United States Department of Labor
Employees' Compensation Appeals Board

L.Y., Appellant **and** **U.S. POSTAL SERVICE, PROCESSING & DELIVERY CENTER, Kansas City, MO, Employer**	)	**Docket No. 13-106** **Issued: March 18, 2014**

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 October 18, 2012 appellant, through his attorney, filed a timely appeal of April 30 and September 21, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment due to his accepted lumbar sprain.

On appeal, appellant's counsel contends that the decisions of OWCP are contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

[2] On October 10, 2012 OWCP also terminated appellant's compensation benefits. Appellant did not appeal from this decision and it is not before the Board. *See* 20 C.F.R. § 501.3(a).

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the prior decisions are hereby incorporated by reference.[3] The facts relevant to the appeal are set forth.

On July 6, 2005 appellant, then a 47-year-old clerk, sustained a lumbar strain/sprain while sitting and sorting mail. He filed a claim for a schedule award on September 12, 2011. By letter dated September 23, 2011, OWCP asked appellant to submit evidence to establish permanent impairment based on his accepted lumbar condition.

By decision dated November 10, 2011, OWCP denied appellant's claim. It found that he had not submitted sufficient medical evidence to establish permanent impairment to a member or function of the body.

By letter dated November 22, 2011, appellant, through counsel, requested a hearing that was held before an OWCP hearing representative on February 14, 2012.

Appellant submitted a November 11, 2011 report from Dr. M. Stephen Wilson, an orthopedic surgeon, who reviewed appellant's history of injury and medical treatment, noting that a December 20, 2005 magnetic resonance imaging scan of the lumbar spine revealed thickening of the ligamentum flavem; hypertrophic facet degenerative changes at L4-5, with left-sided neural foraminal encroachment; and a disc prolapse at L5-S1 indenting the thecal sac. He was treated conservatively, as the prior attending physicians did not consider him a surgical candidate. Dr. Wilson noted that appellant complained of low back pain radiating into both lower extremities with numbness and tingling and noted that he had sustained a significant injury. He set forth findings on physical examination, including lumbar range of motion, and noted that there was decreased two-point discrimination with testing in the L5 nerve distribution of both lower extremities, with discernment with distances less than six millimeters (mm), but retained discrimination at distances greater than six mm. Dr. Wilson referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), and *The Guides Newsletter* (July/August 2009) to rate seven percent impairment to both lower extremities.

Dr. Wilson used Proposed Table 2 to rate spinal nerve impairment to the lower extremities as provided in *The Guides Newsletter*. He characterized appellant's radicular symptoms to both the left and right leg as mild sensory and mild motor deficit of the L4 spinal nerve. This resulted in a class 1 mild sensory deficit with a default value of one percent and a class 1 mild motor sensory loss with a default value of five percent. Dr. Wilson selected grade modifiers as grade 1 for functional history secondary to an AAOS score of 2 (mild) using Table 16-6, and a grade 0 for clinical studies adjustment using Table 16-8. The total score of the modifiers was -1[(1-1)+(0-1)= -1), which shifted the rating to the B position of one percent for mild sensory loss and two percent for mild motor loss, resulting in a total of three percent impairment to each leg based on L4 radiculopathy.

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[3] Docket No. 10-1647 (issued March 1, 2011). The Board found that OWCP properly denied appellant's request for physical therapy. In Docket No. 09-1376 (issued January 22, 2010), the Board found that OWCP properly refused to reopen appellant's case for further merit review.

As to the L5 nerve root, Dr. Wilson characterized the deficit as class 1 mild sensory loss with a default value of one percent and a class 1 mild motor loss with a default value of five percent. He selected grade modifiers as grade 1 for Functional History Adjustment secondary to an AAOS score of 2 (mild) under Table 16-6; and grade 0 for Clinical Studies Adjustment under Table 16-8. The total score of the modifiers was -1[(1-1)+(0-1)= -1, which shifted the rating to the B position of one percent mild sensory loss and three percent for mild motor loss, resulting in four percent impairment to each leg based on L5 radiculopathy. Dr. Wilson combined the three percent L4 impairment with the four percent L5 percent impairment to rate a total of seven percent impairment to both lower extremities.

By decision dated April 30, 2012, an OWCP hearing representative affirmed the November 10, 2011 schedule award denial. He found that the only accepted condition was a lumbar strain and that Dr. Wilson did not provide a firm medical diagnosis other than noting a significant injury. Moreover, Dr. Wilson did not address how the findings on examination related to the accepted condition.

On June 22, 2012 appellant requested reconsideration.

In a June 8, 2012 report, Dr. Wilson referenced his examination of appellant on November 11, 2011. He related appellant's history of injury, noting the findings from the December 20, 2005 MRI scan. Dr. Wilson stated that appellant had changes in the lumbar spine consistent with repetitive trauma and injury to the low back and that he did not agree with the assessment of the hearing representative. He stated that his opinion on impairment remained unchanged and was in compliance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.

The case was referred to Dr. Daniel D. Zimmerman, an OWCP medical adviser. In an April 14, 2012 report, he reviewed the medical record and stated that, since the date of injury, prior examiners had not reported radicular pain, sensory deficit or weakness. Dr. Zimmerman stated that the examination of Dr. Wilson did not conform to the sixth edition of the A.M.A., *Guides*, as two-point discrimination had no relevance to considering radicular sensory changes. Monofilament changes on the distribution of L4-5 (if the testing was performed on the toes) would perhaps be consistent with L4 and L5 distributions but was more likely to be abnormal due to a peripheral neuropathy of which there were multiple causes. Such testing was not relevant to the rating process in the lower extremities. Dr. Zimmerman also stated that Dr. Wilson provided insufficient information to consider dermatomes in the assessment of permanent impairment. He noted that the physical findings set forth by Dr. Wilson were extremely diffuse and not a reliable basis on which to rate impairment.

By decision dated September 21, 2012, OWCP denied modification of the April 30, 2012 decision.

LEGAL PRECEDENT

FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent

impairment of the scheduled member or function.[4] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.[6]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[7] FECA and the implementing federal regulations do not provide for the payment of a schedule award for the permanent loss of use of the body or back as a whole.[8] The Board notes that section 8101(19) specifically excludes the back from the definition of organ.[9] A claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of impairment originated in the spine.[10] A schedule award is not payable for an impairment of the whole body.[11]

Before the A.M.A., *Guides* can be utilized; a description of appellant's impairment must be obtained from his physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decrease in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[12]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures provide that *The Guides*

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[4] 5 U.S.C. § 8107. The section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[5] *A. George Lampo,* 45 ECAB 441 (1994).

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

[7] *Thomas J. Englehart,* 50 ECAB 319 (1999); *D.N.,* Docket No. 11-906 (issued January 23, 2012).

[8] *See D.N.*¸59 ECAB 576 (2008); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[9] 5 U.S.C. § 8101(19).

[10] *J.Q.*, 59 ECAB 366 (2008); *Thomas J. Engelhart, supra* note 5.

[11] *N.M.*, 58 ECAB 273 (2007); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

[12] *Peter C. Belkind*, 56 ECAB 580 (2005); *Vanessa Young*, 55 ECAB 575 (2004); *D.M.*, Docket No. 11-775 (issued October 11, 2011).

Newsletter, Rating Spinal Nerve Extremity Impairment using the Sixth Edition (July/August 2009) is to be applied.[13]

ANALYSIS

OWCP accepted appellant's claim for sprain/strain to his lumbar region. Appellant filed a claim for a schedule award, which OWCP denied.

Dr. Wilson rated seven percent impairment to appellant's right and left legs. The Board notes that he referred to the sixth edition of the A.M.A., *Guides* and to *The Guides Newsletter* in making his impairment rating of seven percent to both lower extremities due to mild motor and sensory deficit affecting the L4 and L5 nerve roots. Dr. Wilson explained how he reached his assessment of the L4 nerve root, describing a class 1 mild sensory deficit with a default value of one percent and a class 1 mild motor sensory loss with a default value of five percent. He selected grade modifiers as grade 1 for functional history secondary to an AAOS score of two (mild) using Table 16-6, and a grade 0 for clinical studies adjustment using Table 16-8. The total score of the modifiers was -1[(1-1)+(0-1)= -1), which shifted the rating to the B position of one percent for mild sensory loss and two percent for mild motor loss, resulting in a total of three percent impairment to each leg based on L4 radiculopathy.

The L5 nerve root deficit was characterized as class 1 mild sensory loss with a default value of one percent and a class 1 mild motor loss with a default value of five percent. Dr. Wilson selected grade modifiers as grade 1 for Functional History Adjustment secondary to an AAOS score of 2 (mild) under Table 16-6; and grade 0 for Clinical Studies Adjustment under Table 16-8. The total score of the modifiers was -1[(1-1)+(0-1)= -1, which shifted the rating to the B position to result in one percent mild sensory loss and three percent for mild motor loss, or a total four percent impairment to each leg based on L5 radiculopathy. Dr. Wilson combined the L4 and L5 nerve root deficits to total seven percent impairment of each leg.

Dr. Zimmerman, the medical adviser, stated generally that Dr. Wilson's ratings were marred by concerns regarding reliability and credibility, and the rating should be rejected. He noted that no other physician found radicular symptoms or sensory symptoms and weakness until Dr. Wilson's November 11, 2011 report. The medical adviser also described the physical findings by Dr. Wilson as a subjective assessment.

The Board finds that the case is not in posture for decision. The rating by Dr. Wilson was in conformance to the protocols under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Zimmerman rejected the impairment rating, largely on the basis that other physicians who had examined appellant had not reported radicular pain, sensory deficit or weakness. For this reason, the case will be remanded to OWCP to refer appellant to an appropriate medical specialist for examination and an opinion on whether he sustained permanent impairment of either leg due to residuals of his accepted injury. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

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[13] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

CONCLUSION

The case is not in posture for decision and requires further development on the nature and extent of any permanent impairment to appellant's legs.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 21 and April 30, 2012 are set aside. The case is remanded for further development consistent with this opinion.

Issued: March 18, 2014
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