United States Department of Labor
Employees' Compensation Appeals Board

V.R., Appellant	)	
and	)	**Docket No. 06-1572**
	)	**Issued: December 13, 2006**
DEPARTMENT OF THE AIR FORCE, McGUIRE AIR FORCE BASE, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 26, 2006 appellant filed a timely appeal of a February 14, 2006 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 3 percent right arm impairment, a 4 percent left arm impairment and a 10 percent right leg impairment, for which he received schedule awards.

FACTUAL HISTORY

The Office accepted that appellant sustained lumbar and cervical strains, tension headache and aggravation of herniated nucleus pulposus L4-5 in the performance of duty on March 27, 1999 when he was involved in a motor vehicle accident. He underwent lumbar surgery on August 11, 1999. Appellant returned to a light-duty position.

In a report dated September 27, 2001, Dr. David Weiss, an osteopath, provided a history and results on examination. He reported that appellant had difficulty performing personal care duties such as washing and dressing, as well as recreational activities. Dr. Weiss noted a perceived sensory deficit over C5, C6 and C7 dermatomes of the left upper extremity, and over C5 and C6 on the right. With respect to permanent impairment, he opined that appellant had a 31 percent right arm impairment, based on: 8 percent for sensory deficit at C5 and C6,[1] 20 percent for grip strength deficit and 3 percent for pain pursuant to Figure 18-1 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). For the left arm, the impairment was 34 percent, based on: 4 percent for sensory deficit at C5 and C7, 6 percent sensory deficit at C6, 20 percent loss of grip strength and 3 percent for pain. Dr. Weiss also opined that appellant had a 33 percent right lower extremity impairment. This impairment was described as 4 percent for L5 nerve root sensory deficit, 12 percent for motor deficit left quads (knee extension), 17 percent for motor deficit left gastrocnemius (ankle plantar flexion), and 3 percent for pain.[2]

Appellant stopped working light duty on March 21, 2002 when the employing establishment withdrew his light-duty position. By letter dated October 2, 2002, the Office informed appellant's congressional representative that the case was not in posture for a schedule award decision as maximum medical improvement had not been reached. The Office stated that an attending physician, Dr. David Lee, had requested additional trigger point injections.

On January 27, 2004 appellant resubmitted the September 27, 2001 report from Dr. Weiss, and a brief report dated January 21, 2004 from Dr. Lee stating that he agreed with Dr. Weiss that appellant had a 31 percent right arm impairment, 34 percent left arm impairment and a 33 percent right leg impairment.

The Office referred the case to an Office medical adviser. In a report dated July 27, 2004, the Office medical adviser stated that the examination by Dr. Weiss did not support the sensory deficit grading used by Dr. Weiss. The medical adviser opined that the sensory deficit impairment for the upper extremities should be Grade 4, or one percent for C5 right, two percent C6 right, one percent C5 left, two percent C6 left and one percent C7 left. In addition, the medical adviser stated grip strength was not a C5-6 function and the examination did not support a grip strength impairment. For the right leg, the medical adviser found that the L5 impairment should be a Grade 4, or one percent. According to the medical adviser, the quadriceps muscle is not enervated by the L5 nerve root. Under Table 15-18, the maximum impairment for L5 motor deficit was 37 percent, and 25 percent of the maximum resulted in a 9 percent impairment for loss of strength. The Office medical adviser concluded that the date of maximum medical improvement was September 27, 2001, the date of examination by Dr. Weiss.

In a decision dated January 28, 2005, the Office issued a schedule award for a 3 percent right arm impairment, a 4 percent left arm impairment and a 10 percent right leg impairment. The period of the award was 50.64 weeks and the starting date was reported as September 21, 2002.

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[1] Dr. Weiss actually reported four percent for C5 twice; apparently he meant C5 and C6 based on his examination.

[2] For the lower extremity motor deficits, Dr. Weiss identified Table 17-8.

Appellant requested a hearing before an Office hearing representative, which was held on November 29, 2005. By decision dated February 14, 2006, the hearing representative affirmed the January 28, 2005 decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.404 of the implementing federal regulations,[4] 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* has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

ANALYSIS

The impairment ratings provide by Dr. Weiss for the upper extremities included impairment for loss of grip or pinch strength under Table 16-34, and a pain impairment under Chapter 18 of the A.M.A., *Guides.* It is evident that the use of Chapter 18 would not be applicable in this case, as this chapter is only used when the condition cannot be adequately rated by other methods, and Dr. Weiss applied Tables 15-15 and 15-17, which include sensory deficit and pain.[6] In addition, loss of grip strength impairment is used only in rare cases, and Dr. Weiss did not explain why it would be appropriate in this case.[7]

With respect to sensory deficit and pain in the upper extremities, both Dr. Weiss and the Office medical adviser provide an impairment rating based on Tables 15-17 and 15-15. Under Table 15-17, the maximum impairment for the C5 and C7 nerve roots is five percent, and for the C6 nerve root it is eight percent.[8] The impairment is then graded based on Table 15-15, according to the severity of the impairment.[9] The medical adviser disagreed with the grading of the impairment by Dr. Weiss, who provided an impairment at 80 percent of the maximum

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.404.

[5] *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] A.M.A., *Guides* 571.

[7] *Id.* at 508. Loss of strength is rated separately only in "a rare case" where the examiner believes the impairment has not been considered adequately by other methods.

[8] *Id.* at 424, Table 15-17.

[9] *Id.* at 424, Table 15-15.

impairment, or a Grade 2 impairment under Table 15-15.[10] On the other hand, the medical adviser graded the impairment at 25 percent of the maximum, which is a Grade 4 impairment.[11]

In addition, the medical adviser disagreed with Dr. Weiss regarding the right leg impairment. Dr. Weiss used Table 17-8, which provides for impairments due to lower extremity muscle weakness.[12] The Office medical adviser used Table 15-18 for spinal nerve root impairments affecting the lower extremity.[13]

The medical evidence therefore contains conflicting opinions regarding the degree of permanent impairment under the A.M.A., *Guides*. Although the Office found the weight of the evidence was represented by the medical adviser, Dr. Weiss performed the examination and there was clear disagreement as to how the sensory and motor deficit tables should be applied to the findings. The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.[14] In view of the conflicting opinions between Dr. Weiss and the Office medical adviser, the case will be remanded to the Office for resolution of the conflict.

The referee examiner should provide a reasoned opinion with respect to a permanent impairment under the A.M.A., *Guides,* with a clear explanation as to how each table was applied. In addition, the referee examiner should provide an opinion as to the date of maximum medical improvement. The Office medical adviser opined that the date of maximum medical improvement was September 27, 2001, the date of the report from Dr. Weiss. The January 28, 2005 schedule award, however, stated that the award commenced on September 21, 2002, the date appellant stopped working and began receiving compensation for wage loss. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[15] This is a medical issue and it is determined by the medical evidence.[16] After the medical evidence is developed, the Office should issue a decision that properly reflects the weight of the medical evidence.

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[10] A Grade 2 impairment is "decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility), with abnormal sensations or moderate pain, that may prevent some activities." The impairment is 61 to 80 percent of the maximum impairment for the identified nerve.

[11] A Grade 4 impairment is "distorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensations or pain, that is forgotten during activity." The impairment is 1 to 25 percent of the maximum.

[12] A.M.A., *Guides* 532, Table 17-8. The impairment is graded under Table 17-7.

[13] *Id.* at 424, Table 15-18.

[14] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321 (1999).

[15] *Albert Valverde*, 36 ECAB 233, 237 (1984).

[16] *Adela Hernandez-Piris*, 35 ECAB 839 (1984); *James T. Rogers*, 33 ECAB 347 (1981).

CONCLUSION

The case is remanded for resolution of a conflict in the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 14, 2006 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 13, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board