United States Department of Labor
Employees' Compensation Appeals Board

W.T., Appellant	)	
and	)	**Docket No. 08-318**
	)	**Issued: July 14, 2008**
DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Colts Neck, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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 November 13, 2007 appellant, through his attorney, filed a timely appeal from a June 19, 2007 Office of Workers' Compensation Programs' hearing representative's decision which granted him a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than a five percent permanent impairment of each lower extremity.

FACTUAL HISTORY

On July 30, 1985 appellant, then a 37-year-old heavy mobile equipment mechanic, filed a claim for an injury occurring on July 29, 1985 in the performance of duty. The Office accepted the claim for low back strain and right lumbar spondylotic radiculopathy at L5 and S1. Appellant stopped work on July 30, 1985. On August 19, 1985 he underwent a hemilaminectomy and foraminotomy at L5-S1 with excision of the displaced space. On

October 21, 1987 appellant required a reexploration of the hemilaminectomy at L4-5 on the right and excision of the calcified portion of the disc. On April 5, 1989 he underwent a laminectomy and discectomy. Appellant returned to limited-duty employment on September 16, 1996. He stopped work on July 1, 1997 due to a reduction-in-force (RIF).[1]

On December 17, 1998 Dr. James V. Gainer, Jr., a Board-certified neurosurgeon, diagnosed postlaminectomy syndrome. He found that appellant had equal leg circumference and normal muscle strength, size and tone. Dr. Gainer opined that appellant could perform his light-duty employment. He found that appellant had reached maximum medical improvement.

On July 15, 2000 appellant filed a claim for a schedule award. He submitted an April 24, 2000 impairment evaluation from Dr. David Weiss, an osteopath, who is Board-certified in family practice. Dr. Weiss determined that appellant had a 5 percent impairment due to a sensory deficit on the right at L4, a 5 percent impairment due to a sensory deficit on the right at L5 and an 8 percent impairment due to a 4/5 motor deficit on the right at L4, for a total right lower extremity impairment of 17 percent. He further found that appellant had a five percent permanent impairment of the left lower extremity due to a left L4 sensory nerve deficit.

On March 27, 2001 an Office medical adviser found that appellant had no impairment of the lower extremities based on the examination of Dr. Gainer. He reviewed the findings of Dr. Weiss and stated that it was "hard to reconcile these neuro[logical] findings with those of Dr. Gainer on December 17, 1998 who did an excellent exam[ination]."

On May 21, 2002 the Office referred appellant to Dr. John S. Boggs, a Board-certified neurosurgeon, to resolve the conflict in opinion regarding whether he had any permanent impairment of the lower extremities due to his employment injury.[2] On May 28, 2002 Dr. Boggs reviewed the evidence of record. He diagnosed failed low back syndrome with positional pain due to multiple lumbar surgeries with residual nerve loss bilaterally at the L5 dermatome. On examination of the right leg, Dr. Boggs found "a patch of hypalgesia to pin in the medial aspect of the thigh that extends down to the knee" and decreased sensation in the dorsal aspect of the right foot to the anterior foreleg. For the left leg, he found hypalgesia to pin throughout the medial aspect of the leg and decreased pin sensation in the dorsal aspect of the left foot. Citing to Table 15-18 on page 424 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*), Dr. Boggs concluded that appellant had a five percent impairment of each lower extremity due to sensory loss of the L5 dermatone. He estimated that appellant reached maximum medical improvement in 1997. Dr. Boggs noted that, in contrast to Dr. Weiss, he found "no motor weakness and sensory loss only in L5 dermatones bilaterally."

[1] By decision dated January 26, 1999, the Office found that appellant had not established that he sustained a recurrence of disability on June 11, 1997 due to his accepted employment injury. By decision dated January 28, 2000, a hearing representative affirmed the January 26, 1999 decision.

[2] The Office indicated that the conflict was between Dr. Weiss and Dr. Gainer; however, Dr. Gainer provided an opinion on the extent of appellant's disability for employment rather than the extent of any permanent impairment. The Office medical adviser reviewed Dr. Gainer's report and found that appellant had no impairment of the lower extremities.

On June 24, 2002 an Office medical adviser reviewed Dr. Boggs report. He agreed that appellant had a five percent impairment of the L5 nerve root for both the right and left lower extremity according to Table 15-18 on page 424 of the A.M.A., *Guides*.

By decision dated July 5, 2002, the Office granted appellant a schedule award for a five percent permanent impairment of each lower extremity. The period of the award ran for 28.8 weeks from May 8 to December 15, 2002.

On July 10, 2002 appellant, through his attorney, requested an oral hearing. A hearing was held on April 2, 2007. By decision dated June 19, 2007, the Office hearing representative affirmed the July 5, 2002 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[3] and its implementing federal regulation,[4] 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.[5] 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.[6]

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.[7] 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.[8]

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

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] 20 C.F.R. § 10.404(a).

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

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

The Office accepted that appellant sustained low back strain and right lumbar spondylotic radiculopathy at L5 and S1 due to a July 29, 1985 employment injury. Appellant underwent a hemilaminectomy and foraminotomy at L5-S1 on August 19, 1985, a reexploration of the hemilaminectomy at L4-5 on the right on October 21, 1987 and a lumbar laminectomy and discectomy. Appellant resumed light-duty employment on September 16, 1996. He stopped work on July 1, 1997 due to a RIF.

On July 15, 2000 appellant filed a claim for a schedule award. The Office determined that a conflict existed between Dr. Weiss, who found that appellant had a 5 percent impairment of the left lower extremity and a 17 percent impairment of the right lower extremity and the Office medical adviser, who found no lower extremity impairment. It referred appellant to Dr. Boggs for an impartial medical examination.

Where 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.[10] The Board finds that the opinion of Dr. Boggs, a Board-certified neurosurgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. On May 28, 2002 Dr. Boggs reviewed appellant's medical history and diagnosed failed low back syndrome with positional pain due to multiple lumbar surgeries with residual nerve loss bilaterally at the L5 dermatome. On examination, he found hypalgesia extending down the medial aspect of the thigh to the knee on the right leg and a loss of sensation in the dorsal aspect of the right foot extending to the anterior foreleg. Dr. Boggs further found hypalgesia throughout the medial aspect of the left leg and decreased pin sensation in the dorsal aspect of the left foot. He applied Table 15-18 on page 424 of the A.M.A., *Guides* and concluded that appellant had a five percent impairment of the right lower extremity and a five percent impairment of the left lower extremity due to sensory loss of the L5 dermatone. An Office medical adviser reviewed Dr. Boggs' findings and concurred with his determination.

Table 15-18 is used for spinal nerve root impairments affecting the lower extremity.[11] The maximum impairment is determined and then the impairment is graded under Table 15-15 for sensory deficits and Table 15-16 for motor deficits. The severity of the sensory or motor deficit is multiplied by the maximum value of the relevant nerve.[12] The maximum impairment of the L5 nerve root under Table 15-18 is five percent. Both Dr. Boggs and the Office medical

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

[10] *Id*.

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

[12] *Id*.

adviser did not specifically grade appellant's sensory deficit but instead gave him the maximum impairment allowed, the equivalent of a graded 100 percent deficit. There is no evidence of record showing that he has more than a five percent impairment to each lower extremity.

On appeal appellant's attorney contends that it is unclear whether Dr. Boggs was selected using the proper rotational system and he did not include any impairment for a preexisting knee condition. Appellant, however, has not submitted any evidence that the Office failed to follow its procedures in selecting Dr. Boggs as the impartial medical examiner.[13] He further has not provided evidence of a preexisting impairment of the knee.[14] The attorney noted that Dr. Boggs did not explain how he applied Table 15-18. As discussed, however, appellant received the maximum impairment allowed under Table 15-18 for an impairment of the L5 nerve root.

CONCLUSION

The Board finds that appellant has not established more than a five percent permanent impairment of each lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 19, 2007 is affirmed.

Issued: July 14, 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

[13] Under the Office's procedures, referee examiners are chosen by a strict rotational system using appropriate medical directories. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (May 2003).

[14] In determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included. *See Clary J. Cleary*, 57 ECAB 563 (2006); *Mike E. Reid*, 51 ECAB 543 (2000).