United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 11-1939**
	)	**Issued: April 17, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 25, 2011 appellant, through his attorney, filed a timely appeal from a June 9, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which affirmed a decision 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 the case.

ISSUE

The issue is whether appellant sustained permanent impairment warranting a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 8, 2007 appellant, then a 46-year-old custodian, injured his back while performing his custodian duties. On January 31, 2008 OWCP accepted a lumbar sprain. Appellant stopped work on March 9, 2007 and retired on December 31, 2008.

From April 9, 2007 to December 1, 2008, appellant was treated by Dr. W. Francis Kennard, a Board-certified orthopedic surgeon, for severe low back pain which started on March 8, 2007 when he was at work and reached for an item. Dr. Kennard diagnosed lower back pain. In a December 19, 2007 report, he noted appellant's history was significant for a September 2004 work-related motor vehicle accident and he was treated for neck pain. Dr. Kennard noted that an October 2, 2007 magnetic resonance imaging (MRI) scan of the lumbar spine revealed mild multilevel degenerative change, possible posterolateral disc protrusion at L3-4 and mild compressive effects on the ventral surface of the thecal sac at L3-4, L4-5. He noted findings of negative straight leg raising and normal reflexes. Dr. Kennard diagnosed cervical spine strain, lower back strain, without evidence of cervical lumbar radicular symptoms noting that the electromyogram and nerve conduction studies did not support radicular findings. He could not make a clear-cut diagnosis as to any obvious pathology that would disable appellant on a permanent basis. In a December 1, 2008 report, Dr. Kennard noted appellant's continued complaints of back, shoulder and neck pain. He noted that the physical examination was unchanged and diagnosed chronic back pain.

OWCP further developed the matter by referring appellant to Dr. Irving Strouse, a Board-certified orthopedist, who, in a December 26, 2007 report, diagnosed lumbar strain and preexisting mild degenerative changes of the lumbar spine. Dr. Strouse noted findings of no spasm, atrophy or deformity of the paralumbar muscles, no true muscle weakness in the legs and normal reflexes, sensation and circulation. He opined that appellant's March 8, 2007 accepted injury had resolved and he could return to work with restrictions. OWCP found a conflict of opinion with Dr. Kennard, appellant's treating physician, and Dr. Strouse and referred appellant to Dr. Dean L. Carlson, a Board-certified orthopedic surgeon, to resolve the conflict. Dr. Carlson diagnosed acute lumbosacral sprain which completely resolved. He noted findings and opined that appellant's work-related condition resolved and he could return to work without restrictions.

On May 19, 2010 appellant filed a claim for a schedule award. In a December 21, 2009 report, Dr. Arthur Becan, a Board-certified orthopedic surgeon, noted that appellant had reached maximum medical improvement on that date. He noted examination of the cervical spine revealed posterior midline tenderness from C4-7, bilateral paravertebral muscle spasm and trapezius muscle spasm from C4-7, tenderness over the posterior facet joints bilaterally at C4-7 and range of motion was restricted. Lumbar spine examination revealed posterior midline tenderness from L3-S1, bilateral paravertebral muscle spasm from L3-S1, bilateral iliolumbar ligament tenderness and sacroiliac joint tenderness, restricted range of motion, muscle strength of the lower extremities revealed quadriceps, hamstrings and gastrocnemius were 4/5 bilaterally, neurological testing of the lower extremities revealed decreased sensation at L5-S1 and deep tendon reflexes revealed decreased right ankle jerk. Dr. Becan diagnosed defined work-related injury of September 27, 2004 of the cervical spine and right shoulder, defined work-related injury on March 8, 2007 of the lumbar spine with left lower extremity radiculopathy, herniated

C5-6 disc, bulging C3-4, C4-5, C6-7 discs, bulging L2-3, L3-4, L4-5 discs, herniated L5-S1 disc and right lumbosacral radiculopathy. He stated that, based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] appellant had 28 percent impairment of each leg. Dr. Becan noted that appellant had a class 1 motor strength deficit of the bilateral extensor hallucis longus/hamstrings/gastrocnemius (sciatic) with a nine percent default impairment.[3] He applied the modifiers for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS) and noted that GMFH would provide a grade modifier of two and GMCS provided a grade modifier of two for a net adjustment of two. Dr. Becan adjusted the impairment rating, concluding that appellant had 13 percent impairment of each leg for this motor strength deficit. He further noted that appellant had a class 1 motor strength deficit of the bilateral quadriceps (femoral) for five percent default impairment.[4] Dr. Becan applied the modifiers and noted that GMFH would provide a grade modifier of two and GMCS provided a grade modifier of two for a net adjustment of two. He adjusted the impairment rating, concluding that appellant had nine percent impairment of each leg for this motor strength deficit. Dr. Becan noted that appellant had a class 1, motor strength deficit of the L5 and S1 nerve root (sciatic) with four percent default impairment.[5] The combined bilateral lower extremity impairment was 28 percent in accordance with the A.M.A., *Guides.*

In an April 22, 2010 report, OWCP's medical adviser stated that there was no basis for rating any impairment based on appellant's accepted conditions. He referenced Dr. Becan's report and disputed the marked findings of the lower extremity impairment related to the lumbar sprain which had been accepted years ago and had completely resolved. The medical adviser noted that appellant's treating physician, Dr. Kennard, in a December 1, 2007 report, stated that there were no objective findings of permanent disability related to appellant's lumbar claim. He further noted that appellant underwent a second opinion examination on December 26, 2007, by Dr. Strouse, and a referee examination on September 18, 2008, performed by Dr. Carlson, both of whom opined that appellant's lumbar condition resolved. The medical adviser recommended referral to an impartial specialist.

OWCP determined that a conflict of medical opinion arose between Dr. Becan, appellant's treating physician, and OWCP's medical adviser, regarding whether appellant sustained a permanent impairment due to his work-related injury. On August 18, 2010 it referred appellant to a referee physician, Dr. Samuel E. Epstein, an osteopath and Board-certified orthopedic surgeon.

In a report dated October 4, 2010, Dr. Epstein reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury as well as other conditions sustained by appellant. Dr. Epstein diagnosed mild preexisting degenerative disc disease with spondylosis of the lumbar sacral spine, small central and right paracentral disc herniation at L5-S1 without objective clinical evidence on physical examination

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

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

[4] *Id.*

[5] *Id.*

of radiculopathy, sprain of the lumbar spine with exacerbation of preexisting degenerative disc disease and spondylosis of the lumbar spine. Examination of the thoracolumbar spine revealed tenderness to palpation from T1 through the sacrum both sacroiliac joints and sciatic notches with limited range of motion. Examination of the lower extremities revealed full range of motion of the hips and knees with pain, deep tendon reflexes were intact and symmetric bilaterally, manual muscle testing was normal at the biceps, triceps, hip flexors, knee flexors, knee extensors, ankle flexors and dorsiflexors and extensor hallucis longus bilaterally. Sensation was intact in all dermatomal distributions of the upper and lower extremities to pin prick, light touch and Semmes-Weinstein monofilament testing.

Dr. Epstein noted with regards to permanent impairment, OWCP did not allow impairment rating for the back unless there was impairment to the extremities. He noted that using Table 16-11, sensory motor severity, page 533 of the A.M.A., *Guides*, appellant's severity score would be zero for sensory deficit in that appellant has a normal sensibility to Semmes-Weinstein monofilament testing in the lower extremities and normal sensation to sharp and dull in the lower extremities. Dr. Epstein noted that, pursuant to Table 16-12, peripheral nerve impairment/lower extremities, page 534-36, appellant would have a severity score of zero for motor deficit as appellant had normal strength in all the myotomal distributions of the lower extremities. He noted that appellant had no objective sensory or motor deficits, he would fall into a class zero and have no impairment of either leg. Dr. Epstein further explained that appellant had no impairment of the legs due to peripheral nerve impairment as he had no objective sensory or motor deficits emanating from the lumbosacral spine. He advised that his examination was consistent with that of Dr. Carlson on September 18, 2008, Dr. Strouse on December 26, 2007 and Dr. Kennard on December 1, 2007. Unlike Dr. Becan, Dr. Epstein found no objective motor weakness in the lower extremities, no sensory deficit, no trophic changes or swelling to suggest complex regional pain syndrome with full range of motion of the hips knees and ankles.

On October 26, 2010 OWCP's medical adviser concurred with the opinion of Dr. Epstein that appellant had no impairment of the lower extremities. He noted that Dr. Epstein properly utilized Table 16-11, sensory motor severity and noted a score of zero for sensory and motor deficit. The medical adviser indicated that Dr. Epstein referenced Table 16-12, peripheral nerve impairment of the lower extremities and noted appellant had no objective sensory or motor deficits and therefore fell into a class zero with no impairment of the legs. He noted that Dr. Epstein supported his findings noting that he found no evidence of objective motor weakness or sensory deficits in the lower extremities during the Semmes-Weinstein testing, and no trophic changes or swelling to suggest complex regional pain syndrome. The medical adviser noted that maximum medical improvement was on October 4, 2010 and appellant sustained no impairment of either leg pursuant to the A.M.A., *Guides*.

On November 30, 2010 OWCP denied appellant's claim for a schedule award.

On December 10, 2010 appellant requested a review of the written record.

In a decision dated June 9, 2011, OWCP's hearing representative affirmed the November 30, 2010 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing federal regulations,[7] 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.[8] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[9]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[10] FECA and the implementing regulations do not provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.[11] The Board notes that section 8101(19) specifically excludes the back from the definition of organ.[12] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[13]

ANALYSIS

Appellant alleges that he is entitled to a schedule award for permanent partial impairment of the lower extremities and back. OWCP accepted his claim for a lumbar sprain. However, as noted above, FECA does not permit a schedule award based on impairment to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper or lower extremities due to his accepted back condition.

In this case, OWCP determined that a conflict existed in the medical evidence between appellant's attending physician, Dr. Becan, who disagreed with OWCP's medical adviser concerning the extent of appellant's impairment of the bilateral lower extremities. Consequently, it referred appellant to Dr. Epstein to resolve the conflict.

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[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404(a).

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

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

[11] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[12] 5 U.S.C. § 8101(19).

[13] *Thomas J. Engelhart*, *supra* note 10.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[14]

The Board finds that, under the circumstances of this case, the opinion of Dr. Epstein is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant is not entitled to a schedule award.

Dr. Epstein noted a history of appellant's work-related injury. He diagnosed mild preexisting degenerative disc disease with spondylosis of the lumbar sacral spine, small central and right paracentral disc herniation at L5-S1 without objective clinical evidence on physical examination of radiculopathy, sprain of the lumbar spine with exacerbation of preexisting degenerative disc disease and spondylosis of the lumbar spine. Dr. Epstein noted examination findings for the lumbar spine and legs. Appellant's reflexes were intact and symmetrical bilaterally, manual muscle testing was normal at the biceps, triceps, hip flexors, knee flexors, knee extensors, ankle flexors and dorsiflexors and extensor hallucis longus bilaterally. Sensation was intact in all dermatomal distributions of the lower extremities to pin prick, light touch and Semmes-Weinstein monofilament testing. Dr. Epstein noted pursuant to Table 16-11, sensory motor severity, page 533 of the A.M.A., *Guides*, appellant's severity score would be zero for sensory deficit in that appellant has a normal sensibility to Semmes-Weinstein monofilament testing in the legs and normal sensation to sharp and dull in the legs. He noted that under Table 16-12, peripheral nerve impairment/lower extremities, page 534-36, appellant had a severity score of zero for motor deficit as appellant had normal strength in all the myotomal distributions of the legs. Dr. Epstein noted that, as appellant had no objective sensory or motor deficits, he fell into class zero and had no impairment of the bilateral lower extremities. He further explained that appellant had no impairment rating for peripheral nerve impairment because he had no objective sensory or motor deficits. Dr. Epstein advised that his findings were consistent with other physicians, except for Dr. Becan, and that he could find no objective basis on which to rate lower extremity impairment.

OWCP's medical adviser properly reviewed the medical record and agreed there was no basis on which to attribute permanent impairment, based on the findings of Dr. Epstein. He noted that Dr. Epstein properly utilized Table 16-11 and Table 16-12 in the A.M.A., *Guides*, but found no objective basis for rating permanent impairment of the legs.

On appeal, appellant asserts that the report of Dr. Epstein was vague, speculative and incomplete and insufficient to carry the weight of the evidence. The Board has reviewed Dr. Epstein's report and notes the impartial specialist reviewed appellant's history provided findings upon physical examination and reviewed diagnostic testing. Dr. Epstein explained that appellant did not have any objective sensory or motor deficits, based on his thorough physical examination, such that he had no ratable impairment of the bilateral lower extremities. Appellant asserts that the questions to the referee physician were misleading and improperly noted that OWCP's medical adviser was an expert in the use of the A.M.A., *Guides* and that special attention should be paid to the reports of Drs. Strouse and Carlson. Dr. Epstein did not give

[14] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

undue attention or weight to the medical adviser's reports or those of Drs. Strouse and Carlson. Rather he explained his own findings on examination of appellant did not support any permanent impairment and were consistent with other physicians except for Dr. Becan. There is no evidence that Dr. Epstein gave undue deference to the reports of Drs. Strouse and Carlson in making his impairment determination. He clearly based his impairment rating on his own thorough physical examination and concluded that appellant had sustained zero percent impairment of the lower extremities due to his accepted work injury.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant did not establish that he sustained permanent impairment of his lower extremity based on his accepted lumbar condition.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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