United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 06-708**
	)	**Issued: November 2, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Lawrence, MA, Employer	)	

Appearances:
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 3, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's January 17, 2006 decision which affirmed a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained more than a five percent permanent impairment of her left lower extremity, for which she received a schedule award.

FACTUAL HISTORY

On April 18, 1981 appellant, then a 37-year-old clerk, filed a traumatic injury claim alleging that, on that date, she was bending both knees and attempting to lift a 50-pound parcel out of a low hamper when she felt a sharp snapping feeling in her low back on the left side and was not able to stand straight or sit down. Appellant stopped work on April 19, 1981 and

returned to light duty on May 6, 1981.[1] The Office accepted her claim for cervical, low back and sacroiliac strains and L-S strain.[2] Appellant received appropriate compensation benefits.

In a December 13, 1985 report, Dr. William B. Patterson, Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and treatment and conducted a physical examination. He found that appellant had "striking" left toe weakness. Dr. Patterson indicated that appellant could not perform any duties with the employing establishment. On January 29, 1988, he examined appellant and determined that her extensor hallucis longus (EHL) weakness had resolved.

On July 8, 2003 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Mordechai M. Kamel, a Board-certified orthopedic surgeon.

In a July 29, 2003 report, Dr. Kamel noted appellant's history of injury and treatment and conducted a physical examination. Appellant sustained a lumbosacral strain on the date of injury and was currently experiencing some degree of spinal deconditioning syndrome. Dr. Kamel explained that there were "no objective findings to support the subjective complaints." He also advised that there were "multiple positive Waddell findings, which in fact, specifically refute the complaints. The degree of cutaneous tenderness, the vertical load, pain, the limited straight leg raising in the sitting position and the simulated rotation pain to the left are all positive Waddell findings which cast serious doubt on this claimant's complaints. Similarly, the normal spinal rhythm with full forward flexion implies a relatively functional lumbosacral spine." Dr. Kamel determined that appellant no longer had residuals related to employment factors and recommended work hardening and muscular rehabilitation. He noted that appellant had reached maximum medical improvement with regard to her lumbosacral strain.[3]

In a September 26, 2003 report, Dr. Victor Conforti, a Board-certified orthopedic surgeon and treating physician, opined that appellant was "still unfit for any type of lifting, bending, stooping, climbing or kneeling." In an October 10, 2003 report, he diagnosed a herniated disc with underlying degenerative arthritis and degenerative disc disease. Dr. Conforti reiterated appellant's restrictions. He opined that appellant had an eight percent whole body impairment based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). Dr. Conforti also indicated that the diagnoses, restrictions and disability were directly related to her employment injury of April 18, 1981.

[1] The record reflects that appellant returned to limited duty and received compensation for intermittent periods of disability through March 27, 1983.

[2] The record reflects that appellant had a preexisting cardiac condition, diabetes, asthma, depression, a breast tumor and obesity. Appellant also filed several claims for recurrences on October 21, December 10, 1981, May 24, 1982, June 8, 1983 and August 8, 1985 that were accepted.

[3] Dr. Kamel also submitted an October 20, 2003 addendum, which clarified certain typographical errors that he had made.

On October 17, 2003 the Office referred appellant, together with a statement of accepted facts and the medical record to Dr. Tetsuto Numata, a Board-certified orthopedic surgeon, for an impartial medical evaluation. It found a conflict in opinion between appellant's treating physician, Dr. Conforti, who opined that appellant continued to be disabled and the second opinion physician, Dr. Kamel, who opined that appellant's work-related condition had resolved.

In a November 10, 2003 report, Dr. Numata noted appellant's history of injury and treatment. He determined that appellant had a normal strength examination and advised that "no thigh or calf muscle atrophy was noted." Dr. Numata opined that appellant's mechanical low back pain, left leg radiculopathy, left leg paresthesis and cervical strain were a direct result of the April 18, 1981 employment injury. Appellant's degenerative disc disease, facet joint arthritis in the lumbar spine and cervical spondylosis were a preexisting condition and that appellant's adult onset diabetes mellitus were unrelated to the employment injury. Dr. Numata opined that appellant was totally disabled. Furthermore, he noted that, "[i]n regard to her cervical strain, the problem has reached the medical end point and further medical interventions are not indicated."

In a June 1, 2004 report, the Office medical adviser reviewed the medical record and determined that appellant reached maximum medical improvement on January 29, 1988 the date which Dr. Patterson determined that appellant had resolution of her left-sided EHL weakness. The Office medical adviser explained that Dr. Patterson had previously found "striking" left toe weakness on December 13, 1985. He opined that there was no specific abnormality of any body part upon which a schedule award can be based." The Office medical adviser noted that mechanical low back pain and cervical strain did not correspond to a schedule award, as the "diagnosis of left lumbar radiculopathy was not confirmed by objective medical evidence." He was unable to provide a schedule award based on this diagnosis. The Office medical adviser indicated, however, that appellant had ongoing "left lower extremity pain radiating to her foot, with paresthesias in the same distribution and 'transient foot drop'" which occurred when she exited the car. He opined that appellant had a five percent impairment of the left lower extremity, which was likely due to residuals of chronic low back strain incurred at the time of her initial injury on April 18, 1981.

By letter dated July 16, 2004, appellant's representative repeated his request for a schedule award.[4]

In a July 21, 2004 treatment note, Dr. Conforti advised that appellant was having "difficulty with her back" and "weakness in the leg" with "some evidence of atrophy." He opined that, based upon this, he felt there was a 10 percent loss in the left leg and an 8 percent loss involving the whole body and low back.

By letters dated August 11 and October 13, 2004, appellant's representative noted that the Office medical adviser had determined that appellant was entitled to an impairment of five percent to the left lower extremity and noted that it should "probably run from November 10, 2003 through February 18, 2004." He requested that the Office issue a schedule award decision.

[4] He also requested that the Office address a consequential psychiatric condition.

In a memorandum dated October 19, 2004, the Office requested that the Office medical adviser refer to the reported findings of atrophy referenced in Dr. Kamel's July 29, 2003 report and Dr. Conforti's July 21, 2004 treatment note and determine whether appellant would be entitled to any impairment for atrophy involving the scheduled member and, if so, his findings.

On October 25, 2004 the Office medical adviser referred to Dr. Conforti's July 21, 2004 treatment note, which found that appellant had "weakness in the leg" and some atrophy. He indicated that both Dr. Kamel and Dr. Numata stated that they found no evidence of lower extremity atrophy or weakness. The Office medical adviser referred to Table 17-2 at page 526 of the A.M.A., *Guides* and noted that "impairment due to sensory abnormalities of pain may not be combined with those for atrophy or muscle weakness." He opined that appellant was not entitled to additional impairment related to atrophy.

By decision dated November 30, 2004, the Office granted appellant a schedule award for five percent permanent impairment of the left lower extremity. The award covered the period from January 29 to May 8, 1988.[5]

Appellant initially requested a hearing on December 20, 2004; however, she changed this to a request for a review of the written record.

In a December 21, 2004 report, Dr. Conforti explained that he had reviewed the Office medical adviser's October 25, 2004 report, which advised that impairments for sensory abnormalities could not be combined with those for atrophy or muscle weakness. He noted that the Office medical adviser did not explain how he arrived at a five percent determination. Dr. Conforti explained that the Office medical adviser did not provide any impairment for a 10 percent loss due to any impairment of the left leg, but rather, he provided an "[eight] percent whole body permanent loss of function based on a problem with the back." He stated that his July 21, 2004 office notes were "entirely related to problems with appellant's hand and shoulder-not to her back." Dr. Conforti conducted a physical examination of the back and noted that there was no radiculitis and that appellant's ankle jerk and knee jerk were absent bilaterally, the extensor longus was intact and there "was no measurable atrophy in either calf or thigh." He explained that range of motion showed 45 degrees of flexion, 15 degrees of lateral bending to the right and left and rotation of 15 degrees. Dr. Conforti referred to Table 15-3[6] and determined that appellant was entitled to an eight percent impairment of the whole person based on the diagnosis-related estimate. He also referred to Table 15-7[7] and advised that appellant had an intervertebral disc that was not operated on, which was positive for radiculitis. Dr. Conforti indicated that appellant had minimal degenerative changes and opined that this would equate to a five percent impairment of the whole person. Regarding loss of motion, he determined that appellant was entitled to two percent for limited right lateral bending, two percent for limited left

[5] The Office, in issuing the schedule award, also informed appellant of her right to receive a disability retirement annuity for the period covered by the award.

[6] A.M.A., *Guides* 384.

[7] *Id*. at 404.

lateral bending pursuant to Table 15-9.[8] Furthermore, Dr. Conforti referred to Table 15-8[9] and determined that appellant was entitled to an award of two percent for loss of flexion and seven percent for a loss of extension. He referred to the Combined Values Chart[10] and opined that this would entitle appellant to an impairment of 17 percent of the whole body.

In a July 11, 2005 treatment note, Dr. Conforti advised that appellant related that her right knee was now the "most painful" and that now her left knee was "giving way." He also noted that she had increased problems with her back.

By decision dated January 17, 2006, the Office hearing representative affirmed the November 30, 2004 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[11] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[12] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[13] The Act's implementing regulation has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule award losses.[14]

ANALYSIS

In reports dating from October 10, 2003 to December 21, 2004, Dr. Conforti opined that appellant had impairment of eight percent of the whole body. He later explained that she had additional problems with her back and opined that appellant was entitled to an impairment of 17 percent of the whole body. However, he referred to the A.M.A., *Guides* and utilized Chapter 15, which is used to rate spinal impairments. The Act specifically excludes the back from the definition of organ.[15] As neither the Act nor the regulations provide for the payment of a schedule award for impairments of the back, appellant is not entitled to such an award.[16]

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[8] *Id*. at 409.

[9] *Id*. at 407.

[10] *Id*. at 604.

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8107.

[13] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[14] 20 C.F.R. § 10.404.

[15] 5 U.S.C. § 8101(19) provides, in pertinent part, that "organ" means a part of the body that performs a special function and for purposes of this subchapter excludes the brain, heart and back...."

[16] *See George E. Williams*, 44 ECAB 530, 533 (1993).

Therefore, as Dr. Conforti used the tables and pages of the A.M.A., *Guides* relevant to rating spinal impairments his reports are of diminished probative value. The Board notes that, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originates in the spine.[17] However, Dr. Conforti did not provide an such impairment rating under the respective tables as set forth in the A.M.A., *Guides*. Rather, he provided whole person rating relative to the spine. The Act, does not provide for a schedule award based on whole person impairments.[18] As such, Dr. Conforti's impairment rating does not conform to the A.M.A., *Guides.* It is well established that, when the attending physician does not provide an estimate of impairment conforming to the protocols of the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment.[19]

In a June 1, 2004 report, the Office medical adviser noted that appellant reached maximum medical improvement on January 29, 1988 as appellant had resolution of her left-sided EHL weakness. He explained that appellant previously had "striking left toe weakness on December 13, 1985." The Office medical adviser referred to Dr. Patterson's January 29, 1988 report where he found that this had resolved.[20] The Office medical adviser opined that there was "no specific abnormality of any body part upon which a schedule award can be based," but determined that she had a five percent impairment of the left lower extremity because she had ongoing "left lower extremity pain radiating to her foot, with paresthesias in the same distribution and transient 'foot drop'" which occurred when she exited the car. The Board notes that this impairment calculation is consistent with Tables 16-10 and 17-37 of the A.M.A., *Guides.*[21]

Although Dr. Conforti submitted several reports after the Office medical adviser's June 1, 2004 report, they did not conform with the protocols of the A.M.A., *Guides*. Thus his opinion is of diminished probative value in establishing permanent impairment.[22]

On appeal, appellant's representative contends that the Office did not consider a conflict of medical opinion regarding the extent of permanent impairment. The Board finds that notes that there is no conflict on the impairment issue. To constitute a conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.[23] As noted,

[17] *Id.*

[18] *See Tania R. Keka*, 55 ECAB ___ (Docket No. 04-177, issued February 27, 2004); *James E. Mills*, 43 ECAB 215 (1991) (neither the Act, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

[19] *See John L. McClanic*, 48 ECAB 552 (1997); *see also Paul R. Evans*, 44 ECAB 646, 651 (1993).

[20] The Board notes that the issue of maximum medical improvement was examined in its two decisions in *Marie J. Born*, 27 ECAB 623 (1976); *petition for recon., denied*, 28 ECAB 89 (1976). The Board notes that the Office medical adviser's rationale for selecting the date of January 29, 1988 because her striking left toe weakness had resolved, appears rationalized and reasoned.

[21] A.M.A., *Guides* 482, 552.

[22] *See supra* note 19.

[23] *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004).

Dr. Conforti's opinion is of diminished probative value as he did not provide an estimate of impairment conforming to the protocols of the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant does not have more than five percent impairment to her left lower extremity, for which she received a schedule award.[24]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 17, 2006 is affirmed.

Issued: November 2, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[24] As the Office has not rendered a decision on the issue of appellant's psychiatric condition or continuing disability, the issues are not presently before the Board. *See* 20 C.F.R. § 501.2(c).