned seven percent impairment of the right leg. In a February 1, 2008 report, Dr. Eric C. Troyer, a Board-certified family practitioner, advised appellant's depression and myalgia were stable.

On July 29, 2008 an Office medical adviser reviewed Dr. Carlton's December 14, 2007 report and concluded that a medical conflict existed between Dr. Carlton and Dr. Troyer. He

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

advised that a medical report addressing the symptoms and physical examination findings of the lower extremities with any diagnostic and imaging studies were necessary.

In a September 2, 2008 letter, the Office requested that Dr. Carlton provide a supplemental report in response to the Office medical adviser's discussion regarding his impairment rating. An unsigned and undated response received on November 17, 2008 stated: "Table 17, page 532, 5th edit."

In a March 17, 2009 decision, an Office hearing representative set aside the March 13, 2008 decision and remanded the case for further development. The hearing representative found that, while it was questionable that a conflict in medical evidence existed, the Office's request to Dr. Carlton for additional information to further develop the schedule award claim was unanswered. Accordingly, the hearing representative directed a second opinion evaluation.

In a March 23, 2009 letter, the Office requested that Dr. Carlton provide further evidence that supported his opinion of seven percent impairment to the right leg. In an April 1, 2009 report, Dr. Carlton noted appellant had an updated magnetic resonance imaging (MRI) scan. He listed an impression of lumbar strain; thoracic strain; mild congenital canal narrowing and small disc herniations at T7-T8 and T8-T9 by MRI scan; congenital canal narrowing and mild spondylosis at L3-L4 and L4-L5 by MRI scan and cervical strain. In response to the Office's question, Dr. Carlton stated there was no imaging study to support the impairment rating of the right lower extremity. The rating was based on the A.M.A., *Guides* and his weakness which was reported in plantar flexion on the right.

The Office referred appellant, together with a list of questions and the medical record, to Dr. Harrison A. Latimer, a Board-certified orthopedic surgeon, for a second opinion examination to assess whether he had any ratable impairment due to the January 24, 2007 work injury. The record reflects that appellant previously saw Dr. Latimer for a second opinion evaluation regarding whether he had residuals of his work injury and whether he could work. In a December 11, 2008 report, Dr. Latimer reviewed an October 21, 2008 statement of accepted facts, the medical record and presented his examination findings.[3] He found that appellant reached maximum medical improvement but there were residual symptoms and he was not able to perform full duties as a nursing assistant. Dr. Latimer completed a January 9, 2009 work capacity evaluation form listing such restrictions, which he deemed were permanent. He further stated that he concurred with Dr. Carlton's assessment that appellant had A.M.A., *Guides* disability of six percent of the back and seven percent of the right leg.

In a June 18, 2009 report, Dr. Latimer evaluated the medical record and presented findings on examination. He found no notable muscle atrophy throughout the lower extremity. Dr. Latimer stated that the most recent MRI scan showed "beautiful lumbar discs with excellent hydration and no evidence of any significant problem with such discs." Appellant's thoracic MRI scan showed slight disc bulge at two mid thoracic levels with no evidence of neurologic impingement and "excellent hydration throughout the thoracic spine." Appellant reached

[3] The most recent statement of accepted facts of record is dated October 21, 2008. It contains a listing of diagnostic testing appellant underwent and notes the last MRI scan for both the thoracic and lumbar spines was October 30, 2006.

maximum medical improvement within six weeks of his January 24, 2007 injury and there was no reliable way to determine restriction in degrees of motion as appellant showed extreme symptom exaggeration. He concluded that appellant had no permanent partial impairment. Dr. Latimer based his findings on the recent MRI scans, the lack of objective findings of decreased strength, atrophy, ankylosis, or sensory changes and "the lack of reliability" of appellant's presentation symptoms.

On July 31, 2009 an Office medical adviser reviewed Dr. Latimer's June 18, 2009 report and concurred with his conclusion that there was no impairment of the extremities.

By decision dated August 7, 2009, the Office denied appellant's schedule award claim. The weight of the medical opinion evidence was accorded to Dr. Latimer.

On August 17, 2009 appellant requested a hearing, which was held telephonically on December 14, 2009. No additional medical evidence or comments following the hearing were submitted.

By decision dated February 23, 2010, an Office hearing representative affirmed the August 7, 2009 decision.

On appeal, appellant's counsel argues that Dr. Latimer's report does not constitute the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.404.

[6] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[7] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.[9] Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[10] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[11] It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[12]

ANALYSIS

Dr. Sumich opined that appellant had two percent impairment based on the original injury to the ribs as well as the small disc herniation and protrusion. He provided no explanation as to how he arrived at his impairment rating or make reference to the A.M.A., *Guides*. Dr. Sumich did not indicate whether the impairment was to a scheduled member or function of the body as a result of the employment injuries.[13] Dr. Carlton found appellant had five percent impairment for the back, but did not explain how he arrived at this rating or whether it was based on the A.M.A., *Guides*. It is well established that neither the Act nor the implementing regulations provide for payment of a schedule award for the permanent loss of use of the back or the body as a whole. A claimant is not entitled to a schedule award for the ribs or back.[14] While Dr. Carlton subsequently found seven percent impairment of the right leg, which was based on weakness reported in plantar flexion, he did not address how he rated impairment based on the A.M.A., *Guides* despite the Office's request for such explanation.[15] Accordingly, the reports of Dr. Sumich and Dr. Carlton are insufficient to establish appellant's schedule award claim.

[9] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b) (January 2010).

[11] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[12] *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

[13] No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. *S.K.*, 60 ECAB ___ (Docket No. 08-848, issued January 26, 2009); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[14] *See D.N.*, 59 ECAB 576 (2008); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[15] The Board notes that Dr. Carlton failed to provide an explanation for his impairment rating in his December 14, 2007 report. Furthermore, the Office properly excluded the unsigned and undated response it received on November 17, 2008 in response to its September 2, 2008 letter to Dr. Carlton. The Board has held that lacking proper identification, such a report cannot be considered as probative evidence. *Merton J. Sills*, 39 ECAB 572 (1988).

In denying appellant's schedule award claim, the Office relied on the June 18, 2009 report of Dr. Latimer who served as an Office referral physician. The Board finds that the opinion of Dr. Latimer requires clarification.

On June 18, 2009 Dr. Latimer listed the findings of his examination, which were notable for no muscle atrophy throughout the lower extremities. On review of the most recent MRI scans, he found that appellant's lumbar discs were "beautiful … with excellent hydration and no evidence of any significant problem." The thoracic discs, which had a slight disc bulge at two mid-thoracic levels, showed no evidence of neurologic impingement and excellent hydration. Dr. Latimer found maximum medical improvement within six weeks of the January 24, 2007 injury and that there was no reliable way to determine restriction in degrees of motion as appellant showed extreme symptom exaggeration. He concluded that there was no permanent impairment involved based on the most recent MRI scans, the lack of objective findings of decreased strength, atrophy, ankylosis, or sensory changes, and "the lack of reliability" of appellant's presentation symptoms.

The Board notes that Dr. Latimer made no mention of the date of appellant's most recent MRI scan dated October 30, 2006. Dr. Sumich and Dr. Carlton advised that small disc herniations were present on the right side at T8-T9 and T9-T10. Dr. Carlton also found congenital canal narrowing and mild spondylosis at L3-L4 and L4-L5. It does not appear that Dr. Latimer reviewed the same studies as Dr. Sumich or Dr. Carlton. Dr. Latimer described "recent" MRI scan study which revealed beautiful lumbar discs with excellent hydration and slight disc bulges at two mid-thoracic levels with excellent hydration throughout the thoracic spine. It is unclear that Dr. Latimer was referencing the October 30, 2006 studies. As noted, the Office accepted thoracic disc disorders under another claim.

On appeal appellant's attorney argued that Dr. Latimer agreed with Dr. Carlton's assessment of six percent of the back and seven percent of the right lower extremity. At the time of his December 11, 2008 report, Dr. Latimer was appointed by the Office to provide a reasoned opinion on whether appellant had any work-related residuals and whether he was capable of resuming his date-of-injury position. His remark agreeing with Dr. Carlton's impairment rating is incidental to the issue which he was asked to resolve. Furthermore, there is no discussion or rationalized explanation for his opinion on permanent impairment. Moreover, when Dr. Latimer was later asked to provide a reasoned opinion on the issue of whether appellant had any impairment related to his work-related injuries, his opinion could change based on current examination findings and his review of the medical evidence. Thus, given the totality of the circumstances, Dr. Latimer's December 11, 2008 remark regarding impairment is of no probative value.

On remand, the Office should request that Dr. Latimer clarify his opinion.[16] If Dr. Latimer is unwilling or unable to provide such clarification, the Office should refer appellant to another appropriate specialist for evaluation. After such development as deemed necessary, the Office should issue an appropriate decision as to whether appellant has established permanent impairment of his lower extremities.

[16] If it is determined that appellant has permanent lower extremity impairment referable to his employment injuries, the appropriate standards of the A.M.A., *Guides* should be used to evaluate such impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: January 26, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board