United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant **and** **DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Cincinnati, OH, Employer**	)	**Docket No. 08-490** **Issued: August 5, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 30, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated November 20, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award decision.

ISSUE

The issue is whether appellant is entitled to an additional schedule award for his right and left lower extremities.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, a 39-year-old special agent, filed a Form CA-2 claim for benefits based on occupational disease on September 21, 1979, alleging that he developed a neurological condition as a result of his exposure to hazardous levels of lead when using an indoor firing range at work from 1972 to 1978. By decision dated October 4, 1982, the Office denied the claim. By decision dated July 14, 1983, an Office hearing

representative affirmed the October 4, 1982 decision. In a February 9, 1984 decision,[1] the Board reversed the Office's October 4, 1982 and July 14, 1983 decisions and found that appellant's claimed neurological condition was causally related to employment factors.

The Office accepted claims for polyneuropathy, polyneuritis of the lower extremity secondary to toxic lead poisoning, bilateral thrombophlebitis and pulmonary emboli as a complication of the phlebitis. Appellant received schedule awards for a 32 percent impairment of the right lower extremity and a 32 percent impairment of the left lower extremity in 1984; a 35 percent impairment of the right lower extremity and a 35 percent impairment of the left lower extremity as of 1988; a 22 percent impairment of the right lower extremity and a 22 percent impairment of the left lower extremity as of 1992; a 15 percent impairment of the right lower extremity and a 15 percent impairment of the left lower extremity as of 1999; and a 3 percent impairment of the right lower extremity and a 3 percent impairment of the left lower extremity as of 2001.

In a decision dated June 17, 2005, the Office awarded appellant an additional award for the right and left lower extremities for the period January 2, 2005 to October 9, 2006, for a total of 92.16 weeks. Appellant, therefore, received schedule awards for a total 88 percent impairment of the left and right lower extremities.

In a March 15, 2006 report, Dr. David A. Davis, Board-certified in psychiatry and neurology and appellant's treating physician, stated:

> "[Appellant] had been seen on March 8, 2006, because of a progressive decline in your function. The legs feel heavier. You have difficulty with ambulation. You have the numbness in your feet. Today, we undertook nerve conduction studies which do show a decline in the velocity of your left peroneal nerve ... a [seven] percent reduction in velocity. The decline is likely manifest throughout your nervous system. Areas such as the spinal cord or genitalia are not easily assessed. My recommendation is that you be given an additional [seven] percent impairment of the whole person."

In a September 14, 2006 report, Dr. Michael W. Morse, Board-certified in psychiatry and neurology, stated:

> "[Appellant] has a lead toxicity polyneuropathy. I have been asked to reevaluate the impairment of his legs only.
>
> "In his legs, [appellant] has essentially no feeling. In his feet, he has no movement of his toes. [Appellant] has absent ankle jerks. He has to walk with a cane. The pain is excruciating and significantly limits [appellant's] activity.
>
> "Based upon the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (fifth edition) [A.M.A., *Guides*], page 348, Table 13-24, classification procedure for determining nervous system impairment due to loss of

[1] Docket No. 83-1844 (issued February 9, 1984).

> muscle power and motor function resulting from peripheral nerve disorder, [appellant] would be rated as 100 percent impaired in his peroneal and tibial nerves distally.
>
> "Based upon Table 17-37, impairments due to nerve deficits, [appellant] is given 42 percent lower extremity [impairment] based upon the common peroneal, and 5 percent for the medial plantar and 5 percent for the lateral plantar nerves.
>
> "Based upon the sensory table, [appellant] is given a five percent for the common peroneal, five percent for the superficial peroneal, two percent for sural, five percent for the medial plantar, and five percent for the lateral plantar.
>
> "For dysesthesias, [appellant] is given five percent for the common peroneal, superficial peroneal, sural, medial plantar and lateral plantar. This gives him a whole body total rating of 52 percent for motor, 27 percent for sensory, 30 percent for dysesthesias. Using the [C]ombined [V]alues [C]hart on page 604, 52 plus 30 equals 66 percent, and 66 plus 27 equals 75 percent. This is for one extremity."

In an impairment evaluation dated November 20, 2006, the Office medical adviser determined that appellant was not entitled to an additional schedule award for the left and right lower extremities greater than the 88 percent already awarded. He calculated, based on Dr. Morse's findings, that appellant actually had a 68 percent impairment of each extremity when calculated pursuant to the Combined Values Chart at page 604 of the A.M.A., *Guides*. The Office medical adviser took Dr. Morse's findings of impairment based on dysesthesia -- 5 percent for the common peroneal, superficial peroneal, sural, medial plantar and lateral plantar under Table 16-10 at page 482 of the A.M.A., *Guides* -- and found that this combined for a 23 percent total lower extremity impairment under the Combined Values Chart for dysesthesias. For appellant's sensory impairment, the Office medical adviser relied on Dr. Morse's findings of 5 percent for the common peroneal, 5 percent for the superficial peroneal, 2 percent for sural, 5 percent for the medial plantar, and 5 percent for the lateral plantar under Table 16-11, page 482 of the A.M.A., *Guides* -- for a total 20 percent total sensory impairment for the right and left extremities. He combined the 23 and 20 percent impairments at page 604 and calculated a 38 percent impairment in each extremity.

The Office medical adviser then calculated a 48 percent lower extremity impairment for the right and left lower extremities by taking Dr. Morse's findings of a 5 percent impairment for the medial plantar, a 5 percent impairment for the lateral plantar nerves and a 42 percent impairment for the common peroneal Table 16-11, page 482 of the A.M.A., *Guides* and combining them at page 604. He found a total 68 percent lower extremity impairment for the right and left lower extremities by combining appellant's 48 percent and 38 percent impairments at page 604.

On June 27, 2007 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right and left upper extremity.

In an August 27, 2007 report, Dr. Morse stated findings on examination, reiterated his previous findings and conclusions, and stated:

> "[Appellant] has had multiple impairment ratings. They have gradually gotten worse because of his worsening neuropathy as documented by continued worsening of his nerve conduction velocity test as well as his clinical picture.
>
> "I have given [appellant] an impairment rating in the past and explained my rationale. There was a disagreement about this and he was referred to [the Office medical adviser, who] gave an impairment rating and rationale. My last impairment rating was 95 percent. Please refer to my note dated September 14, 2006 for the rationale behind this. The patient has gotten worse since then and I would consider him 100 percent disabled at this time."

In an October 25, 2007 impairment evaluation, an Office medical adviser found that Dr. Morse had indicated that appellant had a 95 percent impairment in his September 14, 2006 report and that he considered him 100 percent disabled. However, he noted that Dr. Morse had actually found a 75 percent impairment in each lower extremity in his September 14, 2006 report, a finding which was not properly calculated because Dr. Morse had added rather than combined his findings for dysesthesias, sensory and motor nerve impairment. The Office medical adviser noted that he had found a 68 percent impairment for each lower extremity by taking Dr. Morse's findings and combining them pursuant to the Combined Values Chart at page 604. He further found that Dr. Morse had incorrectly referred to lower extremity figures as whole person figures. The Office medical adviser stated that appellant's condition was worsening, but opined that Dr. Morse's evaluation lacked sufficient detail for him to determine a schedule award for the lower extremities.

By decision dated November 30, 2007, the Office found that appellant was not entitled to additional compensation for his schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 5 U.S.C. § 8107(c)(19).

losses.[4] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[5]

ANALYSIS

The Board finds there are insufficient grounds for an additional award based on appellant's right and left lower extremity impairments. Appellant requested greater impairment than the 88 percent previously awarded by the Office, and the Office medical adviser concluded in his October 25, 2007 report that appellant's condition was indeed worsening. He noted that Dr. Morse indicated in his August 27, 2007 report that appellant had a 95 percent impairment of the left and right lower extremity and that he considered him 100 percent disabled; however, he noted that Dr. Morse, in his actual computations reflected in his September 14, 2006 report, found that appellant only had a 75 percent impairment of the lower extremities. The Office medical adviser further found that the 75 percent figure was not accurate. Dr. Morse had added his findings to arrive at a total 75 percent impairment, rather than combining them, in accordance with the Combined Values Chart at page 604. The Office medical adviser determined that Dr. Morse's findings and calculations produced a 68 percent impairment of the lower extremities when calculated pursuant to the Combined Values Chart at page 604. He found a total 23 percent impairment of the lower extremities for dysesthesia based on Dr. Morse's findings for common peroneal, superficial peroneal, sural, medial plantar and lateral plantar under Table 16-10 at page 482 of the A.M.A., *Guides*; and a total 20 percent total sensory impairment for the right and left extremities based on Dr. Morse's findings of 5 percent for the common peroneal, 5 percent for the superficial peroneal, 2 percent for sural, 5 percent for the medial plantar, and 5 percent for the lateral plantar under Table 16-11, page 482 of the A.M.A., *Guides*; which he combined for a 38 percent impairment in each extremity under the Combined Values Chart at page 604 of the A.M.A., *Guides*; a 48 percent impairment of the lower extremities based on Dr. Morse's findings of a 5 percent impairment for the medial plantar nerve, a 5 percent impairment for the lateral plantar nerves and a 42 percent impairment for the common peroneal under Table 16-11, page 482 of the A.M.A., *Guides.* Relying again on the Combined Values Chart at page 604, the Office medical adviser combined appellant's 48 percent and 38 percent lower extremity impairments for a total 68 percent lower extremity impairment.

The Board affirms the finding of a 68 percent impairment for the left and right lower extremities, as the Office medical adviser's calculations based on Dr. Morse's findings were proper and in accordance with the applicable protocols of the A.M.A., *Guides*. The record also contains the March 15, 2006 report from Dr. Davis which recommended an additional seven percent impairment for the whole person. However, this rating is not probative, as the Act does not provide for permanent impairment of the whole person.[6] As the amount already paid for the prior schedule awards exceeded the amount appellant would be entitled to a schedule award for a 68 permanent impairment for the right and left lower extremities, the Office properly found that appellant was not entitled to additional compensation for a schedule award of compensation.

---

[4] 20 C.F.R. § 10.404.

[5] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[6] *See, e.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

Accordingly, as there is no other probative medical evidence establishing that appellant sustained any additional permanent impairment, the Board will affirm the Office's November 20, 2007 decision.[7]

CONCLUSION

The Board finds that appellant is not entitled to an additional schedule award for his right and left lower extremities.

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 5, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[7] The Board notes that a description of appellant's impairment must be obtained from appellant's physician, which must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. *See Peter C. Belkind*, 56 ECAB 580, 585 (2005).