United States Department of Labor
Employees' Compensation Appeals Board

H.C., Appellant	)	
and	)	**Docket No. 08-377**
	)	**Issued: July 18, 2008**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Mobile, AL, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 November 16, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs September 21, 2007 amended schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a 12 percent impairment of the left lower extremity for which she received a schedule award; and, (2) whether the Office used a proper pay rate in determining her schedule award compensation.

FACTUAL HISTORY

On August 1, 1985 appellant, then a 41-year-old data clerk, sustained an employment-related herniated disc at L5-S1. She underwent surgery on August 20, 1985 and returned to full duty on October 14, 1985.[1] In March 1987, appellant injured her left leg at home and underwent

[1] Appellant returned to four hours of daily work on September 30, 1985.

arthroscopic surgery on July 17, 1987.[2] She returned to light duty on August 18, 1987 but continued to have problems with her leg and developed left lower extremity reflex sympathetic dystrophy (RSD). Beginning in June 1988, appellant went on leave-without-pay status. By decision dated March 16, 1989, the Office found that her disability beginning June 8, 1988 was not caused by the August 1, 1985 injury. Appellant retired on disability effective February 4, 1989.

By letter dated October 9, 2004, appellant requested that her claim be reopened and on November 19, 2004 filed a Form CA-2a, recurrence of disability claim. She requested compensation at the GS-13 level back to the date of injury. On September 6, 2005 the Office accepted that appellant sustained a recurrence of her herniated disc.

On October 26, 2005 appellant filed a schedule award claim.

On February 14, 2006 the Office referred appellant to Dr. Raymond Fletcher, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the degree of impairment. In a March 15, 2006 report, Dr. Fletcher reviewed the medical record, a statement of accepted facts and the history of injury. He reported that appellant used a cane, and was receiving medical treatment for coronary artery disease, peripheral vascular disease, hypertension, knee arthritis and left lower extremity RSD. Dr. Fletcher reported appellant's subjective complaints of significant cervical, shoulder, thoracic, hip, knee and lumbar spine pain, and that her left leg gave way. Dr. Fletcher advised that many of appellant's symptoms were related to RSD. Examination findings included left lower extremity weakness, limping gait while ambulating without a cane, poor ability at heel standing and toe standing, and impaired balance and coordination of the left lower extremity. Examination of the spine demonstrated no spasm but tenderness with decreased range of motion and a positive straight leg raising examination. Strength was 4/5 in the left lower extremity muscle groups. Sensory examination revealed a vague, nondermatomal deficit of the left lower extremity, most noticeable at the lateral border of the left foot. Dr. Fletcher diagnosed a disc herniation at L5-S1, permanent aggravation of lumbar spondylosis and left sciatic radiculitis. Other nonaccepted orthopedic problems included cervical spondylosis and left lower extremity RSD. Dr. Fletcher advised that the need for the cane was due to the nonemployment-related RSD and not to the lumbar condition caused by the August 1, 1985 employment injury. Regarding permanent impairment, he advised that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] appellant had an S1 nerve root impairment of the left lower extremity, under Table 15-18 she had a 2 percent sensory deficit and a 10 percent motor deficit, to equal a 12 percent left lower extremity impairment. Dr. Fletcher advised that maximum medical improvement (MMI) was reached in January 1986.

In a March 24, 2006 report, an Office medical adviser reviewed Dr. Fletcher's report and agreed with his conclusion that MMI was reached in January 1986. He applied Tables 15-15, 15-16 and 15-18 to find that appellant had a 12 percent left lower extremity impairment.

[2] This injury was not accepted as employment related.

[3] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

The Office secured pay rate information from the employing establishment. It determined that appellant's weekly pay rate for schedule award compensation was $280.35 the pay rate in effect on October 25, 1985.

By decision dated March 31, 2006, appellant was granted a schedule award for a 12 percent impairment of the left lower extremity, or 34.56 weeks of compensation from January 31 to September 29, 1986.

In an April 27, 2006 report, an Office medical adviser agreed that appellant had a 12 percent left lower extremity impairment and opined that MMI had been reached on January 3, 1986. He concluded that appellant, therefore, would not be entitled to an additional schedule award for her left lower extremity.

On April 22, 2007 appellant, through her attorney, requested reconsideration, contending that the Office should have used the date of Dr. Fletcher's report in determining the date of maximum medical improvement, that appellant should have the benefit of COLA increases, and that she was entitled to a recurrent pay rate.

On August 31, 2007 the Office accepted that appellant sustained a permanent aggravation of lumbar spondylosis and left sciatic radiculitis.

By decision dated September 18, 2007, the Office modified the March 31, 2006 schedule award to find that the more advantageous date of maximum medical improvement signified by the date of Dr. Fletcher's report should be used to calculate the schedule award. The Office, however, found that appellant was not entitled to a recurrent pay rate.

On September 21, 2007 appellant was granted an amended schedule award to reflect that the period of the award ran from March 15 to November 11, 2006. The new weekly pay rate, with COLA increases, was $374.00.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.404 of the implementing federal regulations,[5] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

A.M.A., *Guides*[6] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[7]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[8] In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[9] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[10]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes a method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of the maximum impairment due to nerve dysfunction applying Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has a 12 percent impairment of the left lower extremity. The only report that provided an impairment rating on physical examination is that of Dr. Fletcher, who reported 4/5 strength of the left lower extremity and sensory loss along the left foot. He concluded that, under Table 15-18, appellant had a 2 percent S1 sensory impairment and a 10 percent S1 motor impairment, or a total 12 percent left lower extremity impairment. As noted by both Office medical advisers, by combining Table 15-18 with Tables 15-15 and 15-16,[12] and utilizing the Combined Values Chart, Dr. Fletcher properly determined that appellant had 12 percent left lower extremity impairment.[13]

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[6] A.M.A., *Guides*, *supra* note 3.

[7] *See Joseph Lawrence, Jr.*, *supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[8] *Pamela J. Darling*, 49 ECAB 286 (1998).

[9] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[10] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[11] A.M.A., *Guides*, *supra* note 3 at 423.

[12] *Id*.

[13] *Id.* at 604-06.

There is no other medical evidence of record that establishes greater left lower extremity impairment. Appellant did not establish that she has greater impairment than the 12 percent awarded.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee's "monthly pay."[14] For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as:

> "The monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[15]

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability, or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).

It is well established that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The Board has explained that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by the Office.[16]

Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[17] A recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment.[18]

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his

[14] 5 U.S.C. § 8107.

[15] 5 U.S.C. § 8101(4).

[16] *D.R.*, 57 ECAB 720 (2006).

[17] 20 C.F.R. § 10.5(x).

[18] 20 C.F.R. § 10.5(y)

or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under the Act and is not entitled to compensation for loss of wage-earning capacity.[19]

ANALYSIS -- ISSUE 2

Although appellant contends that she sustained a recurrence of disability in 2005, the record reflects that at that time the Office merely accepted a recurrence of medical condition. The record does not show that she received compensation for any period subsequent to the time she retired for a nonemployment-related condition in 1989. The Board finds that appellant did not establish that she sustained a recurrence of disability in 2005 as defined by Office regulations[20] but rather sustained a recurrence of medical condition without sustaining any absence from work.[21] Thus, her alleged disability in 2005 is not relevant in determining her rate of pay. The Office properly determined that the 1985 pay rate, adjusted with COLAs, could be used in calculating her schedule award.[22] The Office determined that appellant's augmented weekly pay rate with COLA increases was $374.00 and multiplied it by the period of the award or 34.56 weeks, to equal total entitlement of $12,925.44 or an additional payment of $5,658.77.[23]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she is entitled to a schedule award for her left lower extremity greater than the 12 percent awarded, and that the Office permissibly determined the pay rate for schedule award purposes.

[19] *See Merle J. Marceau*, 53 ECAB 197 (2001).

[20] 20 C.F.R. § 10.5(x).

[21] 20 C.F.R. § 10.5(y).

[22] The Board notes that in cases of continuing exposure to employment factors, the date of the medical report upon which the Office relies in determining the degree of permanent impairment may constitute the date that an injury occurred. *R.S.*, 58 ECAB ___ (Docket No. 06-1346, issued February 16, 2007). This is not a case of continued exposure. Rather, appellant sustained a traumatic injury on August 1, 1985 and retired on disability due to a nonemployment-related left leg injury in 1989. The determination of MMI is based on the persuasive medical evidence of record. *D.R., supra* note 16. The medical evidence from Dr. Fletcher establishes that the date of MMI was January 1986.

[23] Appellant had previously received a $7,266.67 schedule award based on an augmented pay rate of $210.26.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 21 and 18, 2007 be affirmed.

Issued: July 18, 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