United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 07-1920**
	)	**Issued: July 9, 2008**
DEPARTMENT OF THE ARMY, NEW CUMBERLAND ARMY DEPOT, New Cumberland, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 11, 2007 appellant, through his attorney, filed a timely appeal from a March 22, 2007 merit decision of the Office of Workers' Compensation Programs granting him a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a 14 percent permanent of each lower extremity for which he received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board. In the first appeal, the Board set aside an October 26, 1989 decision granting appellant a schedule award for a five percent permanent impairment of the left lower extremity.[1] The Board remanded the case for a second opinion

[1] Docket No. 90-632 (issued November 7, 1990). The Office accepted that on July 14, 1983 appellant, then a 33-year-old aircraft blade mechanic, sustained a lumbar disc biotusion.

examination. By decision dated September 9, 2003, the Board affirmed October 31, 2002 and April 7, 2003 decisions, finding that appellant did not establish a recurrence of disability beginning April 3, 1993 and was not entitled to an increased schedule award as he had not reached maximum medical improvement.[2] On the third time appeal, the Board affirmed a January 9, 2006 decision pay rate determination and affirmed in part and set aside in part a March 6, 2006 schedule award determination.[3] The Board found that appellant had no more than a 71 percent permanent impairment of his penis. The Board determined, however, that a conflict existed on the extent of his lower extremity impairment and remanded the case for resolution of the conflict.

On January 23, 2007 the Office referred appellant to Dr. Donald A. Patterson, a Board-certified orthopedic surgeon, for an impartial medical evaluation. On February 21, 2007 Dr. Patterson reviewed the medical evidence of record and discussed appellant's medical and work history. On examination, he found 4/5 strength of the lower extremities on manual muscle testing and equal circumference of the calf and thigh bilaterally. Dr. Patterson stated:

> "Sensation of the lower legs is quite remarkable and it is not a stocking glove as was reported before as there are a number of skip zones in both his thighs and lower legs and essentially he has normal feeling in his right heel and on the top of the left foot as well as a number of other patchy areas. We did note that he has significant atrophy of the glutei with dimpling in both lateral glutei areas. However, he does not Trendelenburg on either side."

He noted that after appellant's second surgery for left disc extrusions he "had to have lysis of extradural adhesions." Dr. Patterson asserted:

> "Lysis of adhesions is a poor prognostic indicator. Indeed it appears that the erectile dysfunction has been accepted. However, this is on the basis of sacral nerves that are interfered with due to the adhesions. If indeed one can accept the sacral nerves as being interfered with then one should be able to interpolate that other nerve roots would be interfered with such as L3 and L4, which is what Dr. Sullivan used in his evaluation."

He concluded that the extradural adhesions expanded the area of impairment to include L3, L4, L5 and S1. Applying the American Medical Association, *Guides to the Evaluation of Permanent* Impairment, (5th ed. 2001) (A.M.A., *Guides*), he determined that appellant had a 5 percent loss of function at each level which when added yielded a 20 percent maximum loss due to pain and sensory deficit.[4] Dr. Patterson graded appellant's sensory deficit as Grade 2, or 70 percent, for moderate pain with activities.[5] He multiplied the 20 percent maximum impairment for pain and loss of sensation at L3 through S1 by the 70 percent graded pain to find a 14 percent impairment of each lower extremity. Dr. Patterson asserted, "Another question is whether or not maximum

[2] Docket No. 03-1244 (issued September 9, 2003).

[3] *B.C.*, 58 ECAB ___ (Docket No. 06-925, issued October 13, 2006).

[4] A.M.A., *Guides* 424, Table 15-18.

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

medical improvement has occurred and indeed this has occurred long ago, I believe, probably at least a year past the last surgery that was in 1999."

By decision dated March 22, 2007, the Office granted appellant a schedule award for a 14 percent permanent impairment of each lower extremity. The period of the award ran for 66.24 weeks from August 12, 2003 to November 17, 2004.[6] The Office found that appellant reached maximum medical improvement on October 27, 2000. It determined that the applicable pay rate date was March 21, 1985 which with cost-of-living updates yielded a pay rate of $434.75 from August 12 to February 29, 2004 and a pay rate of $441.75 from March 1 to November 17, 2004.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[7] and its implementing federal regulations,[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[10]

Section 8123(a) provides that, 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.[11] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12]

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

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[6] The Office paid appellant a schedule award for his 71 percent impairment of the penis from October 27, 2000 to August 11, 2003.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] 20 C.F.R. § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[11] 5 U.S.C. § 8123(a).

[12] 20 C.F.R. § 10.321.

[13] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

ANALYSIS

The Board previously found that a conflict existed on the extent of appellant's lower extremity impairment. On remand, the Office referred appellant to Dr. Patterson for an impartial medical examination.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14] The Board finds that the opinion of Dr. Patterson, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. In a February 21, 2007 evaluation, Dr. Patterson determined that appellant had 4/5 strength in the lower extremities and equal leg circumference bilaterally. He found loss of sensation in the thighs and lower legs and atrophy of the glutei. Dr. Patterson noted that appellant experienced lysis of extradural adhesions after his second disc surgery, which he opined expanded the area of impairment to include L3, L4, L5 and S1. He applied the A.M.A., *Guides* and determined that appellant had a 5 percent impairment due to loss of function at L3, L4, L5 and S1 which he added to find a 20 percent maximum loss due to pain and sensory deficit.[15] Dr. Patterson graded appellant's sensory deficit as Grade 2, or 70 percent, for moderate pain with activities.[16] He multiplied the 20 percent maximum impairment for pain and loss of sensation at L3 through S1 by the 70 percent graded pain and concluded that he had a 14 percent impairment of each lower extremity. Dr. Patterson maintained that appellant reached maximum medical improvement "probably at least a year past the last surgery that was in 1999." As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.[17]

On appeal, appellant's attorney generally questioned the pay rate utilized for the schedule award. The Board previously affirmed the Office's determination that appellant was entitled to compensation based on an effective pay rate of March 21, 1985 at the three-quarters compensation rate including increases for cost of living.[18] The Office set the date of maximum medical improvement as October 27, 2000 in accordance with the findings of the impartial medical examiner. The period of appellant's schedule award for his 71 percent penile impairment ran from October 27, 2000 to August 11, 2003. The Office thus began the schedule award for his 14 percent permanent impairment of each lower extremity on August 12, 2003. Counsel has not submitted any evidence showing that the Office erred in selecting the appropriate pay rate for the schedule award.

[14] *Id*.

[15] A.M.A., *Guides* 424, Table 15-18.

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

[17] *See Darlene R. Kennedy*, 57 ECAB 414 (2006).

[18] *See B.C.*, *supra* note 3.

CONCLUSION

The Board finds that appellant has no more than a 14 percent permanent of each lower extremity for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2007 is affirmed.

Issued: July 9, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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