United States Department of Labor
Employees' Compensation Appeals Board

WIILLIAM N. BIRTIKIDIS, Appellant	)	
and	)	**Docket No. 05-1566**
	)	**Issued: April 5, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 22, 2005 appellant filed a timely appeal of an Office of Workers' Compensation Programs' schedule award decision dated July 19, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award issue.

ISSUE

The issue is whether appellant has more than a three percent left lower extremity impairment and a one percent right lower extremity impairment for which he received a schedule award.

FACTUAL HISTORY

On February 22, 1993 appellant, then a 43-year-old maintenance worker, was injured in the performance of duty while shoveling snow. Appellant lost no time from work. The Office accepted the condition of low back strain and herniated nucleus pulposus at L5 as being work

related and authorized a lumbar discectomy and fusion at L3-S1 on May 4, 2001.[1] Following his surgery, appellant returned to light-duty work. He retired in December 2004.

On April 4, 2005 appellant claimed a schedule award and submitted an April 4, 2005 report from Dr. Donald J. Viscusi, a Board-certified family practitioner specializing in occupational medicine. In an April 4, 2005 report, he noted appellant's complaint of constant low back pain and persistent right and left lower extremity symptoms extending into the feet with resulting numbness. Dr. Viscusi listed the history of injury and presented his examination findings, which included normal strength with sensory disturbance with decreased sensation into the right foot and decreased sensation in the left foot and lateral aspect of the left lower extremity. He opined that appellant had a four percent right lower extremity impairment due to sensory deficit/pain and an eight percent left lower extremity impairment due to sensory deficit/pain according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Viscusi found that, as there were no motor deficits in either leg, appellant had a zero percent impairment due to motor deficit of the spinal nerve. He found that appellant had bilateral sensory deficits and provided a rating utilizing Tables 15-15, 15-18 as well as the Combined Values Chart in the A.M.A., *Guides*. For the right lower extremity, Dr. Viscusi found that, under Table 15-15 on page 424, appellant's L5 right sensory disturbance would be classified as a Grade 2 sensory deficit or an 80 percent sensory deficit. As the maximum loss for a sensory deficit or pain for the L5 nerve root is 5 percent under Table 15-18 on page 424, Dr. Viscusi multiplied 5 percent by the 80 percent sensory deficit grade to yield a 4 percent right lower extremity impairment due to sensory deficit or pain. For the left lower extremity, Dr. Viscusi found that appellant's L5 and S1 sensory impairment equated to a Grade 2 or 80 percent sensory deficit for each nerve under Table 15-15 which, when multiplied by the maximum percent loss of function of 5 percent, yielded a 4 percent impairment for both the left L5 and left S1 nerve. Dr. Viscusi then utilized the Combined Values Chart on page 604 to find that the combined left lower extremity impairment was an eight percent impairment.

In an April 15, 2005 report, an Office medical adviser reviewed Dr. Viscusi's report and the fifth edition of A.M.A., *Guides.* He found a 1.25 percent permanent impairment of the right lower extremity and a 3 percent permanent impairment of the left lower extremity. The Office medical adviser stated that the L5 nerve root was involved in sensory loss for the dorsum and lateral aspect of the foot and that there was no other sensory loss. The Office medical adviser noted that, while the S1 nerve root was also involved, the S1 nerve root was not an accepted work-related condition and thus should not be included in the schedule award. Accordingly, the Office medical adviser stated that Dr. Viscusi's calculations involving the S1 nerve root should not be included. The Office medical adviser stated that, under Table 15-18, page 424 of the A.M.A., *Guides,* the maximum sensory loss of the L5 root was five percent. The Office medical adviser further stated that, under Table 15-15, page 424, a Grade 4 sensory deficit of the right leg equated to a 25 percent deficit and a Grade 3 deficit of the left leg equated to a 60 percent deficit. The Office medical adviser then multiplied the 5 percent maximum sensory deficit for the L5 nerve root by the 25 percent deficit to yield a 1.25 percent lower extremity impairment for the

[1] The FECA Nonfatal Summary reflects that a concurrent disability not due to injury was L5-S -- 3/92 + 9/91 -- prior claim.

right foot and multiplied the 5 percent maximum sensory impairment by the 60 percent deficit to obtain a 3 percent left lower extremity impairment.

By decision dated July 19, 2005, the Office issued a schedule award for a one percent permanent impairment of the right lower extremity and a three percent permanent impairment of the left lower extremity.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[3]

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.404 of the implementing federal regulation,[5] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[6] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[7]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[8] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[9] The Board notes that section 8109(19) specifically excludes the back from the definition of organ.[10] 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.[11]

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Gary J. Watling*, 52 ECAB 278 (2001).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[7] *See Joseph Lawrence, Jr., supra* note 6; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

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

[9] 5 U.S.C. § 8107; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[10] 5 U.S.C. § 8109(c).

[11] *Thomas J. Engelhart, supra* note 8.

ANALYSIS -- ISSUE 1

The Office granted schedule awards of a one percent permanent impairment to the right lower extremity and a three percent permanent impairment to the left lower extremity based on the April 15, 2005 report of an Office medical adviser. The Office's procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.[12]

The Office medical adviser disagreed with Dr. Viscusi's inclusion of the S1 nerve root calculation in the schedule award determination as it was not an accepted work-related condition. The Office medical adviser stated that Dr. Viscusi's calculations involving the S1 nerve root should not be included. It is well established that, in determining the amount of the schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included in the evaluation of permanent impairment.[13] The record reflects that appellant had a preexisting disability at the L5-S1 site. Accordingly, appellant's disability stemming from the S1 nerve root is considered a preexisting impairment which should be included in the evaluation of appellant's permanent impairment. Furthermore, the Office authorized lumbar fusion surgery involving the S1 level. Additionally, the Board notes that Dr. Viscusi advised that the S1 nerve root was only involved on the left side.

The Office medical adviser compared the findings of Dr. Viscusi with the provisions of the A.M.A., *Guides* pertaining to impairments due to spinal nerve root impairments affecting the lower extremity under Tables 15-15 and 15-18.[14] Table 15-18 sets forth the maximum percentage loss of function due to sensory deficit or pain and due to strength for the impaired nerve root. Table 15-15 sets forth criteria for grading impairments due to sensory loss and provides a range of percentages for sensory deficit depending upon the grade or description of the sensory deficit. Under Table 15-15, individuals in a Grade 2 sensory deficit would have decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility), with abnormal sensations or moderate pain, that may prevent some activities. Those individuals are assigned a 61 to 80 percent sensory deficit. The Board has recognized that the selection of a percentage from the range of values allowed by the A.M.A., *Guides* involves a subjective judgment.[15] The application of Table 15-15 of the A.M.A., *Guides* requires a subjective judgment as it allows for selection of a value between a range of percentages between grades of sensory deficits when an impairment rating is assigned due to a sensory loss.

In arriving at his impairment calculations for the L5 nerve root, the Office medical adviser assigned appellant a Grade 4 sensory deficit equating to 25 percent for the right lower extremity and a Grade 3 sensory deficit equating to a 60 percent deficit for the left lower

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[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

[13] *See Eleanor E. Smith*, 53 ECAB 292 (2002); *Lela M. Shaw*, 51 ECAB 372 (2000).

[14] A.M.A., *Guides* (5th ed.), Table 15-15, Determining Impairment Due to Sensory Loss, and Table 15-189, Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity, p. 424.

[15] *John Keller*, 39 ECAB 543, 547 (1988).

extremity. However, Dr. Viscusi had assigned a Grade 2 sensory impairment equating to an 80 percent sensory deficit for both the L5 and S1 nerve root.

The Board has recognized that an attending physician, who has an opportunity to examine appellant, is often in a better position to make certain judgments regarding schedule awards.[16] The Board has also held that, with respect to schedule awards, the opinion of an examining specialist in the appropriate field of medicine takes precedence over the opinion of an Office medical adviser when considering subjective factors.[17]

The Board finds that Dr. Viscusi, appellant's attending physician, selected a value of 80 percent or Grade 2 impairment for impairments due to the L5 nerve root on both the left and right side and due to the S1 nerve root on the left side. His rating of impairment takes precedence over the opinion of the Office medical adviser, who selected a value of 25 percent or Grade 4 impairment for the right side and a value of 60 percent or Grade 3 impairment. Dr. Viscusi noted appellant's complaints of pain and numbness involving his feet and found decreased sensation in both feet. His opinion that appellant was at the high end of a Grade 2 impairment is consistent with a proper application of the A.M.A., *Guides.* The Office medical adviser did not provide adequate reasoning to explain why the selection of Grade 2 impairment was not appropriate in this case.

The Board finds that appellant is entitled to greater schedule awards for his lower extremities than the one percent permanent impairment to the right lower extremity and the three percent permanent impairment to the left lower extremity awarded. There is no evidence that Dr. Viscusi improperly applied the A.M.A., *Guides* and the Office medical adviser did not provide any reasoning to support his determination that appellant's impairment was that of the high point of a Grade 4 and a Grade 3 sensory impairment for the lower right and lower left extremities, respectively. Moreover, the medical adviser did not acknowledge or comment on Dr. Viscusi's observation of appellant's subjective symptoms. Thus, based on Dr. Viscusi's report and the inclusion of the S1 nerve involvement in the schedule award calculation for the left lower extremity, the Board finds that appellant has a four percent right lower extremity impairment from the L5 nerve root and a eight percent left lower extremity impairment due to sensory deficit or pain from both the L5 and S1 nerve root.

The Board will set aside the Office's July 19, 2005 decision and remand the case to the Office to compensate appellant for the four percent right lower extremity impairment and the eight percent left lower extremity impairment as determined by Dr. Viscusi.

[16] *See Richard Giordano*, 36 ECAB 134, 139 (1984); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (August 2002). The procedure manual notes that, when the A.M.A., *Guides* ask for a percentage within a range, the physician may be asked why he assigned a particular percentage of impairment.

[17] *Michelle L. Collins*, 56 ECAB ___ (Docket No. 05-443, May 18, 2005); *Richard Giordano, supra* note 16.

CONCLUSION

The Board finds that appellant has greater than a one percent right lower extremity impairment and a three percent left lower extremity impairment for which he received a schedule award. The well-reasoned opinion of Dr. Viscusi, the examining physician in this case, takes precedence over the Office medical adviser and establishes a four percent right lower extremity impairment and an eight percent left lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 19, 2005 is set aside as to the determination of the total schedule award for the lower extremities and the case is remanded for further action consistent with this opinion.

Issued: April 5, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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