United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 11-700**
	)	**Issued: November 10, 2011**
SOCIAL SECURITY ADMINISTRATION, SOUTHEAST REGION, Atlanta, GA, Employer	)	

Appearances:
Stephen Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2011 appellant filed a timely appeal from the August 5, 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 (FECA)[1] 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 met his burden of proof to establish that he is entitled to schedule award compensation.

FACTUAL HISTORY

OWCP accepted that on August 17, 2006 appellant, then a 44-year-old claims representative, sustained a lumbar sprain and stenosis of his lumbar region when he slipped, but did not fall, in a restroom at work.[2] On January 11, 2007 Dr. Juris Shibayama, an attending

[1] 20 C.F.R. § 8101 *et seq.*

[2] Appellant stated that his left leg slipped on water and he had to hold onto a partition to prevent himself from falling.

Board-certified orthopedic surgeon, performed back surgery, including laminectomy at L4 and L5 with bilateral foraminotomies, posterolateral arthrodesis at L4-5, posterior nonsegmental instrumentation at L4 and L5 and left iliac crest bone graft. The procedures were authorized by OWCP.

In a June 5, 2007 report, Dr. Shibayama stated that appellant was seen for a follow-up examination after his January 11, 2007 surgery. Appellant reported that he only experienced occasional pain and was back at work on a full-time basis. Dr. Shibayama stated that on examination appellant's surgical wound appeared well healed and that he had 5/5 strength in all lower extremity muscle groups with sensation intact throughout. He noted that x-ray studies, including, anteroposterior and lateral views, showed that the fusion at L4-5 was solid and the hardware was all in excellent position. Dr. Shibayama diagnosed "5-1/2 months status post L4-5 laminectomy and fusion, doing well" and indicated that appellant could return to full activity.

In another June 5, 2007 report, Dr. Shibayama stated, "The patient has requested that I issue him an impairment rating for an L4-5 laminectomy and instrumented posterior lateral fusion. He would require an impairment rating of 20 percent."

On September 24, 2007 appellant filed a claim for a schedule award due to his accepted employment injuries.

On November 4, 2008 an OWCP medical adviser stated that Dr. Shibayama indicated that appellant had 5/5 strength and intact sensation in his legs, x-rays showing solid L4-5 fusion in excellent position and the ability to return to full activity. He indicated that, under the standards of the fifth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), this qualified appellant for a zero percent permanent impairment of his right leg and a zero percent permanent impairment of his left leg. The medical adviser noted that Dr. Shibayama's rating of 20 percent impairment, without giving any basis, did not follow the fifth edition of the A.M.A., *Guides*.

In an April 8, 2009 letter, OWCP advised appellant that the opinion of Dr. Shibayama was not sufficient to establish his claim for a schedule award.

In an April 14, 2009 report, Dr. Shibayama stated that appellant reported residual radicular symptoms in his bilateral buttocks and lateral legs, particularly in the lateral aspect of both thighs. He indicated that appellant reported that he could not sit in a car or drive for long periods of time. Dr. Shibayama stated that physical examination of appellant's back revealed that he had extension to 10 degrees and flexion to 70 degrees with discomfort and that he had pain in the upper part of his lumbar spine. Appellant had decreased sensation and dysesthesias in both lateral thighs and legs and intermittent numbness in his both buttocks. Lateral bending was to 10 degrees to the left and to 15 degrees to the right. Dr. Shibayama diagnosed, "Two years, three months status post L4-L5 laminectomy and fusion with residual symptoms." He stated that he was using the fifth edition of the A.M.A., *Guides* to assess appellant's impairment and stated:

> "[Appellant] would require an impairment rating of 12 percent for sciatic dysesthesias in each lower extremity. He is experiencing sciatic dysesthesias to each lower extremity which is limiting his ability to perform his normal work activities and normal ability. This is based on Table 17-37 on page 552 [of the

A.M.A., *Guides*] under sciatic nerve dysesthesias -- 12 percent for each lower extremity both right and left."

In a letter dated April 14, 2009, Dr. Shibayama stated that he had previously given appellant a total body impairment rating based on the fifth edition of the A.M.A., *Guides*. He indicated that, if a lower extremity impairment rating was required, he would give him a 12 percent rating for his right lower extremity as well as for his left lower extremity for sciatic dysesthesia "which are common after lumbar laminectomy and fusion." Dr. Shibayama indicated that the rating was derived from Table 17-37 on page 552 of the fifth edition of the A.M.A., *Guides*.

On April 29, 2009 Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that Dr. Shibayama now stated that appellant had bilateral sciatic dysesthesia for which he recommended a 12 percent impairment of the right leg and a 12 percent impairment of the left leg under Table 17-37 of the fifth edition of the A.M.A., *Guides*. He noted that this was in contrast to Dr. Shibayama's earlier statements that appellant had normal strength and sensation in his legs and had returned to full duty. Dr. Hogshead stated that objective findings of a radiculopathy including dermatomal radiation below the knee and corresponding motor loss must be documented in order to find impairment. He provided his opinion that appellant had a zero percent permanent impairment of his right leg and a zero percent permanent impairment of his left leg, but recommended that appellant be sent for a second opinion evaluation with an orthopedic surgeon.

In an April 30, 2009 decision, OWCP denied appellant's claim on the grounds that the medical evidence did not show that he was entitled to schedule award compensation. It found that the basis for Dr. Shibayama's impairment rating was not adequately explained.

Appellant requested an oral hearing before an OWCP hearing representative. At the September 10, 2009 hearing, OWCP's hearing representative made a summary decision that, per the recommendation of Dr. Hogshead, appellant should be referred to a second opinion physician for further evaluation of his claim of permanent impairment. He set aside OWCP's April 30, 2009 decision and remanded the case to OWCP for referral to a second opinion physician.

On remand OWCP referred appellant to Dr. Tarek G. Elalayli, a Board-certified orthopedic surgeon, for examination and evaluation of his claimed permanent impairment.

In a November 2, 2009 report, Dr. Elalayli provided a description of appellant's factual and medical history, including details of his August 17, 2006 employment injury and his January 11, 2007 back surgery. He noted that appellant reported that the surgery alleviated about 70 percent of his pain although in the last year his symptoms had been slowly returning. Appellant currently complained of low back pain as well as numbness and burning in his legs. Dr. Elalayli indicated that on examination appellant had positive Waddell signs including pain with rotation of the trunk, pain with axial loading and pain that was absent with distraction. He also had an exaggerated response to light palpation and was able to flex forward to the mid-thigh level. Dr. Elalayli stated that appellant's extension and rotation were limited and that straight leg raise testing was negative. There was no hip irritability but there was point tenderness at T1 and L1 to S1. Motor and sensory testing and deep tending reflexes were symmetric. Dr. Elalayli indicated that other physicians had found impairment under the fifth edition of the A.M.A.,

Guides. He posited that, under the sixth edition of the A.M.A., *Guides*, appellant was entitled to a 12 percent permanent impairment to the whole body. Dr. Elalayli stated:

> "Specifically, [appellant] is not entitled to any separate impairment for the lower extremities. He was appropriately evaluated under the guidelines under Lumbar Spine Regional Grid after having undergone a decompression and fusion at L4-5. Additionally, it is important to note that [appellant] demonstrates evidence of symptom magnification consistent with secondary gain. Again, even though it seems that I was asked to determine an impairment of the lower extremities, it is my opinion that he does not have any impairment specifically of the lower extremities."

On December 23, 2009 Dr. Hogshead, again serving as an OWCP medical adviser, stated that Dr. Elalayli indicated that appellant has a 12 percent impairment of the whole person but noted that OWCP does not use whole person impairment for rating purposes. He indicated that impairment ratings were limited to the extremities and Dr. Elalayli stated that the lower extremities were normal. Appellant had a zero percent permanent impairment of his right leg and a zero percent permanent impairment of his left leg.

In a January 13, 2010 decision, OWCP denied appellant's claim noting that the opinion of Dr. Elalayli, OWCP's referral physician, showed that appellant did not have any permanent impairment of his legs under the relevant standards of the sixth edition of the A.M.A., *Guides*.

Appellant requested an oral hearing before an OCWP hearing representative, but this was later converted to a request for a review of the written record by an OWCP hearing representative. He submitted additional medical evidence, but this evidence did not contain any impairment rating evaluation.

In an August 5, 2010 decision, OWCP's hearing representative affirmed OWCP's January 13, 2010 decision noting that appellant had not submitted medical evidence showing that he had work-related permanent impairment.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[3]

The schedule award provision of FECA[4] and its implementing regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

[3] *See Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

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 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.[6] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7]

A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA. Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[8]

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain and stenosis of his lumbar region and, on January 11, 2007, Dr. Shibayama, an attending Board-certified orthopedic surgeon, performed back surgery, including laminectomy at L4 and L5 with bilateral foraminotomies, posterolateral arthrodesis at L4-5, posterior nonsegmental instrumentation at L4 and L5 and left iliac crest bone graft. Dr. Shibayama provided impairment ratings for appellant's legs but OWCP medical advisers determined that the ratings did not contain adequate medical rationale. Appellant was referred to Dr. Elalayli, a Board-certified orthopedic surgeon, for examination and evaluation of his claimed permanent impairment. On November 2, 2009 Dr. Elalayli determined that he had a zero percent permanent impairment of his right leg and a zero percent permanent impairment of his left leg under the sixth edition of the A.M.A., *Guides* and, on December 23, 2009, Dr. Hogshead, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, agreed with the assessment of Dr. Elalayli. Based on the opinions of Dr. Elalayli and Dr. Hogshead, OWCP determined that appellant had not shown that he had permanent impairment entitling him to schedule award compensation.

The Board finds that appellant did not establish that he is entitled to schedule award compensation. The November 2, 2009 impairment assessment of Dr. Elalayli, as agreed to by Dr. Hogshead, shows that appellant did not have permanent impairment of his legs under the standards of the sixth edition of the A.M.A., *Guides*.

In his November 2, 2009 report, Dr. Elalayli noted that on examination appellant had positive Waddell signs including pain with rotation of the trunk and pain with axial loading, but pointed out that pain was absent with distraction. Appellant also had an exaggerated response to light palpation and was able to flex forward to the mid-thigh level. He stated that straight leg raise testing was negative, there was reported point tenderness at T1 and L1 to S1 and motor and sensory testing and deep tending reflexes were symmetric. Dr. Elalayli found that, under the sixth edition of the A.M.A., *Guides*, appellant would not be entitled to any separate impairment rating for the legs as the medical evidence did not show any impairment in his legs due to a

[6] *Id*.

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

[8] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

work-related condition.[9] Dr. Elalayli further explained that it was important to note that appellant demonstrated evidence of symptom magnification consistent with secondary gain. In a December 23, 2009 report, Dr. Hogshead expressed agreement with the assessment of Dr. Elalayli.

On appeal counsel argued that there was a conflict in the medical opinion evidence between the impairment rating of Dr. Elalayli and the impairment ratings of Dr. Shibayama. The Board notes that Dr. Shibayama applied an edition of the A.M.A., *Guides* that was not in effect when OWCP made its January 13 and August 5, 2010 schedule awards determinations, *i.e.*, he applied the fifth edition rather than the sixth edition of the A.M.A., *Guides*.[10] In addition, Dr. Shibayama's impairment ratings are of limited probative value because Dr. Shibayama did not adequately explain how appellant's accepted employment low back injuries caused impairment to his legs.

In a June 5, 2007 report, Dr. Shibayama stated, "The patient has requested that I issue him an impairment rating for an L4-5 laminectomy and instrumented posterior lateral fusion. He would require an impairment rating of 20 percent." This report is of limited probative value because Dr. Shibayama did not provide any explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.[11] Moreover, Dr. Shibayama did not explain how his finding of permanent impairment was consistent with the medical findings of record, including his own findings (reported on June 5, 2007) that appellant had 5/5 strength and intact sensation in his legs, x-rays showing solid L4-5 fusion in excellent position and the ability to return to full activity.

In April 14, 2009 reports, Dr. Shibayama stated that, under Table 17-37 on page 552 of the fifth edition of the A.M.A., *Guides*, appellant had an impairment rating of 12 percent in each leg due to sciatic dysesthesias which limited his ability to perform his normal work activities and normal nonwork activities. This report is of limited probative value on the relevant issue of this case because Dr. Shibayama did not provide any explanation of how he applied the standards of the A.M.A., *Guides* and he again failed to explain how appellant's accepted employment injuries of lumbar sprain and lumbar stenosis caused impairment to his legs. Dr. Shibayama did not present objective medical evidence, such as findings of diagnostic testing, to show that appellant had impairment from his August 16, 2007 back injuries that extended into his legs. Medical rationale relating such a radiating condition to a work-related cause would be especially necessary given that appellant reported in June 2007 that he had no symptoms in his legs.

For these reasons, appellant has not established that he is entitled to schedule award compensation. He may request a schedule award based on evidence of a new exposure or

[9] Dr. Elalayli posited that, under the sixth edition of the A.M.A., *Guides*, appellant had 12 percent permanent impairment of the whole body under the Lumbar Spine Regional Grid. *See* A.M.A., *Guides* 570-74, Table 17-4 (Lumbar Spine Regional Grid). However, Dr. Elalayli acknowledged that appellant would not be entitled to a schedule award for a whole person impairment and went on to assess his leg impairment. *See supra* note 8.

[10] *See supra* note 7.

[11] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

medical evidence showing progression of an employment-related condition resulting in permanent impairment.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he is entitled to schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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