United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 10-2168**
	)	**Issued: July 18, 2011**
U.S. POSTAL SERVICE, POST OFFICE, East Austin, TX, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from an April 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for 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 is entitled to a schedule award for a permanent impairment of a scheduled member or function.

FACTUAL HISTORY

This case is before the Board for the third time. In a decision dated November 4, 1997, the Board affirmed a February 15, 1995 decision denying appellant's request for reconsideration of the termination of his compensation on the grounds that it was untimely and did not establish

[1] 5 U.S.C. § 8101 *et seq.*

clear evidence of error.[2] By decision dated August 1, 2007, the Board set aside a January 25, 2007 decision finding that appellant had no more than a three percent permanent impairment of the left lower extremity.[3] It determined that the opinion of the second opinion examiner was insufficient to establish the extent of any permanent impairment and remanded the case for OWCP to obtain an opinion resolving the issue. The facts and circumstances of the case set forth in the Board's prior decisions are hereby incorporated by reference.

In an impairment evaluation dated April 16, 2007, Dr. Mary A. Gonzales, an attending Board-certified physiatrist, determined that appellant had a five percent whole person impairment rating using the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (A.M.A., *Guides*). On December 4, 2007 OWCP's medical adviser reviewed Dr. Gonzales' report and opined that it did not show additional left lower extremity impairment. He noted that FECA did not provide awards for abdominal wall impairments or whole person impairments. By decision dated December 20, 2007, OWCP found that appellant had no more than the previously awarded three percent left lower extremity impairment.

On January 11, 2008 appellant, through his attorney, requested an oral hearing. Following a preliminary review, on July 10, 2008 OWCP's hearing representative vacated the December 20, 2007 decision. She found that OWCP had not followed the Board's instructions to further develop the evidence regarding the extent of appellant's impairment. OWCP's hearing representative additionally found that he had not established erectile dysfunction due to the accepted work injury.

On August 1, 2008 OWCP referred appellant to Dr. Jonathan Clark Race, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated August 19, 2008, Dr. Race opined that appellant had an impairment due to his hernia repair but not to his left lower extremity, noting that the etiology of his lower extremity pain was uncertain and that diagnostic studies were reported to be normal. He concluded that appellant had a five percent impairment due to his hernia under Table 6-9 on page 136 of the A.M.A., *Guides,* relevant to determining impairments of the digestive tract.

On September 26, 2008 OWCP's medical adviser reviewed Dr. Race's opinion and noted that the abdomen was not a scheduled member under FECA. He asserted that appellant had no impairment of the left lower extremity.

By decision dated October 3, 2008, OWCP denied appellant's schedule award claim after finding that he had not established a permanent impairment to a scheduled member or function.

On September 25, 2009 appellant requested reconsideration. He submitted a September 14, 2009 report from Dr. Bruce B. McDonald, a surgeon, in support of his request.

[2] Docket No. 95-2200 (issued November 4, 1997). OWCP accepted that appellant sustained abdominal strain, an inguinal hernia, left ilioninguinal nerve entrapment, and left scrotal varices due to an October 21, 1985 work injury. By decision dated September 14, 1992, it terminated his compensation after finding that he had no further disability causally related to his accepted work injury.

[3] Docket No. 07-817 (issued August 1, 2007).

Dr. McDonald described appellant's pain performing various activities. On physical examination, he found that he experienced extreme pain of the inguinal area. Dr. McDonald measured full range of motion and strength of the lower extremities. He stated, "There is an area on the medial thigh which is approximately the size of my hand which exhibits numbness to pin prick and tenderness to light palpation." Citing the fifth edition of the A.M.A., *Guides*, Dr. McDonald found that appellant had a 15 percent impairment due to a "[c]lass 2 hernia-related impairment under the digestive system" and an additional 3 percent impairment due to pain, for a total whole person impairment of 18 percent."

On November 2, 2009 OWCP's medical adviser noted that the digestive system was not a scheduled member under FECA and that the fifth edition of the A.M.A., *Guides* was no longer applicable to determine permanent impairments. He recommended a second opinion examination to determine whether appellant was entitled to a schedule award due to pain.

By letter dated December 11, 2009, OWCP referred appellant to Dr. William W. Janes, a Board-certified physiatrist, for an impairment evaluation. On January 20, 2010 Dr. Janes discussed his complaints of left foot, left hip and low back pain with numbness and tingling in the lower back, left foot and left groin. He interpreted a 2005 magnetic resonance imaging (MRI) scan study as showing disc material touching but not compressing the left L4 nerve root on the right and a tear on the left in the annulus, with disc desiccation and a broad-based disc bulge at L4-5 and L5-S1 and a disc bulge impinging on the anterior aspect of the thecal sac. Dr. Janes found full strength of the lower extremities and tenderness with some loss of sensation in the testicular area. Utilizing the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as a left inguinal hernia using Table 6-10 on page 122. Dr. Janes found a class 2 impairment or 10 percent whole person impairment. He stated, "[Appellant] does have injury to his ilioinguinal nerve; however, I feel the hernia impairment from Table 6-10 takes this into account."

On March 17, 2010 OWCP's medical adviser found that there was no lower extremity impairment based on an ilioinguinal nerve injury. He noted that the sixth edition of the A.M.A., *Guides* described impairments due to a peripheral nerve injury at section 16.4 on page 541 and that the ilioinguinal nerve was depicted in Figure 16-3 on page 537. OWCP's medical adviser found, however, that the sixth edition of the A.M.A., *Guides* did not provide a lower extremity impairment for the ilioinguinal nerve in the accompanying diagnosis-based tables.

By decision dated April 19, 2010, OWCP denied modification of its October 3, 2008 decision.

On appeal, appellant argues that he has an 18 percent impairment as found by Dr. McDonald in his September 14, 2009 report. He further notes that his pain has increased.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing federal 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. However, FECA 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

The sixth edition requires identifying the impairment class for the Diagnosed Condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[8] The Net Adjustment Formula is GMFH-CDX + GMPE-CDX + GMCS-CDX.

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[9] FECA identifies members such as the arm, leg, hand, foot, thumb and finger, organs to include the eye and functions as loss of hearing and loss of vision.[10] Section 8107(c)(22) of FECA provides for the payment of compensation for permanent loss of "any other important external or internal organ of the body as determined by the Secretary of Labor.[11] The Secretary of Labor has made such a determination, and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.[12]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[13] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

[7] 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).

[8] A.M.A., *Guides* 494-531.

[9] *See Leroy M. Terska*, 53 ECAB 247 (2001).

[10] 5 U.S.C. § 8107(c).

[11] *Id*. at § 8122(c)(22).

[12] 20 C.F.R. § 10.404; *Henry B. Ford, III*, 52 ECAB 220 (2001).

[13] *Peter C. Belkind*, 56 ECAB 580 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

justice is done.[14] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[15]

ANALYSIS

OWCP accepted that appellant sustained an abdominal strain, an inguinal hernia and left ilioinguinal nerve entrapment, or left mononeuritis of the lower limb and left scrotal varices due to an October 21, 1985 employment injury. On August 1, 2007 the Board determined that the opinion of the second opinion examiner was insufficient to establish the extent of any permanent impairment of the left lower extremity and remanded the case for further development. In a report dated August 19, 2008, Dr. Race, OWCP's referral physician, found that appellant had a five percent impairment due to his hernia according to Table 6-9 of the sixth edition of the A.M.A., *Guides*. Section 8107 of FECA, however, does not provide for a schedule award for a hernia.[16] The regulations similarly provide no entitlement for a schedule award for a hernia.[17] As noted, a schedule award is not payable for any member, function or organ of the body not listed in section 8107 of FECA or its implementing regulations; consequently, Dr. Race's opinion does not support entitlement to a schedule award.[18]

In a report dated September 14, 2009, Dr. McDonald found that, according to the fifth edition of the A.M.A., *Guides*, appellant had a 15 percent permanent impairment due to his hernia and an additional 3 percent impairment due to pain, for a total whole person impairment of 18 percent. As discussed, however, FECA does not provide an impairment rating for hernias. Additionally, OWCP currently uses the sixth edition of the A.M.A., *Guides* to determine the extent of permanent impairments. A medical opinion not based on the appropriate edition of the A.M.A., *Guides* has diminished probative value in determining the extent of a claimant's permanent impairment.[19] Moreover, FECA does not provide for impairment of the whole person.[20]

At the recommendation of OWCP's medical adviser, OWCP referred appellant for another second opinion examination. In a report dated January 20, 2010, Dr. Janes reviewed his complaints of pain in his left foot, left hip and low back and tingling and numbness in the left foot, left groin and lower back and some loss of sensation in the testicle area. He discussed the 2005 findings on MRI scan study of a disc bulge at L4-5 impinging the thecal sac and disc desiccation at L4-5 and L5-S1. Dr. Janes found that appellant had a 10 percent whole person impairment due to his hernia under the sixth edition of the A.M.A., *Guides*. He advised that

[14] *Richard E. Simpson*, 55 ECAB 490 (2004); *Lourdes Davilla*, 45 ECAB 139 (1993).

[15] *Melvin James*, 55 ECAB 406 (2004).

[16] *Supra* note 4.

[17] *Supra* note 5.

[18] *See J.D.*, 58 ECAB 254 (2007).

[19] *Fritz A. Klein*, 53 ECAB 642 (2002).

[20] *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

there was an impairment of the ilioinguinal nerve but that he believed that this was included in the hernia impairment at Table 6-10.

OWCP medical adviser reviewed Dr. Janes' report and found that his determination that appellant had an impairment due to a hernia did not conform with FECA guidelines. He further found that the A.M.A., *Guides* did not provide a rating for the lower extremity due to an impairment of the ilioinguinal nerve. Consequently, OWCP's medical adviser found that appellant was not entitled to a schedule award for a left lower extremity impairment. The A.M.A., *Guides*, however, provides, "In the event that a specific diagnosis is not listed in the diagnosed-based impairment grid, the examiner should identify a similar listed condition to be used as a guide to the impairment calculation. The rationale for this decision should be described."[21] Furthermore, once OWCP undertakes development of the record, it has the responsibility to do so in a proper manner.[22] Dr. Janes found that appellant had an impairment of the ilioinguinal nerve and some loss of sensation in the testicles. It is not clear from Dr. Janes' report whether appellant has a lower extremity impairment or impairment of the testicles due to the accepted employment injury. As OWCP developed the issue, it should secure a medical opinion that resolves the question of whether appellant sustained a permanent impairment of the left lower extremity or other scheduled member due to his accepted employment injury.[23] The medical opinion should address whether any impairment of the lower extremity resulted from the accepted conditions. After such further development as deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

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

[21] *Id*. at 499.

[22] *See Melvin James*, *supra* note 15.

[23] *See Peter C. Belkind*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 18, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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