United States Department of Labor
Employees' Compensation Appeals Board

GLENN WARNE, Appellant	)	
and	)	**Docket No. 04-2211**
	)	**Issued: April 8, 2005**
U.S. POSTAL SERVICE, MONTEREY STATION, Lubbock, TX, Employer	)	

Appearances:
Glenn Warne, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 8, 2004 appellant filed a timely appeal of an August 27, 2004 merit decision of the Office of Workers' Compensation Programs finding the evidence insufficient to establish any additional impairment of his lower extremities as a result of his September 17, 2000 injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this schedule award.

ISSUE

The issue is whether appellant has any additional impairment of his legs related to his September 17, 2000 injury.

FACTUAL HISTORY

On December 1, 1994 appellant, then a 42-year-old letter carrier, filed a claim for compensation for an occupational disease of his neck, back, chest, left arm and hand, that he attributed to carrying and casing mail. The Office authorized a C5-6 discectomy and fusion,

which was performed on November 30, 1995 using bone grafts harvested from his right iliac crest.

On April 23, 1997 appellant filed a claim for compensation for an occupational disease, claiming that the bone extracted from his right hip resulted in stiffness of his right leg. On March 1, 1999 the Office issued him a schedule award for a five percent impairment of his right leg, based on medical evidence equating his bone graft to a healed pelvic fracture. On September 14, 2001 the Office issued appellant a schedule award for an additional 17 percent impairment of his right leg, based on limitation of motion of his right hip and impairment of the lateral femoral cutaneous nerve.

On April 18, 2001 appellant filed a claim for compensation for a recurrence of the need for medical treatment on September 17, 2000. He stated that he stood up and his back and left leg went into spasm. A lumbar magnetic resonance imaging (MRI) scan on November 20, 2000 showed a disc herniation at L2-3, central and eccentric to the left. In a December 11, 2000 report, Dr. James Woessner, a physiatrist, diagnosed left S1 radiculopathy, right L3 radiculopathy and subacute recurrent back pain. He stated that the left of center L2-3 herniation clearly made appellant's left S1 radicular pain worse and that normally an L2-3 herniation resulted in groin pain on the side of the herniation, making his right groin pain an atypical clinical presentation. A nerve conduction (NC) study and electromyogram (EMG) on December 29, 2000 suggested a left L5 radiculopathy with signs of active and ongoing axonal loss in that nerve root. In a March 22, 2001 report, Dr. Owen C. DeWitt, a Board-certified orthopedic surgeon, stated that the repetitive nature of appellant's work as a letter carrier "created degenerative problems in his lower back which ultimately resulted in the failure experienced on September 17, 2000," when appellant experienced left buttock and leg pain when squatting and twisting and reaching to his right at home.

On September 28, 2001 the Office advised appellant that it had accepted that he sustained an aggravation of radiculopathy at S1. On May 21, 2002 he filed a claim for a schedule award.

An October 19, 2001 lumbar discogram showed annular tears at L2-3, L4-5 and L5-S1, central disc protrusions at L4-5 and L5-S1, left paracentral disc protrusion at L2-3 and marked bilateral degenerative joint disease of the sacroiliac joints. In a March 13, 2002 report, Dr. Woessner stated that appellant had, using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, for the nerves innervated by his L3 nerve root, a three percent sensory impairment of each leg and a five percent impairment of the left leg for weakness; for the nerves innervated by his S1 nerve root, a five percent impairment of the left leg for weakness. He also allotted 20 percent impairment for the left leg and 10 percent for the right leg for pain, 35 percent impairment of the right leg and 45 percent of the left leg for reduced hip motion, for a combined total of 43 percent impairment of the right leg and 61 percent impairment of the left leg. An Office medical adviser reviewed Dr. Woessner's report on August 12, 2002 and stated that his estimate of appellant's impairment was not probative because his combination of impairment due to decreased motion with that due to motor deficits was prohibited by the A.M.A., *Guides*, because he awarded an impairment for both thigh and calf weakness based on the same nerve root and because he used an incorrect section of the A.M.A., *Guides* to rate appellant's pain. The Office medical adviser recommended referral for another evaluation of his impairment.

On August 30, 2002 the Office referred appellant to Dr. Dennis Ice, a Board-certified physiatrist, for an evaluation of his permanent impairment. In a September 24, 2002 report, Dr. Ice stated that appellant complained of left leg weakness, bilateral groin pain, leg spasms and tingling toes, especially on the left, when he walks. On examination Dr. Ice reported 5/5 motor strength, normal pinprick on sensory examination, 3 centimeters of left calf atrophy and 4 centimeters of left thigh atrophy. Dr. Ice diagnosed low back injury with discogenic findings and chronic radiculopathic findings manifested mainly by atrophy in the left lower extremity and, using Table 17-6 of the A.M.A., *Guides*, fifth edition, on assigned 13 percent each for the thigh and calf atrophy. Dr. Ice stated that the right leg showed normal strength, sensation and reflexes, though there was some occasional discomfort going down into the leg and concluded that there was no objective evidence of a right leg impairment. An Office medical adviser reviewed Dr. Ice's report on October 23, 2002 and combined the two 13 percent impairments for atrophy for a 24 percent impairment of the left leg.

On November 12, 2002 the Office issued appellant a schedule award for a 24 percent impairment of his left leg.[1]

Appellant requested a hearing and submitted a January 13, 2003 report from Dr. John D. Ellis, a specialist in occupational medicine and a March 26, 2003 report from Dr. Robert N. Phelps, a Board-certified orthopedic surgeon. Dr. Ellis's examination revealed no patellar and Achilles deep tendon reflexes, equal sensation of the feet, good toe strength, one centimeter of left thigh atrophy and one and a half centimeters of left calf atrophy and a marked limp favoring the left leg. Dr. Ellis concluded that appellant had, for the right leg, a 3 percent impairment due to L5 nerve root motor loss and a 10 percent impairment due to L5 nerve root decreased sensation; for the left leg, a 4 percent impairment due to L5 nerve root decreased sensation and a 25 percent impairment due to L5 nerve root motor loss. Dr. Phelps, who did not examine appellant, stated that the 35 and 45 percent impairments of the right and left hips, respectively, assigned by Dr. Woessner for loss of hip motion, was in addition to the permanent impairment as a result of his back condition.

By decision dated August 8, 2003, an Office hearing representative found that there was a conflict of medical opinion between Dr. Ice and Dr. Ellis regarding the degree of appellant's permanent impairment of the legs. To resolve this conflict the Office referred appellant, the case record and a statement of accepted facts to Dr. Don Leon Fong, a Board-certified orthopedic surgeon. In a December 22, 2003 report, he reviewed prior medical reports and reported that examination showed 1+ ankle and knee jerks, sparse sensation over the right lateral thigh and weakness of the left foot on active dorsiflexion. Dr. Fong concluded that the left L5 radiculopathy was due to appellant's September 17, 2000 injury and that he concurred with Dr. Ice's rating of 24 percent for the left leg, explaining that Dr. Ellis, in using the tables for motor and sensory loss, "used the most severe levels in percentage form of pain and motor loss which would explain his 29 percent impairment rating. However, his findings of minimal atrophy and sensory loss does not indicate using the most severe percentage levels." Dr. Ellis recommended another EMG/NC study to determine if right L5 radiculopathy existed.

[1] The schedule award lists a 25 percent impairment, but the number of weeks, 69.12, indicates a 24 percent award, given that section 8107(c)(2) of the Federal Employees' Compensation Act provides that 288 weeks of compensation are paid for loss of a leg.

On March 4, 2004 Dr. Cheryl F. Weber, a Board-certified physiatrist, performed EMG and a NC study, which she concluded, showed an improvement in appellant's previously seen left L5 radiculopathy and "no electrodiagnostic evidence of lumbosacral (L4-S1) radiculopathy on the right side." In a March 30, 2004 report, Dr. Fong noted that Dr. Weber's EMG/NC study showed no evidence of radiculopathy on the right side and stated: "Therefore, Dr. Ellis' diagnosis of right lower extremity radiculopathy was not confirmed and his 13 percent impairment rating for right radiculopathy was not valid. Dr. Ice's rating of zero percent right lower extremity is, therefore, correct."

By decision dated May 12, 2004, the Office found that the evidence did not establish a permanent impairment of the right leg related to the accepted condition of aggravation of radiculopathy.

Appellant requested reconsideration, contending that the loss of motion of his hips, his gait disturbance and his pain should have been considered in the Office's schedule award. He submitted results of an April 22, 2004 lumbar discogram. An Office medical adviser reviewed the medical evidence on August 13, 2004 and stated that the motion of appellant's hips was not affected by his lumbar condition.

By decision dated August 27, 2004, the Office found the evidence was insufficient to establish any additional impairment of his lower extremities as a result of his September 17, 2000 injury.

LEGAL PRECEDENT

The schedule award provision of the Act[2] and its implementing regulation[3] 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, the Act 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *James P. Roberts*, 31 ECAB 1010 (1980).

ANALYSIS

There was a conflict of medical opinion on the degree of permanent impairment of appellant's legs related to his September 17, 2000 injury, which was accepted for aggravation of lumbosacral radiculopathy. Dr. Ice, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion on his impairment, concluded that he had a 24 percent impairment of the left leg due to atrophy and no impairment of the right leg. Dr. Ellis, a specialist in occupational medicine, whose report was submitted by appellant, concluded that he had a 29 percent impairment of the left leg and a 13 percent impairment of the right leg.

To resolve this conflict, the Office referred appellant to Dr. Fong, a Board-certified orthopedic surgeon, who agreed with Dr. Ice's rating of a 24 percent impairment of the left leg, which was based on Dr. Ice's measurement of atrophy of appellant's left thigh and calf and explained why he believed Dr. Ellis' 29 percent rating was too high. Dr. Fong, however, did not measure the circumference of his thighs and calves himself. His reliance on another physician's findings on physical examination is inconsistent with his function as an impartial medical specialist resolving a conflict of medical opinion.[5] The conflict of medical opinion on the extent of appellant's left leg impairment related to his September 17, 2000 injury remains unresolved.

Dr. Fong did resolve the conflict of medical opinion on the impairment of appellant's right leg. He stated that a new EMG/NC study was needed to determine whether appellant had a lumbar radiculopathy affecting his right leg. This study, done on March 4, 2004, concluded there was no electrodiagnostic evidence of L4-S1 radiculopathy affecting the right leg. Dr. Fong properly relied on the results of this study to conclude that appellant did not have radiculopathy of the right leg. As this was the condition accepted by the Office as related to the September 17, 2000 injury, the Board finds that the special weight of Dr. Fong's report, as that of an impartial medical specialist resolving a conflict of medical opinion, establishes that appellant has no permanent impairment of the right leg related to his September 17, 2000 injury.

With regard to the limited motion of appellant's hips, the Board notes that there is no rationalized medical opinion establishing that this impairment is related to his September 17, 2000 injury. An Office medical adviser concluded that there was no such relation. In the absence of medical evidence sufficient to establish that this impairment is causally related to the accepted injury, the Board finds that the Office properly excluded it from consideration in its schedule awards payable for the September 17, 2000 injury.

CONCLUSION

The Board finds that the weight of the medical evidence establishes that appellant has no permanent impairment of his right leg causally related to his September 17, 2000 injury. The Board also finds that the case must be remanded to the Office for resolution of the conflict of medical opinion on the degree of permanent impairment of appellant's left leg.

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5b(1) (October 1995) states that, if someone other than the impartial medical specialist examines the claimant, the report cannot be used to resolve a conflict in medical opinion and cannot be afforded special weight.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2004 decision of the Office of Workers' Compensation Programs is affirmed with regard to the right leg and set aside with regard to the left leg. The Office's May 12, 2004 decision, which addressed only the right leg impairment is affirmed.

Issued: April 8, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member