United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
	)	**Docket No. 11-620**
and	)	**Issued: January 4, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 11, 2011 appellant filed a timely appeal of a November 16, 2010 schedule award decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than 21 percent impairment of each lower extremity, for which he received schedule awards.

On appeal, appellant contends that he is entitled to a schedule award for whole person impairment.

[1] The Board will adjudicate appellant's appeal from a January 19, 2011 overpayment decision, filed on January 31, 2011, in a separate decision.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on May 25, 1993 appellant, then a 38-year-old mail handler, sustained a lumbar strain and herniated disc at L5-S1 as a result of bending over to pick up a box weighing 30 to 50 pounds at work.[3]

On March 25 2008 appellant filed a claim for a schedule award.

In a June 6, 2008 medical report, Dr. Alvin Stinson, an attending Board-certified physiatrist, advised that appellant might have six percent impairment of the whole person due to decreased lumbar range of motion under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He concluded that appellant had no impairment due to inconsistencies in objective range of motion testing. Dr. Stinson stated that the impairment rating testing was invalid.

By letters dated July 18, 2008, OWCP requested that Dr. Stinson submit a medical report regarding the extent of appellant's permanent impairment under the fifth edition of the A.M.A., *Guides*. Appellant was also advised that he should contact his physician to determine whether he was entitled to an impairment rating. Neither Dr. Stinson nor appellant submitted the requested evidence.

On October 28, 2008 Dr. Guillermo M. Pujadas, an OWCP medical adviser, reviewed the medical record. He stated that the date of maximum medical improvement could not be determined. Dr. Pujadas also stated that the medical evidence was also insufficient to determine any permanent impairment under the fifth edition of the A.M.A., *Guides*. He recommended a current medical examination which addressed appellant's symptoms and provided objective findings in each lower extremity and diagnostic test results to determine the extent of his impairment.

On March 16, 2009 appellant was referred, together with a statement of accepted facts and the medical record, to Dr. Robert L. Pearlman, a Board-certified neurologist, for a second opinion.

In a March 30, 2009 report, Dr. Pearlman obtained a history of the May 25, 1993 employment injury and appellant's medical treatment, social and family background. Appellant's current symptoms included back pain radiating down to his legs on both sides with some numbness and tingling. The pain affected his stability and impaired his gait and ability to exercise. Appellant had a hard time bending over or performing any physical activity. On physical examination, Dr. Pearlman reported essentially normal findings with the exception of weakness more distally in the lower extremity to dorsiflexion and plantar flexion of each foot that was perhaps 4/5. There was decreased sensation to pin where it felt quite dull with pain radiating down to the legs with positive straight leg raising bilaterally. Deep tendon reflexes were +1 at the arms, biceps, triceps and trace brachioradialis and +1 at the knees and trace at the ankles. Appellant's toes were down going. He ambulated with a cane and had a swollen right ankle that was chronic in nature. Dr. Pearlman diagnosed chronic bilateral radiculopathy

[3] Appellant retired on disability from the employing establishment effective February 18, 1994.

at L5-S1. He reviewed a March 7, 2002 magnetic resonance imaging (MRI) scan which showed a disc or spur lateralizing to the left at L5-Sl, right-sided disc herniation at L4-5 and degenerative disc disease at L3-4. A MRI scan performed a year earlier revealed significant degenerative disease of the lumbosacral interspace with retrolisthesis at L5-S1. There was asymmetry of the disc lateralizing to the left and mild to severe narrowing of the anterior/posterior diameter of the spinal canal. At L4-5 there was a central right disc protrusion which pushed on the thecal sac and right LS nerve root. There was also degenerative joint disease at L4-5 and L3-4.

Dr. Pearlman advised that appellant probably reached maximum medical improvement effective February 18, 1994. He stated that, in addition to appellant's complaint of pain to palpation in his low back, objective findings of sensory changes bilaterally at L5-S1 and weakness were found on examination. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Pearlman noted that appellant's motor and sensory examination were about equal in both lower extremities with motor deficit being 4/5 bilaterally at L5 and S1 and probably 2/5 for sensory deficit at L5-S1 bilaterally. He determined that appellant had 21 percent impairment of each lower extremity with both L5 and S1 nerve roots affected. Dr. Pearlman utilized the Combined Values Chart to calculate a 38 percent whole person impairment rating.[4] He advised that appellant had significant arthritic degenerative changes in his back which would not resolve due to their degenerative nature. Dr. Pearlman advised that there were objective findings to support a herniated disc at L5-S1. An electromyogram (EMG) was consistent with right S1 radiculopathy in the past, although it was not tested on the left leg. Dr. Pearlman concluded that he did not expect the diagnosed herniated disc condition to resolve as it was degenerative and arthritic with what looked to be spinal stenosis of the spinal canal which could occur with disc herniations and was part of the degenerative spinal condition. He expected that this condition would be long lasting and permanent.

On April 15, 2009 Dr. Howard P. Hogshead, an OWCP medical adviser, reviewed Dr. Pearlman's March 30, 2009 findings and agreed with his conclusion that appellant had 21 percent impairment of each lower extremity under the fifth edition of the A.M.A., *Guides*. He stated that Dr. Pearlman provided a well-organized and lucid presentation of appellant's objective findings.

By letter of April 30, 2009 decision, OWCP granted appellant a schedule award for 21 percent impairment of each lower extremity.[5] The period of the award ran for 120.96 weeks from April 10, 2009 to August 4, 2011. The date of maximum medical improvement was listed as April 10, 2009.

In August 2010, appellant requested reconsideration, contending that the date of maximum medical improvement was February 18, 1994 as set forth in Dr. Pearlman's March 30, 2009 report.

[4] *See* A.M.A, *Guides* 604 (Combined Values Chart).

[5] In an August 25, 2009 decision, OWCP denied appellant's claim for a recurrence of disability commencing May 25, 1993. The medical evidence was insufficient to establish that the claimed disability was causally related to the accepted employment injuries. In an August 11, 2010 decision, OWCP denied appellant's request for reconsideration without a review of the merits of the claim. Appellant has not appealed this decision to the Board. Thus, the Board will not review it on this appeal. *See* 20 C.F.R. § 501.3.

On September 16, 2010 Dr. James W. Dyer, an OWCP medical adviser, reviewed the medical record. He noted that appellant received nonsurgical treatment for pain in his lower back and leg from the onset of his May 25, 1993 injuries and never improved during the nine months of active treatment leading up to his disability retirement on February 18, 1994. Therefore, the medical adviser concluded that the correct date of maximum medical improvement was February 18, 1994 and not April 10, 2009.

By decision dated October 25, 2010, OWCP denied appellant's request for reconsideration on the grounds that it was not timely filed. However, it stated that a separate decision would be issued based on OWCP director's own motion as the evidence established clear evidence of error with regard to the date of maximum medical improvement.

In an October 26, 2010 decision, OWCP vacated the April 30, 2009 decision, finding that appellant established clear evidence of error under FECA with regard to the date of maximum medical improvement. The evidence established that the correct date of maximum medical improvement was February 18, 1994.

On November 16, 2010 OWCP issued amended schedule awards for 21 percent impairment to each lower extremity. The corrected date of maximum medical improvement was noted as February 18, 1994. The period of the awards was 120.96 weeks from February 18, 1994 to June 13, 1996.[6]

LEGAL PRECEDENT

The schedule award provision of FECA[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, functions and organs of the body. FECA, 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[9] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[10] For decisions issued

[6] On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before OWCP at the time of the final decision. *See* 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

[10] *Supra* note 8.

after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11] For decisions issued after May 1, 2009, the sixth edition will be used.[12]

ANALYSIS

OWCP accepted appellant's claim for a lumbar strain and herniated disc at L5-S1. At the time it issued the April 30, 2009 schedule award for 21 percent impairment of each lower extremity commencing April 10, 2009, the fifth edition of the A.M.A., *Guides* was in effect.[13] In an October 26, 2010 decision, OWCP vacated its schedule award decision as appellant established clear evidence of error with regard to the date of maximum medical improvement.[14] On November 16, 2010 it issued an amended decision for 21 percent impairment of each lower extremity and corrected the date of maximum medical improvement to February 18, 1994. The Board finds that appellant has established more than 21 percent impairment.

In the June 6, 2008 impairment evaluation, Dr. Stinson, an attending physician, found that appellant had no impairment to each the right and left lower extremity under the fourth edition of the A.M.A., *Guides*. He determined that his initial six percent whole person impairment rating due to decreased lumbar range of motion was not valid as there were objective inconsistencies with appellant's range of motion testing. Although OWCP requested that Dr. Stinson submit a report in conformance with the fifth edition of the A.M.A., *Guides*, he did not respond.

On October 28, 2008 Dr. Pujadas, an OWCP medical adviser, reviewed the medical record. He found that the date of maximum medical improvement could not been determined. Dr. Pujadas also found that there was insufficient medical evidence to determine appellant's impairment under the fifth edition of the A.M.A. *Guides*. He recommended further development of the medical evidence.

In order to determine the extent and degree of any employment-related impairment, OWCP referred appellant to Dr. Pearlman for a second opinion. In his March 30, 2009 impairment evaluation, Dr. Pearlman found essentially normal findings with the exception of weakness more distally in the lower extremity to dorsiflexion and plantar flexion of each foot that was perhaps 4/5. He also found decreased sensation to pin where it felt quite dull with pain radiating down to the legs with positive straight leg raising bilaterally. Dr. Pearlman noted reviewing a March 7, 2002 MRI scan which demonstrated a disc or spur lateralizing to the left at L5-Sl, right-sided disc herniation at L4-5 and degenerative disc disease at L3-4. He also reviewed a 2001 lumbar MRI scan that showed significant degenerative disease of the lumbosacral interspace with retrolisthesis at L5-S1, asymmetry of the disc lateralizing to the left and mild to severe narrowing of the anterior/posterior diameter of the spinal canal, a central right

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

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

[13] *Supra* note 11.

[14] The Board notes that, on reconsideration, appellant was asking OWCP for review of the schedule award and not additional compensation subsequent to the prior award.

disc protrusion which pushed on the thecal sac and right LS nerve root at L4-5 and degenerative joint disease at L4-5 and L3-4. Dr. Pearlman found that appellant had chronic bilateral radiculopathy at L5-S1. He stated that his objective findings of sensory changes bilaterally at L5-S1 and weakness were found on examination. Dr. Pearlman advised that appellant had a herniated disc at L5-S1 based on an EMG study which was consistent with previous right S1 radiculopathy. He advised that this lumbar condition was permanent. Dr. Pearlman also advised that appellant had significant arthritic degenerative changes in his back which would not resolve due to their degenerative nature. He related that appellant reached maximum medical improvement effective February 18, 1994. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Pearlman determined that appellant had 21 percent impairment of each lower extremity with both L5 and S1 nerve roots affected, noting that his motor deficit was 4/5 bilaterally at L5 and S1 and his sensory deficit was 2/5 at L5-S1 bilaterally.[15] The Board finds that Dr. Pearlman's ratings conform to the fifth edition of the A.M.A., *Guides*.[16]

Dr. Hogshead, an OWCP medical adviser, reviewed Dr. Pearlman's findings on April 15, 2009 and concurred with his determination that appellant had 21 percent impairment of each lower extremity under the fifth edition of the A.M.A., *Guides*. He stated that Dr. Pearlman provided a well-organized and lucid presentation of appellant's objective findings.

The Board finds that appellant has no more than 21 percent impairment of each lower extremity. There is no other medical evidence of record addressing the extent of his permanent impairment under the fifth edition of the A.M.A., *Guides*.

On appeal, appellant contended that he was entitled to a schedule award for whole person impairment. As noted, however, there is no statutory basis for the payment of a schedule award for whole body impairment under FECA.[17]

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 has failed to establish that he has more than 21 percent impairment of each lower extremity, for which he received schedule awards.

[15] A.M.A., *Guides* 424, Tables 15-15, 15-16, 15-18.

[16] The Board notes that, following his impairment rating of both of appellant's lower extremities, Dr. Pearlman utilized the Combined Values Chart to conclude that appellant had 38 percent whole person impairment rating. The Board notes that the payment of schedule awards for the permanent impairment of the whole person is not authorized under FECA. Payment is authorized only for the permanent impairment of specified members, organs or functions of the body. *Tania R. Keka*, 55 ECAB 354 (2004).

[17] *Tania R. Keka, supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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