United States Department of Labor
Employees' Compensation Appeals Board

R.N., Appellant	)	
and	)	**Docket No. 10-1355**
	)	**Issued: January 6, 2011**
DEPARTMENT OF JUSTICE, ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, Fairview Heights, IL, Employer	)	

Appearances:
Appellant, pro se
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 April 20, 2010 appellant filed a timely appeal of a January 14, 2010 Office of Workers' Compensation Programs' merit decision granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has more than 26 percent permanent impairment of his right lower extremity and three percent permanent impairment of his left lower extremity for which he has received schedule awards.

FACTUAL HISTORY

On November 22, 2006 appellant, then a 41-year-old senior special agent, filed a traumatic injury claim alleging on September 19, 2006 he injured his low back when his supervisor fell on him in the performance of duty. In December 6, 2001, he previously underwent a right-sided L4-5 hemilaminotomy and discectomy. The Office accepted appellant's

claim for recurrent L4-5 herniated disc on the right. On October 9, 2007 it authorized a repeat L4-5 discectomy. Dr. Robert Bernardi, a Board-certified neurosurgeon, performed surgery on November 1, 2007. The Office placed appellant on the periodic rolls on November 16, 2007. Appellant returned to full-time work on August 18, 2008.

Dr. Bernardi examined appellant on November 26, 2008 and stated that he had reached maximum medical improvement. He noted numbness in appellant's right foot involving the arch of foot and three lateral toes. Dr. Bernardi found normal motor power in both lower extremities with cramping and pain in both legs.

Appellant requested a schedule award on November 30, 2008. In a report dated March 27, 2009, Dr. Raymond F. Cohen, an osteopath, noted right foot drop with ambulation. Appellant's right L5 innervated muscles were weak at 3+/5 including the extensor hallucis longus, extensor digitorum brevis and extensor digitorum longus. Dr. Cohen found no left lower extremity weakness. Appellant had a distinct right L5 dermatomal loss to pin and temperature as well as light touch reduced in the L5 and S1 distribution. On the left, he demonstrated loss of sensation to pain and temperature in the S1 dermatome. Dr. Cohen diagnosed right L5 radiculopathy and left S1 radiculopathy. With regard to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] he stated:

> "Table 15-15, Table 15-16 and Table 15-18 (page 424) were used for impairment due to sensory loss and loss of power in motor deficits. In regard to the right lower extremity, sensory loss Grade 3 with 60 percent deficit multiplied by L5 nerve root impaired with a maximum percent loss of 5 percent equals 3 percent impairment. Using Table 15-16, [appellant] had a Grade 3 50 percent motor deficit multiplied by maximum 37 percent loss of function due to strength which equals 19 percent impairment due to motor loss of L5 on the right. Using Table 15-15, he had a Grade 3 60 percent sensory deficit multiplied by a maximum 5 percent loss due to sensory deficit of the S1 nerve root which results in a 3 percent impairment of the left S1 nerve root. Using Table 15-16, [appellant] had a Grade 5 motor deficit of the S1 nerve root which equals 0 percent motor deficit and 0 percent impairment at S1 at the left leg. The 3 percent L5 sensory loss and the 19 percent L5 motor loss are combined (Combined Values Chart, page 604) to be a 21 percent impairment of the right lower extremity. This was combined with the 3 percent impairment of the left lower extremity using the Combined Values Chart to give a combined impairment of 23 percent for the spinal nerve deficit."

The Office referred the medical evidence to the Office medical adviser and noted that appellant previously received schedule awards for 10 percent impairment of the right lower extremity and 2 percent impairment of the left lower extremity. It requested that the Office medical adviser utilize the sixth edition of the A.M.A., *Guides*.[2] In a report dated November 16, 2009, Dr. Neil Ghodadra, an Office medical adviser, stated that the sixth edition of the A.M.A., *Guides*, Table 16-12, provided a 26 percent impairment of the common peroneal nerve

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

[2] *Id.* (6th ed. 2009).

distribution for appellant's right foot drop. He found that the radicular symptoms leading to left S1 radiculopathy corresponded to a three percent left lower extremity deficit.

By decision dated January 14, 2010, the Office granted appellant a schedule award for 26 percent impairment of his right leg and 3 percent impairment of his left leg.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition.[5]

The Act does not authorize the payment of schedule awards for the permanent impairment of the whole person.[6] Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[7] Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,[8] no claimant is entitled to such an award.[9]

Amendments to the Act, however, modified the schedule award provisions to provide 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 the Act include the extremities, a claimant may be entitled to a

[3] 5 U.S.C. §§ 8101-8193, 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id.* at § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[6] *W.D.*, 61 ECAB ___ (Docket No. 10-274, issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975).

[7] *W.D., id.*; *William Edwin Muir*, 27 ECAB 579 (1976).

[8] The Act itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[9] *W.D., supra* note 6. *Timothy J. McGuire*, 34 ECAB 189 (1982).

schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[10]

ANALYSIS

In evaluating sensory deficits, the A.M.A., *Guides* provide that an evaluator should determine the sensory or motor deficits on the basis of the descriptions in Table 16-11.[11] Dr. Ghodadra found that appellant had a severe motor deficit as movement with gravity was eliminated based on the finding of right foot drop and accorded appellant a Class 3 severe motor deficit of the common peroneal nerve.[12] He then determined that the middle grade of 26 percent was the correct impairment value. The Board finds that Dr. Ghodadra properly determined that appellant had 26 percent impairment of the right lower extremity due to his accepted back injury.

As to appellant's left lower extremity, Dr. Ghodadra stated only that the radicular symptoms leading to left S1 radiculopathy corresponded to a three percent left lower extremity deficit. He did not adequately explain how he reached this impairment rating or refer to any tables of the A.M.A., *Guides*. The Board is unable to determine how the left leg rating was made. Dr. Ghodadra did not cite to any tables for rating lower extremity impairment involving the S1 nerve root.

Due to the deficiencies in the left lower extremity rating, the Board finds that this case is not in posture for a decision and will be remanded for additional development. The medical evidence establishes no more than 26 percent impairment to the right leg.

CONCLUSION

The Board finds that appellant has 26 percent right leg impairment. The case is not in posture for decision as to his left leg impairment.

[10] *W.D., supra* note 6. *Rozella L. Skinner*, 37 ECAB 398 (1986).

[11] A.M.A., *Guides* 533.

[12] *Id.* at 535, Table 16-12.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2010 decision of the Office of Workers' Compensation Programs be affirmed, in part, and set aside in part. The case is remanded for development consistent with this decision.

Issued: January 6, 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