United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 07-70**
	)	**Issued: June 15, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Aliquippa, PA, Employer	)	

Appearances:
Jeffrey P. Zeeland, 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 October 10, 2006 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' September 27, 2006 decision, denying appellant an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant sustained a permanent impairment to his left lower extremity greater than the 13 percent previously awarded.

FACTUAL HISTORY

On October 28, 1995 appellant, then a 41-year-old letter carrier, filed a claim for a traumatic injury alleging that on that date he injured his back and right leg while he was lifting trays of mail out of a hamper. His claim was accepted for lumbar strain and herniated nucleus pulposus L5-S1. On November 28, 1995 appellant underwent approved surgery consisting of a

lumbar laminectomy and discectomy. Appropriate medical and compensation benefits were paid.

On August 21, 2001 appellant filed a claim for a schedule award. In a medical report dated August 15, 2001, Dr. Paul M. Hoover, his treating Board-certified physiatrist, stated:

> "To summarize what the problems present is that the discs are out of place with narrowing and press around nerve roots as they exit the spine on the left more than right[-]sided low back with nerve damage into the left leg as revealed via the [electromyogram/nerve conduction velocity] EMG/NCV of January 18, 2001 showing subacute to chronic L5 left[-]sided radiculopathy. The discogenic syndrome is disc mediated pain that occurs predominately in the low back. According to the [American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001)] he would have a categorical lumbar spine disorder according to page 384 -- Table 15-3 that is a [three] percent whole person impairment, which is DRE [diagnosis related estimate] [l]umbar [C]ategory three impairment. According to [appellant's] lumbar range of motion disorder, he has a 2 percent whole person impairment due to his extension loss and due to flexion loss, [appellant] has a 0 percent impairment, combining the 2 values via the Combined Values Chart page 604, yields a whole person impairment of 15 percent.
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> In a supplemental medical report dated September 6, 2001, Dr. Hoover stated:
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> "I used lumbar DRE [C]ategory III impairment which is a lower extremity impairment due to a back abnormality. The impairment rating was obtained from the A.M.A., *Guides* (5th ed.). Appellant does indeed have a lower extremity impairment that is discussed according to the above text in a DRE [C]ategory III lumbar spine impairment which includes a lower extremity impairment. The percent disability I assigned in his case is based upon the lower extremity impairment."

On September 19, 2001 the Office referred appellant's case to an Office medical adviser. On September 21, 2001 he noted that the back was specifically excluded from a schedule award consideration. The Office medical adviser noted that there was no report of any muscle atrophy or weakness to the lower extremities in the medical records. Therefore, appellant had no impairment for muscle atrophy or weakness. The Office medical adviser indicated that appellant did have pain and numbness which prevented some activity. According to the A.M.A., *Guides* this represented a Grade 2 deficit which equals 80 percent. The Office medical adviser noted that the maximum sensory loss for L5 was 5 percent and that 80 percent of 5 percent was 4 percent.[1] He noted that there was no loss of range of motion in the left leg. Therefore, the Office medical adviser concluded that appellant had a four percent impairment of the left leg.

By letter dated September 21, 2001, the Office advised appellant that a schedule award could be paid while he is receiving compensation for wage loss and that he could postpone

[1] A.M.A., *Guides* 424, Tables 15-15 and 15-18.

receiving a schedule award until he returned to work full time or retired. On December 18, 2001 the Social Security Administration approved appellant's application for disability retirement effective January 2, 2002. On March 4, 2002 the Office issued a schedule award for a four percent impairment of the left lower extremity.

On June 14, 2002 appellant requested review of the written record. In an April 3, 2002 report, Dr. Hoover stated:

> "[Appellant's] extremity impairment rating in his left leg is based upon the L5 radiculopathy noted via EMG/NCV studies and by neurologic survey. Referring to the spinal nerve impairment rating system Table 15-18, [the A.M.A., *Guides*] was utilized; looking at Table 15-18 of the L5 nerve root gets maximum sensory impairments of 5 percent and 37 percent maximum motor impairments. There are several ways to assess this impairment, therefore, I will present three schemas that lead to three (3) different rating[s] which are all based upon the medically relevant test conducted in his case. In all of these scenarios based on the loss of sensation in the left foot, L5 area, he gets the total sensory impairment of [five] percent.
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> "In looking at the motor impairment following a manual muscle testing guideline which is stipulated in the text book, [appellant] was a [four] out of [five] strength test of the extensor digitorum brevis muscle which would be applying a 25 percent of the 37 percent motor impairment which is a total of 9 percent motor impairment adding to a 5 percent….
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> "Another way of calculating the degree of motor impairment is by the EMG/NCV test I conducted whereas the extensor digitorum brevis muscle had about 50 percent drop out of muscle fibers, thus, applying 50 percent to the 37 percent I would get a total of 19 percent and combining the 5 percent sensory impairment gives a 23 percent total extremity impairment gives a 23 percent total extremity impairment.
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> "Finally by muscle bulk assessed during physical examination [by] his extensor digitorum brevis muscle on the left side is one-third (1/3) [of] the size of the right[-]sided extensor digitorum brevis muscle thus, I would apply a .66 percent times the 37 percent to reach a 24 percent motor impairment by the muscle bulk assessment and then combining the 24 percent to the 5 percent sensory impairment giving a total 28 percent extremity impairment.
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> "In these three different schemas [appellant] runs a gamut between 14 percent and 28 percent extremity impairment based upon the spinal nerve dysfunction…."

In a decision dated October 17, 2002, the hearing representative remanded the case for further development of the medical evidence.

On November 7, 2002 the Office referred the record to the Office medical adviser who recommended referring appellant to a neurologist for examination.

On November 22, 2002 the Office referred appellant to Dr. Edward Williamson, a Board-certified neurologist. In a medical report dated December 10, 2002, Dr. Williamson stated that he saw no evidence of disability in appellant as a result of his back injuries. He noted that there were no objective findings and evidence of exaggeration. The report of Dr. Williamson was forwarded for review by Dr. Hoover.

In a February 6, 2003 report, Dr. Hoover stated:

"Impairment Rating of Right Lower Extremity:

> "In evaluating the neurological loss in the right leg, I am using page 424, Table 15-16 and Table 15-18, the motor deficient would be Classification Grade IV for the right leg with a 25 percent maximum motor deficient multiplying factor times the L5 maximum percent loss of function due to strength at 37 and the 25 percent times 37 equals a 9.25 percent impairment and adding that percentage to the sensory deficient or pain for L5 of 5 percent, multiplying times the 25 percent maximum yields 1.25 percent; combining the two values, 1.25 percent and 9.25 percent, a 10.5 percent, rounded up to an 11 percent whole person impairment based upon neurological dysfunction of the right leg only. This methodology was produced by utilizing examples 15-22, page 425 as per the reference source of the [A.M.A., *Guides*]. The right leg impairment is based upon the objective EMG/NCV date with examination findings."

Dr. Hoover indicated that Dr. Williamson's report was based on inaccurate data.

The Office found a conflict in the medical opinion between Dr. Hoover and Dr. Williamson on the extent of permanent impairment to appellant's lower extremities as a result of the accepted work injury and surgery. He was referred to Dr. Jimmy J. Ong, a Board-certified neurologist, for an impartial medical examination. In a medical report dated April 15, 2003, Dr. Ong stated:

> "[Appellant] is suffering from chronic low back and leg pain which has been ongoing for several years. [He] has achieved maximum medical improvement and the prognosis for any significant change in his symptoms is unlikely. On the basis of [appellant's] clinical history and his neurological examination and review of his records, it indicates that he has some asymmetry of the reflexes particularly at the knee jerk on the left with some patchy decreased pinprick which might indicate the L5-S1 dermatome on the left, but he also has nonphysiological and nonanatomic changes in the thigh area with sharp cut off. His workup shows no definite herniated disc at this time. Although [appellant's] EMG/nerve conduction studies seem to have variable results with normal findings on one and chronic L5 radiculopathy on the other, his clinical symptomatology does indicate that he has some degree of lumbar radiculopathy on the left. On the basis of his clinical history and examination with changes suggestive of left lumbar radiculopathy and on the basis of his electrodiagnostic findings, [appellant's] DRE lumbosacral [C]ategory III shows impairment of the whole person of about 10 percent according to the A.M.A., *Guides*.

On November 21, 2003 the Office referred appellant's case to the Office medical adviser to determine whether there was any impairment to the lower extremities.

In a report dated December 1, 2003, the Office medical adviser stated:

> "Dr. Ong found evidence of some sensory loss along the left L5 nerve root. The 'giveaway' motor weakness is not due to nerve impairment but is under psychologic or voluntary control and is not ratable. [Federal] FECA [Procedure Manual, Chapter] 3.0700-2.
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> "The sensory loss prevents some activity so it can be rated Grade 2 (80 percent). Table 15-18, page 424, gives maximum L5 as [five] percent. Five percent [times] 80 percent [equals] 4 percent.
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> "Four percent impairment [of the] left leg. [Date of Maximum Medical Improvement]: April 15, 2003. This is the amount previously awarded for left leg radiculopathy so there is NO additional impairment.

In a January 7, 2004 decision, the Office denied appellant's claim for additional impairment to his left lower extremity.

On January 9, 2004 appellant requested review of the written record.

In a June 7 2004 decision, the hearing representative remanded the case for further development of the medical evidence. The hearing representative directed the Office to ask Dr. Ong to clarify the issue of impairment to the lower extremities.

In a medical report dated August 27, 2004, Dr. Steven E. Tooze, a Board-certified orthopedic surgeon, opined that pursuant to the A.M.A., *Guides*, appellant had a 20 percent impairment of his left lower extremity as a result of his work-related injury.

In a letter dated September 22, 2004, Dr. Ong's office informed the Office that he was not trained in the fifth edition of the A.M.A., *Guides.*

On September 22, 2004 the Office referred appellant's claim to the Office medical adviser for evaluation of whether appellant was entitled to an additional schedule award. The Office medical adviser replied that he recommended an increase in appellant's schedule award of 3 percent based on 0 millimeter cartilage interval of the knee which he found that the A.M.A., *Guides* indicate equals of 20 percent impairment of the left lower extremity or an increase of 3 percent.[2]

On October 12, 2004 the Office issued a schedule award for an additional nine percent impairment of the left leg. Appellant requested review of the written record. In a decision dated May 31, 2005, the hearing representative remanded the case for referral of appellant to an impartial medical examiner with regard to the issue of lower extremity impairment.

[2] *Id*. at 544, Table 17-21.

On November 8, 2005 the Office referred appellant to Dr. Kornel Lukacs, a Board-certified psychiatrist and neurologist, to resolve the conflict with regard to the extent of impairment residuals due to the work-related injury. In a report dated November 25, 2005, Dr. Lukacs noted that appellant had residual lower back pain, ambulatory dysfunction, difficulty putting weight on the left leg and some sciatic symptoms. He also noted some cramping and dysesthesia of the left leg but no atrophy. Dr. Lukacs stated:

> "As far as the permanent impairment of the left lower extremity is concerned, [appellant] does have absent ankle jerks, decreased knee jerks, now bilaterally. There is no significant sensory loss, there has been previously patch of sensory loss in the outside of the left foot, now somewhat increased sensation or dysesthesia of the lateral aspect of the leg which is compatible with S1 radiculopathy. There is some 'giving away weakness' which improves a little bit if the left foot is flexed. It may be improved perhaps if a brace is made for [appellant]. Most of [appellant's] problem may be coming from his lower back pain, perhaps the residual dis[c], the neurosurgeon is talking about. Although since he does not want anymore procedures, he did reach his maximum improvement. I cannot see in the left lower extremity (left leg) an impairment exceeding greater than 13 percent based on [the Office medical adviser's] examination and findings…."

Dr. Lukacs noted that, in regard to Dr. Ong's impairment rating, the giveaway motor weakness was not due to nerve impairment but due to psychological or voluntary control and, therefore, not ratable. He also noted that he did not see any evidence that the sensory loss had progressed to where it would require an increase in sensory rating.

By decision dated September 27, 2006, the Office denied appellant's claim for an additional schedule award.[3]

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[4] 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.[5] 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

[3] The Office further denied expansion of appellant's claim to accept penile dysfunction as being causally related to the work injury. Appellant did not appeal this finding.

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8107.

uniform standards applicable to all claimants.[6] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

Section 8123(a) of the Act provides in pertinent part: If there is 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 an examination.[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[9]

ANALYSIS

In the instant case, the Office awarded appellant a schedule award for 13 percent impairment to his left lower extremity. Pursuant to the instructions of the hearing representative, on November 8, 2005 the Office referred appellant to Dr. Lukacs to resolve the conflict between appellant's treating physician, Dr. Hoover and Dr. Williamson, a second opinion physician, regarding the extent of impairment to his left lower extremity. The Board finds that the Office properly referred appellant to Dr. Lukacs to serve as the second impartial medical specialist since the first impartial medical specialist, Dr. Ong, stated that he was not trained in the application of the fifth edition of the A.M.A., *Guides.*[10]

In a November 25, 2005 report, Dr. Lukacs stated that he could not see the impairment of the left lower extremity exceeding 13 percent based on his examination and findings. However, he did not explain this conclusion or provide a rationalized medical opinion. Dr. Lukacs did not apply the A.M.A., *Guides* nor provide an explanation for adopting such rating. The Board finds that his brief conclusory statement is insufficient to resolve the conflict in medical opinion.

The case will be remanded to the Office to obtain a further explanation from the impartial medical examiner. If Dr. Lukacs is unable to provide a rationalized explanation as to appellant's permanent impairment the Office should refer appellant to a new impartial medical examiner.[11]

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is required.

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

[7] 20 C.F.R. § 10.404.

[8] 5 U.S.C. § 8123(a).

[9] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

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

[11] *Charles Feldman*, 28 ECAB 314 (1977).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 27, 2006 is set aside and the case is remanded for further consideration consistent with this opinion.

Issued: June 15, 2007
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