United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 10-2359**
	)	**Issued: September 21, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Bolton, NC, 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
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 21, 2010 appellant timely appealed the April 12, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied 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.[2]

ISSUE

The issue is whether appellant has a ratable impairment of the lower extremities.

[1] 5 U.S.C. §§ 8101-8193 (2006).

[2] The record forwarded to the Board included evidence received after OWCP issued its April 12, 2010 decision. The Board's appellate review is limited to evidence that was in the case record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c) (2010). Accordingly, any evidence received after April 12, 2010 will not be considered on appeal.

FACTUAL HISTORY

Appellant, a 70-year-old retired rural carrier, was involved in an employment-related motor vehicle accident (MVA) on September 13, 1999.[3] OWCP initially accepted his traumatic injury claim for right leg hematoma and multiple lacerations (low back, both legs, right arm and right shoulder). It later expanded the claim to include loose bodies in the left elbow, aggravation of lumbar degenerative disc disease and aggravation of lumbar spinal stenosis (L3-S1). OWCP also authorized surgery, which included a left elbow arthroscopy and a January 10, 2001 laminectomy at L4-5.

On February 1, 2002 OWCP granted a schedule award for one percent impairment of the left upper extremity.[4] On July 8, 2006 appellant requested a schedule award for impairment of the lower extremities due to his back condition.

In a report dated April 25, 2007, Dr. Neill H. Musselwhite, a family practitioner, indicated that appellant had 15 percent impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2001) disability ratings.[5] He explained that appellant had damage to nerve roots L4-L5, S1 and S2. Dr. Musselwhite also noted that appellant had chronic pain that averaged about 7 on a scale of 1 to 10. Appellant also had weakness, which Dr. Musselwhite graded two to three out of five. Lastly, Dr. Musselwhite reported that appellant had difficulty using foot pedals while operating a motor vehicle.

The district medical adviser (DMA) reviewed Dr. Musselwhite's April 25, 2007 report and found that there was insufficient objective findings to assign an impairment rating under the A.M.A., *Guides* (5th ed. 2001). He recommended that OWCP refer appellant to an orthopedic surgeon for examination and an impairment rating of the lower extremities.

Since 2007 OWCP has referred appellant to four different physicians for the purpose of determining the cause and extent of any lower extremity impairment.[6]

OWCP denied a lower extremity schedule award on February 22, 2008, May 18, 2009 and most recently on April 12, 2010. The Branch of Hearings and Review set aside the

[3] Appellant retired effective April 30, 2002.

[4] By decision dated August 20, 2004, the Board found that appellant failed to establish that he had greater than one percent impairment of the left upper extremity. Docket No. 04-1140.

[5] OWCP had written Dr. Musselwhite requesting that he provide a lower extremity impairment rating in accordance with the fifth edition of the A.M.A., *Guides* (2001).

[6] In addition to the various OWCP referrals, appellant submitted a March 23, 2009 impairment rating from Dr. Paul J. Tawney, a Board-certified physiatrist with a subspecialty in spinal cord injuries, who found 3 percent impairment of the right lower extremity based on a grade 3 60 percent sensory deficit involving the L5 nerve root. With respect to the left lower extremity, Dr. Tawney found 4 percent impairment based on a grade 2 80 percent sensory deficit involving the L5 nerve root. He referenced Tables 15-15 and 15-18, A.M.A., *Guides* 424 (5th ed. 2001).

February 22, 2008 and May 18, 2009 decisions because of deficiencies with respect to medical development of record.[7]

OWCP referred appellant to Dr. Edward R. Mulcahy, a Board-certified orthopedic surgeon. Also, on January 26, 2010, it expanded his claim to include aggravation of lumbar degenerative disc disease (L5-S1) and aggravation of lumbar spinal stenosis (L3-S1). OWCP prepared an amended SOAF dated January 27, 2010, which reflected, *inter alia*, the recently accepted lumbar conditions and appellant's previously approved January 2001 lumbar laminectomy.

Dr. Mulcahy examined appellant on March 25, 2010 and diagnosed preexisting degenerative disc disease and spinal stenosis. He further indicated that the temporary aggravation of lumbar degenerative disc disease and spinal stenosis had resolved. Other resolved conditions included the accepted loose bodies in appellant's left elbow, his right shoulder and right lower leg lacerations, as well as his lumbar strain. Dr. Mulcahy found that appellant did not have any ongoing residuals and no impairment of the upper or lower extremities secondary to his September 13, 1999 employment injury. He noted that the chronic electrodiagnostic findings were secondary to the natural progression of appellant's preexisting conditions. OWCP did not refer Dr. Mulcahy's report to its DMA for review.

By decision dated April 12, 2010, OWCP denied appellant's schedule award claim for the lower extremities.

LEGAL PRECEDENT

Section 8107 FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[8] It, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[9] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[10]

[7] By decision dated November 24, 2009, the hearing representative ordered OWCP to further develop the medical record on the issue of whether appellant's current low back condition was causally related to his employment injury. The hearing representative also ordered that the statement of accepted facts (SOAF) be updated to accurately reflect appellant's accepted conditions, including all OWCP-authorized surgical procedures. Lastly, the hearing representative ordered that appellant be referred to a second opinion specialist for evaluation of any work-related permanent impairment under the latest edition of the A.M.A., *Guides* (6th ed. 2008).

[8] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[9] 20 C.F.R. § 10.404.

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or in the implementing regulations.[11] Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.[12]

ANALYSIS

Since 2007 OWCP has referred appellant for examination on at least four occasions. The purpose of which was to determine if he had an employment-related impairment of the lower extremities. Pursuant to Branch of Hearings and Review's latest remand dated November 24, 2009, OWCP expanded the claim, updated the SOAF and then referred appellant to Dr. Mulcahy,[13] who examined appellant on March 25, 2010 and diagnosed preexisting degenerative disc disease and spinal stenosis. According to Dr. Mulcahy, these were appellant's only unresolved conditions. He further noted that the temporary aggravation of lumbar degenerative disc disease and spinal stenosis had resolved. Dr. Mulcahy found no ongoing residuals or impairment of the upper or lower extremities secondary to appellant's September 13, 1999 employment injury. He attributed appellant's chronic electrodiagnostic findings to the natural progression of his preexisting conditions.

In its most recent denial dated April 12, 2010, OWCP relied upon Dr. Mulcahy's March 25, 2010 report.

The Board finds that the question of appellant's entitlement to a schedule award is not in posture for decision.

While the sixth edition of the A.M.A., *Guides* (2008) provides a methodology for rating spinal nerve extremity impairment,[14] Dr. Mulcahy did not calculate lower extremity impairment presumably because he believed that appellant's current lumbar condition was not employment related, but in fact preexisted the September 13, 1999 MVA. The Board notes, however, that preexisting impairment of the member under consideration is generally included in calculating

[11] *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

[12] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[13] The January 27, 2010 SOAF included appellant's previously authorized January 2001 lumbar laminectomy and the additional accepted conditions of aggravation of lumbar degenerative disc disease (L5-S1) and aggravation of lumbar spinal stenosis (L3-S1). The amended SOAF also included lumbar strain and aggravation of pelvic arthritis as accepted conditions. The Board is unable to independently verify OWCP's purported acceptance of the latter two conditions. While the corresponding ICD-9 codes are reflected in iFECS, the Board has not uncovered any OWCP internal memoranda or other communication to appellant advising of the acceptance of either lumbar strain or aggravation of pelvic arthritis. The hearing representative referenced an August 4, 2003 OWCP memorandum as documentation of the acceptance of a right pelvic condition. However, the Board is unable to locate the referenced document.

[14] *Supra* note 10, Exhibit 4.

the percentage of loss.[15] OWCP neglected to emphasize this point when referring the case to Dr. Mulcahy.

Another deficiency with respect to Dr. Mulcahy's March 25, 2010 report is that he failed to adequately explain his opinion regarding the cause of appellant's current lumbar condition.[16] OWCP recently expanded the claim to include aggravation of lumbar degenerative disc disease (L5-S1) and aggravation of lumbar spinal stenosis (L3-S1). Dr. Mulcahy characterized this aggravation as temporary and found that it had resolved. He noted that appellant's chronic electrodiagnostic findings were secondary to the natural progression of his preexisting conditions. The Board finds that Dr. Mulcahy did not adequately explain how he was able to attribute appellant's current lumbar complaints to the natural progression of his preexisting condition rather than the September 13, 1999 employment related MVA or the January 2001 OWCP-approved lumbar laminectomy. Dr. Mulcahy also failed to explain his finding of a temporary aggravation, particularly in light of the fact that appellant's lumbar condition was asymptomatic prior to his employment injury. It is incumbent upon him to identify the timeframe when the aggravation ceased and the factors that supported his stated conclusion. The Board finds that Dr. Mulcahy's March 25, 2010 report does not include adequate rationale to support his opinion on causal relationship.

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[17] As the medical evidence developed by OWCP does not adequately address the extent of any lower extremity impairment or causal relationship, the case will be remanded for further development. After OWCP has developed the case record to the extent it deems necessary, a *de novo* decision shall by issued regarding entitlement to a schedule award.

CONCLUSION

The case is not in posture for decision regarding whether appellant has a ratable impairment of the lower extremities.

[15] *R.D.*, 59 ECAB 127, 130 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(2) (January 2010).

[16] Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

[17] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: September 21, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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