United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 10-1779**
	)	**Issued: May 9, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Bayamon, PR, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 22, 2010 appellant filed a timely appeal from a January 14, 2010 schedule award decision and a May 20, 2010 decision of the Office of Workers' Compensation Programs that denied merit review. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he is entitled to a schedule award for his accepted aggravation of a lumbar or lumbosacral disc; and (2) whether the Office properly refused to reopen his claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant asserts that, as found by the Office referral physician, he has a 14 percent impairment of the lower extremities.

[1] 5 U.S.C. § 8107.

FACTUAL HISTORY

On March 29, 2006 appellant, then a 57-year-old parcel post carrier, filed an occupational disease claim, alleging that his employment duties caused disc disease in his lower back. He stopped work on February 17, 2006. The Office accepted aggravation of degeneration of lumbar or lumbosacral intervertebral disc and appellant received compensation. In a January 22, 2007 report, Dr. Fernando Rojas, a Board-certified orthopedic surgeon and Office referral physician, provided examination findings and diagnosed disc protrusions at L3-4 and L4-5. He advised that appellant was totally disabled. In a March 20, 2007 report, Dr. Rojas advised that appellant had not recovered from his employment injury.

Appellant elected retirement benefits, effective February 14, 2007. On November 21, 2007 he filed a schedule award claim and submitted an undated report in which Dr. Ismael Mercado Oliveras provided an impairment rating, in accordance with Table 15-15 and Table 15-16 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[2] Appellant had a 20 percent impairment of the lumbar spine and a 35 percent impairment of the lower extremities.[3]

By decision dated February 11, 2008, the Office denied the schedule award claim on the grounds that appellant's condition had not yet reached maximum medical improvement, a fixed and permanent state. In nonmerit decisions dated August 25, 2008 and January 14, 2009, it denied his reconsideration requests. On February 2, 2009 appellant again requested reconsideration and submitted medical evidence including reports dated September 26, 2008 and January 27, 2009 from Dr. Mercado Oliveras, who advised that appellant had reached maximum medical improvement and that further recovery or deterioration was not anticipated.[4]

In a March 17, 2009 report, Dr. Morley Slutsky, an Office medical adviser Board-certified in occupational and preventive medicine, reviewed the medical record, including Dr. Mercado Oliveras' impairment ratings. He noted that the rating were not in accordance with the fifth edition of the A.M.A., *Guides* because Dr. Mercado Oliveras did not document motor and sensory testing. Dr. Slutsky recommended a supplemental report.

By decision dated April 3, 2009, the Office vacated the decisions dated February 11 and August 25, 2008 and January 14, 2009. It found that appellant had reached maximum medical improvement but denied his schedule award claim on the grounds that Dr. Mercado Oliveras' reports were insufficient to establish the rating. Appellant was instructed to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.[5]

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

[3] Dr. Mercado Oliveras' credentials could not be ascertained.

[4] Appellant also submitted a duplicate of Dr. Mercado Oliveras' previous impairment evaluation, copies of magnetic resonance imaging (MRI) scan studies, electromyographic (EMG) studies and treatment notes that did not include an impairment evaluation.

[5] A.M.A., *Guides* (6th ed. 2008).

In an undated report, received by the Office on May 28, 2009, Dr. Mercado Oliveras advised that he had treated appellant continually since October 25, 2004. He noted appellant's complaint of radiating lumbosacral pain and his review of medical studies. Dr. Mercado Oliveras provided examination findings and diagnosed chronic bilateral radiculopathy, discogenic disc disease, bulging disc, muscle spasm of back and narrowing of the left neural. In accordance with the sixth edition of the A.M.A., *Guides*, appellant had a class 4 impairment under Table 17-4, for a diagnosis of lumbar stenosis at multiple levels and a class 2 impairment for spondilolisthesis. Dr. Mercado Oliveras utilized the adjustment grid tables and found a grade modifier of 3 for functional history under Table 17-6, a grade modifier of 2 for physical examination under Table 17-7 and a grade modifier of 2 for clinical studies under Table 17-9, and concluded that appellant had a net adjustment of five percent.

By report dated June 4, 2009, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and Office medical adviser, reviewed the medical evidence, including Dr. Mercado Oliveras' recent report. He noted that Dr. Mercado Oliveras did not provide an opinion as to impairment of the lower extremities. Dr. Mercado Oliveras did not correctly apply the sixth edition for evaluation of peripheral neuropathy, and Dr. Magliato did not understand Dr. Mercado Oliveras' finding of a net adjustment of five percent. Dr. Magliato recommended that appellant be referred for a second opinion evaluation to assess any lower extremity impairment.

On August 20, 2009 the Office referred appellant to Dr.Fernando Rojas, an orthopedic surgeon, for a second opinion evaluation. Dr. Rojas was asked to assess appellant's impairment in accordance with the sixth edition of the A.M.A., *Guides* and was provided a permanent impairment worksheet. In a September 4, 2009 report, he noted his review of the medical evidence and provided findings on physical examination. Dr. Rojas diagnosed lumbar sprain with L4-5 and L5-S1 radiculopathies and discogenic disease. He advised that maximum medical improvement had been reached on January 22, 2007, the date of his initial evaluation, and that appellant was totally disabled. Dr. Rojas completed the permanent impairment worksheet and advised that appellant's primary diagnosis was lumbar sprain which, under Table 16-1, was moderate to severe or class 2. He found no peripheral nerve impairment, and applied the adjustment modifiers, finding a modifier of two for functional history under Table 16-6, a zero modifier for physical examination under Table 16-7 and a modifier of one for clinical studies under Table 16-8, for a grade A or a 14 percent lower extremity impairment.

Dr. Magliato reviewed Dr. Rojas' report on December 1, 2009. He advised that the peripheral neuropathy tables should be used in this case and, since there was no clinical radiculopathy present, appellant's impairment rating was zero.

By decision dated January 14, 2010, the Office found that the weight of the medical evidence rested with the opinion of Dr. Magliato and denied appellant's claim for a schedule award.

On April 20, 2010 appellant requested reconsideration and submitted an April 23, 2009 EMG study of the lower extremities that demonstrated bilateral S1 radiculopathy.[6]

In a nonmerit decision dated May 20, 2010, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act,[7] and its implementing federal regulations,[8] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] For decisions issued after May 1, 2009, the sixth edition will be used.[10]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[11] In 1960, amendments to the Act 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. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[12] A schedule award is not payable for an impairment of the whole body.[13] It is well established that, in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[14]

[6] Appellant also stated that he was submitting a new report from Dr. Mercado Oliveras but this is not found in the case record.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 10.404(a).

[10] FECA Bulletin No. 09-03 (issued March 15, 2009).

[11] *Pamela J. Darling*, 49 ECAB 286 (1998).

[12] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[13] *N.M.*, 58 ECAB 273 (2007).

[14] *Peter C. Belkind*, 56 ECAB 580 (2005).

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[15] Under the sixth edition, for lower extremity impairments the evaluator identifies 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).[16] The net adjustment formula is (GMFH-CDX) + (GMPE - CDX) + (GMCS-CDX).[17] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[18]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[19]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. The accepted condition in this case is aggravation of degeneration of lumbar or lumbosacral intervertebral disc. As noted, although a schedule award is not payable under the Act for injury to the spine,[20] a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[21]

The medical evidence relevant to an impairment evaluation includes an undated report, received by the Office on November 21, 2007, in which Dr. Mercado Oliveras, an attending physician, provided an impairment rating under the fifth edition of the A.M.A., *Guides.* Dr. Mercado Oliveras concluded that appellant had a 35 percent lower extremity impairment. He, however, did address whether appellant had reached maximum medical improvement. It is well established that a schedule award cannot be paid until a claimant has reached maximum medical improvement.[22] Although Dr. Mercado Oliveras advised on September 26, 2008 that appellant had reached maximum medical improvement, his November 2007 impairment evaluation was not in accordance with the fifth edition of the A.M.A., *Guides*, which was in

[15] A.M.A., *Guides*, *supra* note 4 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[16] *Id*. at 494-531.

[17] *Id*. at 521.

[18] *Id*. at 23-28.

[19] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[20] *Pamela J. Darling*, *supra* note 11.

[21] *Thomas J. Engelhart*, *supra* note 12.

[22] *D.S.*, Docket No. 08-885 (issued March 17, 2009).

effect at that time, as he did not document motor and sensory testing. This report was insufficient to establish the nature or extent of any lower extremity impairment.

The sixth edition of the A.M.A., *Guides* became effective on May 1, 2009.[23] In an undated report, received by the Office on May 28, 2009, Dr. Mercado Oliveras provided an impairment evaluation under the sixth edition. While he identified specific classes of impairment under Table 17-4 and utilized the adjustment grid tables, concluding that appellant had a net adjustment of five percent, Dr. Mercado Oliveras did not specify any impairment to appellant's lower extremities. Thus, this report is also insufficient to establish that appellant has permanent impairment to either leg.

On August 20, 2009 the Office referred appellant to Dr. Rojas for a second opinion evaluation regarding appellant's lower extremity impairment. Dr. Rojas advised that appellant had reached maximum medical improvement on January 22, 2007 and diagnosed lumbar sprain with L4-5 and L5-S1 radiculopathies and discogenic disease. He completed a permanent impairment worksheet, utilizing Table 16-1 to find a class 2 impairment and, after applying grade modifiers, concluded that appellant had a 14 percent lower extremity impairment.

Dr. Rojas identified L5-S1 radiculopathies and discogenic disease in his September 4, 2009 report. The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under the Act, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.[24] The Office has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures.[25]

If more than one rating method can be used, the method that provides the higher rating should be adopted.[26] The record in this case, however, does not indicate that Dr. Rojas was provided this information or instructed as to how he should assess impairment based on a spinal nerve impairment. Moreover, Dr. Magliato did not apply the tables found in Exhibit 4 of section 3.700 of the Office's procedures in his December 1, 2009 report. Therefore, neither Dr. Rojas nor Dr. Magliato provided an impairment analysis in accordance with the A.M.A., *Guides*.

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Once it has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. The Office has an obligation to

[23] *Supra* note 9.

[24] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

[25] *Id.* at Chapter 3.700 (January 2010) (Exhibits 1, 4).

[26] *C.J.*, Docket No. 08-2429 (issued August 3, 2009).

see that justice is done.[27] As the medical evidence of record does not comport with the A.M.A., *Guides* in assessing appellant's lower extremity impairment, the Board finds this case is not in posture for decision. The case will be remanded to the Office to obtain a supplemental report from Dr. Rojas with appropriate instructions regarding proper application of the A.M.A., *Guides* to include the above-described methodology for rating spinal nerve extremity impairment using the sixth edition of the A.M.A., *Guides* and for such further development as deemed necessary, it shall issue a *de novo* decision in any permanent impairment of appellant's lower extremities.

In light of the Board's finding, the second issue on appeal is rendered moot.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 20 and January 14, 2010 are set aside. The case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: May 9, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[27] *A.A.*, 59 ECAB 726 (2008).