United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 08-53**
	)	**Issued: April 10, 2008**
DEPARTMENT OF THE AIR FORCE, KIRKLAND AIR FORCE BASE, NM, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 5, 2007 appellant filed a timely appeal from the September 11, 2007 Office of Workers' Compensation Programs' decision, which denied modification of the Office's June 14, 2006 schedule award decision. 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 has met her burden of proof in establishing that she sustained any permanent impairment related to her accepted injury.

FACTUAL HISTORY

On September 14, 1988 appellant, then a 29-year-old cashier, sustained injury to her lower back and shoulder while picking up a 50-pound bag of dog food at work. She stopped work on September 14, 1988 and returned on October 23, 1988.[1] The Office accepted the claim for neck strain, lumbar strain and right knee chondromalacia. It also accepted adjustment

[1] The record reflects that appellant returned to light duty.

reaction and aggravation of major depression. Appellant received appropriate compensation benefits. On December 4, 2004 she filed a claim for a schedule award.

On September 7, 2005 the Office referred appellant to Dr. Robert E. Pennington, Board-certified in physical medicine and rehabilitation for a second opinion. In a report dated June 20, 2005, Dr. Pennington noted appellant's history of injury and treatment. He found that she had reached maximum medical improvement. Dr. Pennington conducted a physical examination and noted that appellant had motor strength for plantar dorsiflexion, knee flexion and extension, hip abduction and adduction of 5/5. He noted mild crepitance in the right knee and good patellar tracking, a negative Lachman and McMurray. Dr. Pennington examined the low back and determined that appellant had mild tenderness over the right sacroiliac joint and a positive "Gaenslen" sign with some tenderness over the posterior elements. He diagnosed chronic sacroiliitis combined with patellofemoral chondromalacia. Regarding the right knee, Dr. Pennington referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*) at page 384 and noted that appellant's impairment was consistent with the diagnostic-related estimate (DRE) lumbosacral category. He determined that appellant had impairment for chronic muscle spasms in the paraspinals, which were the primary pain generator. Appellant did not have a radicular component on the diagnostic test results. Dr. Pennington opined that appellant had an impairment of five percent of the whole person. In a September 20, 2005 electromyogram (EMG), he determined that appellant's examination was unremarkable and consistent with chronic nerve root irritation in the L5 distribution.

In a November 29, 2005 report, the Office medical adviser opined that Dr. Pennington did not provide sufficient medical evidence to support impairment of the lower extremities. He noted that the spine was not a scheduled member and could not be utilized as a basis for rating impairment. The Office medical adviser also noted that Dr. Pennington indicated that appellant could receive impairment due to radiculopathy; however, he did not report that appellant had radiculopathy in the lower extremities.

By decision dated June 14, 2006, the Office denied appellant's claim for a schedule award.

By letter dated June 6, 2007, appellant's representative requested reconsideration and submitted additional evidence. He alleged that the November 14, 2004 and May 18, 2007 reports of appellant's treating physician, Dr. Pamela O. Black, Board-certified in physical medicine and rehabilitation, supported impairment. On November 15, 2004 Dr. Black stated that the best way to assess appellant's lower extremity impairment was related to muscle weakness secondary to an L5 radiculopathy. She excluded the weakness in toe curls and granted appellant 50 percent of the total impairment for hamstring weakness, and explained that these were primarily S1 innervated muscles. Dr. Black indicated that appellant should receive a full impairment for loss of strength in abduction, dorsiflexion, EHL and eversion. She referred to Table 17-8[2] and advised that results from manual muscle testing suggested that appellant had 25 percent lower extremity impairment for abduction, a 12 percent impairment for loss of

[2] A.M.A., *Guides* 532.

dorsiflexion, a 12 percent impairment for loss of eversion and a 7 percent impairment for 1oss of toe extension. Dr. Black noted that appellant could also receive 12 percent impairment for her hamstring, but explained that she was only allowing 50 percent, which would result in a 6 percent lower extremity impairment for the hamstring. She did not allow any impairment for loss of toe curl strength, as this would not be related to her L5 radiculopathy. Dr. Black combined the 25 percent impairment for abduction with the 12 percent for loss of dorsiflexion, which totaled 34 percent. She combined this with the 12 percent impairment for loss of eversion, resulting in 42 percent impairment. Dr. Black combined the 7 percent for loss of toe extension with the 42 percent, and to total 46 percent impairment. She combined the 46 percent with the 6 percent for the hamstring, finding 49 percent leg impairment. On May 18, 2007 Dr. Black determined that appellant should proceed with right L4-5, L5-S1 facet and possible L3-4 facet injections and then proceed with right sacroiliac deep interosseous joint ligament injection. She noted that Dr. Pennington did not deny lumbar radiculopathy on the right at L5.

In a July 27, 2007 report, the Office medical adviser indicated that the report from Dr. Black did not contain the necessary information to make a probative schedule award determination.

By decision dated September 11, 2007, the Office denied modification of its June 14, 2006 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[3] 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.[4] 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.[5] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

ANALYSIS

The Board finds that this case is not in posture for decision.

In this case, the Office referred appellant for a second opinion examination with Dr. Pennington. In a June 20, 2005 report, Dr. Pennington concluded that appellant had five percent impairment of the whole person. The Office medical adviser reviewed his findings and noted that the spine could not be utilized on the basis for an impairment rating. Instead of requesting clarification from Dr. Pennington, the Office concluded that his report was

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8107.

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

[6] 20 C.F.R. § 10.404.

insufficient to establish any permanent impairment. It is well established that proceedings under the Act are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[7] Accordingly, once the Office undertakes development of the medical evidence, it has the responsibility to do so in a proper manner.[8] In this case, the Office should have requested clarification Dr. Pennington, as his report was insufficient to resolve whether appellant sustained any permanent impairment due to her accepted injury.

While appellant submitted reports from Dr. Black, these reports do not comport with the requirements of the A.M.A., *Guides*. On November 15, 2004 Dr. Black provided an impairment rating of 49 percent to the lower extremities. However, she did not explain how she arrived at the specific values under Table 17-8 of the A.M.A., *Guides*, or what specific grades she selected under Table 17-7. Furthermore, section 17.2e of the A.M.A., *Guides*, Manual Muscle Testing, notes that manual muscle testing, for which impairment under Table 17-8 is derived, is dependent on the examinee's conscious and unconscious control and, to be valid, "results should be concordant with other observable pathologic signs and medical evidence." This section of the A.M.A., *Guides* cautions that manual muscle testing is "best used for pathology that does not have a primary neurologic basis, such as a compartment syndrome or direct muscle trauma. Weakness caused by an identifiable motor deficit of a specific peripheral nerve should be assessed under section 17.2l, Peripheral Nerve Injuries."[9] Dr. Black did not address why she found that Table 17-8 best approximated appellant's impairment in view of the cautionary statement in the A.M.A., *Guides*. Consequently, her opinion is of diminished probative value.

The Board, therefore, finds that the case must be remanded for further development of the medical evidence and a reasoned opinion regarding whether appellant has a permanent impairment of the right lower extremity due to her accepted employment injury. Following such further development as deemed necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[7] *Richard E. Simpson*, 55 ECAB 490 (2004).

[8] *Melvin James*, 55 ECAB 406 (2004).

[9] A.M.A., *Guides* 531.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2007 is set aside and remanded.

Issued: April 10, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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