

stenosis and a temporary aggravation of degenerative disc disease at C3-4, 4-5 and 6-7, but indicated that both accepted conditions had resolved. On April 9, 2003 the Office also accepted cervical disc herniations and aggravation of T11-12 spinal stenosis and related surgery. On May 27, 2004 appellant filed a claim for a schedule award.

In a report dated May 24, 2004, Dr. Robert S. Hood, an attending Board-certified neurosurgeon, opined that appellant had a 39 percent permanent impairment of the whole person as a result of his April 20, 2001 employment injury.

In a September 14, 2004 report, Dr. Bradley R. Melville, an attending Board-certified physiatrist, provided findings on physical examination and stated:

EXAMINATION: ... [Appellant] has limited range of motion of the cervical spine. Movements limited are flexion, extension quite severely, lateral rotation to 45 [degrees] in each direction. He has good range of motion of both shoulders. [Appellant] provides normal and symmetrical strength with shoulder abduction, flexion, external rotation and extension, elbow flexion and extension, wrist extension, grip and thumb opposition. Biceps and triceps stretch reflexes are symmetrical. He has a [positive] Phalen's test bilaterally.

"In the lower limbs [appellant] provides symmetrical resistance with hip flexion, abduction and extension, knee flexion and extension, ankle dorsiflexion, plantar flexion, inversion and eversion. Quadriceps and triceps surae stretch reflexes are symmetrical. Straight leg raise is negative.

IMPRESSION: Status post fall at work with resultant cervical and lumbar spine injury, presumably discal injuries resulting in a radiculopathy, necessitating a cervical discectomy and fusion on [November 20, 2001] and a lower lumbar discectomy in May 2003. [Appellant] continues to have residual symptoms and numbness in the fingers and thumbs of the right hand and sensory symptoms in the right leg. No motor deficits are noted on examination.

IMPAIRMENT: An impairment rating is provided. This is rated based upon [appellant's] symptoms in the right upper limb and right lower limb. The [American Medical Association, *Guides to the Evaluation of Permanent Impairment*]¹ [A.M.A., *Guides*] is employed for this rating.

"In regards to the right upper limb, Table 16-10 defines impairments due to sensory deficits or pain. It is felt that [appellant] is in [G]rade 4, resulting in a 25 percent sensory impairment. Multiplied this with spinal nerve 6, maximum percent upper extremity impairment would be 8 percent. This results in a 2 percent impairment of the right upper limb. In regards to the right lower limb, again using Table 16-10, he has a [G]rade 4 impairment. For the sciatic nerve a 17 percent impairment maximum is possible. Multiplying 17 percent by 25 percent results in a 4 percent impairment of the right lower limb.

¹ A.M.A., *Guides* (5th ed. 2001).

“In summary, [appellant] has a [two] percent impairment of the right upper limb and a [four] percent impairment of the right lower limb.”

In a November 17, 2004 worksheet, Dr. Hugh H. Macaulay, III, an Office medical consultant, calculated appellant’s impairment based on the September 14, 2004 report of Dr. Melville. He calculated a two percent impairment of the right upper extremity for sensory deficit of the right cervical nerve root, C6, based on Table 15-15 at page 424 of the A.M.A., *Guides* (25 percent for Grade 4 multiplied by a maximum impairment of 8 percent). Dr. Macaulay calculated a 4 percent impairment of the right lower extremity for sensory deficit of the right sciatic nerve root, based on Table 15-15 at page 424 (25 percent multiplied by a 17 percent maximum impairment). As appellant has both a right upper extremity impairment and a right lower extremity impairment, Dr. Macaulay erred in finding a six percent combined impairment of the right lower extremity, rather than separate impairments of the upper and lower extremities.

By decision dated December 13, 2004, the Office granted appellant a schedule award for 17.28 weeks, based on a six percent impairment of the right leg. Appellant requested reconsideration and submitted additional evidence.

In a January 18, 2005 report, received by the Office on January 31, 2005, Dr. Corey D. Anden, an attending Board-certified physiatrist, provided a history of appellant’s condition, findings on examination and diagnoses. In a March 4, 2005 report, he stated:

“With regard to [appellant’s] right upper extremity, he has right C5, C6 and C7 sensory radiculopathy which, using Table 15-15, equates to [G]rade 3 sensory deficit or 50 percent impairment. Using Table 15-17, right C5 equates to a maximal 5 percent upper extremity impairment, right C6 to maximal 8 percent upper extremity impairment and right C7 to maximal 5 percent upper extremity impairment. Therefore, for right C5 radiculopathy, 5 percent times 50 percent equals 3 percent upper extremity impairment. For right C6 radiculopathy, 8 percent times 50 percent equals 4 percent upper extremity impairment. For right C7 radiculopathy, 5 percent times 50 percent equals 3 percent upper extremity impairment. Using the Combined Values Chart, a total 10 percent right upper extremity impairment is assigned for sensory radiculopathy.”

* * *

“With regard to right lower extremity sensory radiculopathy, using Table 15-18, right L4 allows a maximal 5 percent lower extremity impairment, right L5 a maximal 5 percent lower extremity impairment and right S1 a maximal 5 percent lower extremity impairment. Using Table 15-15, [G]rade 3 sensory deficit, equates to 50 percent sensory deficit. Therefore, for right L4 radiculopathy, 5 percent times 50 percent equals 3 percent lower extremity impairment. For right L5 radiculopathy, 5 percent times 50 percent equates to a 3 percent lower extremity impairment. For right S1 radiculopathy, 5 percent times 50 percent equates to a 3 percent lower extremity impairment. Using the Combined Values Chart, a total 9 percent right lower extremity impairment is assigned for radiculopathy.”

On February 25, 2005 the Office received from Dr. Anden the results of appellant's February 14, 2005 nerve conduction study and electromyogram (EMG).

On July 30, 2005 the Office asked Dr. Morley Slutsky, an Office medical consultant, to review Dr. Anden's March 4, 2005 report and advise whether his impairment rating for appellant was accurate. In a July 8, 2005 memorandum, Dr. Slutsky stated that Dr. Anden did not provide a complete impairment report. He indicated that Dr. Anden did not provide a medical history, symptoms at the time of his examination, findings on physical examination, diagnostic testing or diagnoses. Dr. Slutsky stated that he was unable to confirm the sensory and motor grades for the various spinal nerves provided by Dr. Anden. He recommended that the Office obtain the complete evaluation from Dr. Anden, not just his impairment rating.

By decision dated August 12, 2005, the Office denied modification of the December 13, 2004 decision.

Appellant requested reconsideration and submitted two pages from a medical and personal history form. He also submitted evidence previously of record.

By decision dated December 6, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence did not warrant further merit review of his claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim. Since the Board's jurisdiction is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to the issuance of its final decision. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.²

ANALYSIS

In this case, the Office received Dr. Anden's January 18, 2005 report on January 31, 2005. It received the results of objective testing, a nerve conduction study and EMG on February 25, 2005. In his July 8, 2005 report, Dr. Slutsky did not mention Dr. Anden's January 18, 2005 report or February 14, 2005 test results, only his March 4, 2005 impairment rating. He indicated that the March 4, 2005 report lacked a medical history, symptoms, physical findings and diagnoses and recommended that the Office "obtain a complete evaluation from Dr. Anden, not just his impairment rating." It appears that Dr. Slutsky was not aware of

² *Yvette N. Davis*, 55 ECAB ____ (Docket No. 04-122, issued April 22, 2004; *William A. Couch*, 41 ECAB 548 (1990).

Dr. Anden's January 18, 2005 report, which contained a medical history, symptoms, physical findings and diagnoses or the February 14, 2005 objective test results. As the Board held in *Linda Johnson*,³ when the Office receives relevant evidence, it must be properly reviewed by the Office. The Office indicated in the August 12, 2005 decision, that Dr. Slutsky "reviewed the medical records and Dr. Anden's report of [March 4, 2005]" and found that Dr. Anden did not provide a complete report with a history, symptoms, physical findings and diagnoses. Therefore, it appears that the Office did not consider the January 18 or February 14, 2005 reports from Dr. Anden in evaluating appellant's request for reconsideration of the December 13, 2004 schedule award decision. Although Dr. Slutsky indicated that he had "reviewed all the information contained in the claimant's file," his failure to mention the January 18 and February 14, 2005 reports, suggests that he did not conduct a review of all the reports from Dr. Anden. Since Dr. Anden's January 18 and February 14, 2005 reports were in the Office's possession at the time it issued its August 12, 2005 decision, these reports must be considered by the Office in evaluating the evidence.⁴

Accordingly, the case must be remanded for a proper review of the evidence and an appropriate final decision.

The Board notes that the Office granted appellant a schedule award for 17.28 weeks in its December 13, 2004 decision, based on a six percent impairment of the right leg. The date of maximum medical improvement in the schedule award was September 14, 2004, the date of Dr. Melville's report. In his report, he found a two percent impairment of appellant's right upper extremity and a four percent impairment of his right lower extremity. Dr. Macaulay noted Dr. Melville's separate impairment ratings for the upper and lower extremity but stated erroneously that appellant had a six percent impairment of the right lower extremity, an error carried forward in the December 13, 2004 schedule award decision. The Act provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity.⁵ It provides for 312 weeks of compensation for the upper extremity.⁶ Based on Dr. Melville's September 14, 2004 report, upon which the Office relied in its December 13, 2004 schedule award decision, appellant is entitled to a two percent impairment of the right upper extremity and a four percent impairment of the right lower extremity. Because the Act provides for a greater number of weeks of compensation for the arm, appellant is entitled to additional compensation for his right upper extremity impairment. Two percent of 312 weeks, for the arm, is 6.24 weeks. Four percent of 288 weeks, for the leg, is 11.52 weeks. Therefore, appellant was entitled to receive 17.76 weeks of compensation in the December 13, 2004 decision not 17.28 weeks. On remand, after further consideration of all the medical evidence of record, the Office should make separate findings regarding appellant's right upper and lower extremity in its decision.

³ See *Linda Johnson*, 45 ECAB 439 (1994).

⁴ *Willard McKennon*, 51 ECAB 145 (1999).

⁵ 5 U.S.C. § 8107(c)(2).

⁶ 5 U.S.C. § 8107(c)(1).

CONCLUSION

The Board finds that this case is not in posture for a decision on whether appellant has more than a six percent impairment of the right lower extremity. The Office denied modification of its December 13, 2004 schedule award decision without reviewing all the evidence of record. The Board will set aside the Office's August 12, 2005 decision and remand the case for a merit review of all the evidence received and for an appropriate final decision on appellant's impairment of his right upper and lower extremity due to his accepted spinal conditions. The second issue on appeal, whether the Office properly denied a merit review of appellant's claim, is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 6 and August 12, 2005 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: July 26, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board