United States Department of Labor
Employees' Compensation Appeals Board

C.H., III, Appellant	)	
and	)	**Docket No. 06-911**
	)	**Issued: August 7, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Reading, 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

JURISDICTION

On March 13, 2006 appellant filed a timely appeal from the February 16, 2006 merit decision of the Office of Workers' Compensation Programs, which found an additional seven percent permanent impairment of his left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the amended schedule award issue.

ISSUE

The issue is whether appellant has more than an 11 percent permanent impairment of his left lower extremity.

FACTUAL HISTORY

On September 25, 1990 appellant, then a 41-year-old letter carrier, sustained an injury in the performance of duty when porch steps collapsed under him. The Office accepted his claim for lumbar radiculopathy, approved a microdiscectomy for a herniation at L4-5 and authorized a spinal fusion.

On July 10, 2002 appellant filed a claim for a schedule award. The Office referred him, together with the case record and a statement of accepted facts, to Dr. Richard J. Mandel, an orthopedic surgeon, for an impairment rating.

On April 17, 2003 Dr. Mandel related appellant's history and complaints. Findings on physical examination included the following:

> "Lower extremity examination revealed mild atrophy of the left thigh and calf with thigh circumference at 17 inches and calf circumference at 17¾ inches. On the right side, thigh circumference was 17½ inches and calf circumference 18¼ inches. Sensation was diminished in the left L4 and S1 dermatomes. The left Achilles reflex was +½. Other reflexes were normally active and +2. Motors were 5/5 to manual motor testing.
>
> "His gait was normal and reciprocal. He was able to stand on his heels and on his toes."

Dr. Mandel reported that his impression remained that of post-laminectomy syndrome with evidence of mild ongoing left lumbar radiculopathy. He offered an impairment rating of 13 percent of the whole person.

In a supplemental report dated April 30, 2003, Dr. Mandel stated that appellant reached maximum medical improvement as of April 17, 2003, the date of examination. He explained his evaluation of impairment:

> "In recalculating the left lower extremity impairment, I have followed the guidelines of the Federal Employees' Compensation Act, using the A[merican] M[edical] A[ssociation,] *Guides* [*to the Evaluation of Permanent Impairment*], Fifth Edition, [T]ables 15-15 through 15-18. The lower extremity impairment rating, thus calculated is 3.5 percent. This is calculated on the basis of a 35 percent sensory impairment in the left L4 spinal root and a 35 percent sensory impairment in the left S1 spinal nerve root. There is 0 motor deficit. The maximum nerve root impairment affecting the lower extremity is 5 percent for the L4 root and 5 percent for the S1 root (Table 15-18). Thus, the overall impairment is 5 percent x 35 percent or 1.75 percent for the L4 nerve root and 1.75 percent for the S1 nerve root. This totals 3.5 percent for the extremity."

On July 21, 2003 the Office issued a schedule award for a four percent permanent impairment of appellant's left lower extremity.

Appellant requested an oral hearing before an Office hearing representative. He submitted a March 9, 2004 report from Dr. George L. Rodriguez, a physiatrist. Based on his review of Dr. Mandel's findings, Dr. Rodriguez offered a different rating of impairment under the A.M.A., *Guides* (5th ed. 2001):

> "Comparing Dr. Mandel's own physical examination findings of April 17, 2003 with the A.M.A., *Guides to the Evaluation of Permanent Impairment* 5th Edition, I notice a significant discrepancy. First, I agree with his finding that this claimant

has a four percent impairment for sensory losses attributable to the left L4 and S1 nerve roots (based upon Tables 15-15 and 15-18, page 424.) However, where he claims that there is a '0 motor deficit,' his own examination contradicts him. On page 2 of his examination he documents 'mild atrophy of the left thigh and calf with thigh circumference at 17 inches and calf circumference at 17¾ inches.' While 'on the right side, thigh circumference was 17½ inches and calf circumference 18¼ inches.' This represents a difference in circumference of the thighs and calves, respectively, of ¾ inches (or 7½ [centimeters]) each. Additionally, he supports further motor deficit by documenting a left Achilles reflex of + ½ compared with a right Achilles reflex of 2 -- a significant deficit in an S1 nerve root innervated muscle.

"Based on Dr. Mandel's own finding of motor deficits as described above, one must turn to Table 17-6, page 530 of the [A.M.A.,] *Guides*. According to 17-6 a., a difference in circumference in the thigh of 3+ [centimeters] is considered 'severe' and carries a lower extremity impairment rating of 13 percent. 17-6 b. describes that a difference in circumference in the calf of 3+ [centimeters] is also considered 'severe' and carries a lower extremity impairment rating of an additional 13 percent. These different areas of the lower extremity are innervated by different nerve roots -- primarily L4 (thigh) and S1 (calf) -- and, as such, are combined to produce a total of 24 percent. Combining the motor deficit of 24 percent with the sensory deficit of 4 percent produces a correct Impairment Rating total of 27 percent."

The Office hearing representative found a conflict in medical opinion between Dr. Mandel and Dr. Rodriguez on the percentage impairment of appellant's left lower extremity. The hearing representative remanded the case for referral to an impartial medical specialist.

The Office referred appellant, together with the case file and a statement of accepted facts, to Dr. William H. Spellman, a Board-certified orthopedic surgeon. On September 28, 2005 he related appellant's history and current status. Findings on physical examination included the following:

"Deep tendon reflexes are 2+ symmetrically in the lower extremities, except for the right Achilles reflex which is absent. Motor strength is grossly full in the lower extremities, except for the left EHL, which is trace weak compared to the right (4+/5). There is full painless range of motion of the knees, ankle and distal joints. All joints are stable and pain free to stressing."

Dr. Spellman measured both lower extremities circumferentially. At 10 centimeters proximal to the superior pole of the patella, the left thigh was 43.2 centimeters, the right was 44.5 centimeters. At 10 centimeters distal to the crown of the tibial tubercle, corresponding to the maximum girth of the thigh, the left was 45 centimeters, the right 46.3. Dr. Spellman stated that both the left thigh and left calf demonstrated a fairly uniform circumferential deficit of 13 millimeters or about half an inch. He stated that appellant reported slightly decreased sensation to light touch over the dorsum and plantar surface of the mid and forefoot. After briefly reviewing medical records, Dr. Spellman found a 5.5 percent impairment of the left lower

extremity due to thigh atrophy and a 5.5 percent impairment due to calf atrophy. He found a three percent impairment due to sensory loss of the L5 nerve root, which he classified as Grade 3. He found the same impairment due to sensory loss of the S1 nerve root, which he classified the same. Dr. Spellman combining the 11 percent impairment for atrophy with the 6 percent combined impairment for sensory deficit and concluded that appellant had a 16 percent total permanent impairment of the left lower extremity.

On January 17, 2006 an Office medical adviser, Dr. Morley Slutsky, reviewed Dr. Spellman's estimate of impairment and noted that impairments for atrophy could not be combined with impairments due to peripheral neuropathies, citing Table 17-2, page 526, of the A.M.A., *Guides*. In such situations, he explained, the method yielding the greater impairment rating is used. The Office medical adviser advised that the final impairment rating for appellant's left lower extremity was therefore 11 percent due to combined thigh and calf atrophy.

In a decision dated February 16, 2006, the Office issued an amended schedule award for an additional 7 percent impairment of the left lower extremity, for a total impairment rating of 11 percent.

LEGAL PRECEDENT

Section 8107 of the Act[1] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[2]

ANALYSIS

Appellant's physician, Dr. Rodriguez, agreed with the second opinion physician, Dr. Mandel, that appellant had a four percent impairment of the left lower extremity due to sensory deficit from two spinal nerve roots. Dr. Spellman, the other referral physician, reported a greater impairment. While Dr. Mandel and Dr. Rodriguez graded the sensory deficit of the L5 and S1 nerve roots at 35 percent, falling below the midway point of Grade 3 in Table 15-15, page 424, of the A.M.A., *Guides*, Dr. Spellman gave appellant the maximum percentage deficit allowable for that classification, or 60 percent. As the maximum loss of function due to sensory deficit in these nerve roots is five percent, according to Table 15-18, page 424, Dr. Spellman concluded that appellant had a six percent impairment of the left lower extremity due to sensory deficit (0.6 x 0.05 for each nerve root).

The only other impairment noted by these physicians is for atrophy. Dr. Mandel reported mild atrophy in the left thigh and calf, a difference in circumference of one-half inch in the thighs and one-half inch in the calves. Dr. Rodriguez correctly observed that this represented impairment not rated by Dr. Mandel, but he had trouble with his numbers. Rather than compare

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001).

the left thigh to the right thigh, and the left calf to the right calf, Dr. Rodriguez compared the left thigh to the left calf, and the right thigh to the right calf. This increased the "differences" in circumference from one-half to three-quarters inches. In addition, he converted three-quarters inches into 7.5 centimeters. Properly converted, one-half inch is equal to 1.27 centimeters. Using Table 17-6, page 530, of the A.M.A., *Guides*, this interpolates to something less than a 5.5 percent impairment of the lower extremity due to unilateral thigh atrophy. The same difference in circumference in the calves yields the same impairment of the lower extremity due to unilateral calf atrophy. Rounding to the nearest whole number,[3] or 5 percent, appellant has a 10 percent impairment of the left lower extremity due to unilateral thigh and calf atrophy. Dr. Spellman used 1.3 centimeters, rounded up to 5.5 percent, then added the two for an 11 percent impairment, which the Office awarded. The Board finds that appellant has no more impairment than this for atrophy.[4]

Where Dr. Spellman and Dr. Rodriguez both combined the impairment for atrophy with the impairment for sensory deficit, Dr. Slutsky reported that this was prohibited. Dr. Rodriguez justified the combination by characterizing atrophy as a motor deficit, which may be combined with sensory deficits if both are caused by peripheral or spinal nerve injuries. But Table 17-2, page 526, prohibits combining muscle atrophy with peripheral nerve injury. Indeed, the only methods that may be combined with muscle atrophy are limb length discrepancy, other muscle atrophy, skin loss and vascular disorders. Page 530 states further:

> "Diminished muscle function can be estimated using four different methods. Only one should be used; that is, use only one method for assessing muscle function. Atrophy rating should not be combined with any of the other three possible ratings of diminished muscle function (gait derangement, muscle weakness, and peripheral nerve injury)."

Because peripheral nerve injury encompasses both sensory and motor deficits, the Board finds, as Dr. Slutsky reported, that appellant may not receive a schedule award that combines impairments for atrophy and sensory deficit, even if from a spinal nerve root. The Board will therefore affirm the Office's February 16, 2006 amended schedule award for an additional 7 percent impairment of the left lower extremity, for a total impairment rating of 11 percent.

CONCLUSION

The Board finds that the evidence in this case establishes no more than an 11 percent permanent impairment of the left lower extremity, for which appellant received a schedule award.[5]

---

[3] *See* A.M.A., *Guides* at 20.

[4] Because Dr. Rodriguez misread Dr. Mandel's findings and did not properly convert inches to centimeters, his 24 percent estimate for atrophy, or what he called motor deficit, is not probative.

[5] Appellant makes a good argument that no conflict in medical opinion, per se, existed between Dr. Mandel and Dr. Rodriguez, only a difference in the application of the A.M.A., *Guides* and an error in math. But that does not mean that Dr. Spellman's opinion should be discarded. Even as a second opinion physician, his clinical findings were current and material to the determination of appellant's entitlement.

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board