

**United States Department of Labor
Employees' Compensation Appeals Board**

M.M., Appellant)	
)	
and)	Docket No. 08-485
)	Issued: July 16, 2008
U.S. POSTAL SERVICE, POST OFFICE, Bakersville, CA, Employer)	
)	

Appearances:
Appellant, pro se
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 28, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 1, 2006 finding that she was not entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing a permanent impairment to a scheduled member.

FACTUAL HISTORY

This case has previously been on appeal before the Board. Appellant filed a claim for a herniated disc due to bending and lifting in the performance of duty. The Office accepted her claim for lumbosacral strain on August 17, 1999. Appellant underwent a bilateral L4-5 and L5-S1 discectomies and laminectomies with foraminotomies for stenosis on December 3, 1999. She returned to light-duty work on March 25, 2000. The Office authorized additional surgery on

December 14, 2000. Appellant underwent an excision, revision, plastic reconstruction and repair of hypertrophic postoperative surgery scar, lumbar spine and a repeat central decompressive bilateral total laminectomy of L4 and L5 on March 1, 2001. By decision dated October 11, 2000, the Office denied appellant's claim for compensation from June 27 to September 29, 2000. Appellant requested reconsideration by decision dated January 2, 2001 and the Office denied modification of the October 11, 2000 decision. By decision dated June 12, 2002,¹ the Board set aside the Office's decision and remanded the case for additional development. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Appellant underwent an additional back surgery on October 17, 2002 consisting of removal of hardware and lumbar laminectomy at L3 and L4. In reports dated April 23 and August 29, 2003, her attending physician, Dr. Michael O. McCabe, a Board-certified orthopedic surgeon, stated that appellant did not require any further treatment or evaluation of her low back. He found that appellant had a substantial right leg limp, normal neurologic evaluation of all extremities and full range of motion of her joints. Dr. McCabe diagnosed degenerative lumbar disc disease with chronic persistent low back pain requiring formal pain management. On October 7, 2003 he stated that appellant had waddling-type gait with no limp in either lower extremity. Dr. McCabe found no atrophy of the thigh or calf and full range of motion of all joints. He noted appellant exhibited volitional give-way in manual resistance strength testing. Dr. McCabe reported diffuse tenderness in the lumbar spine and limited range of motion of the back. He stated that appellant could return to sedentary work lifting less than five pounds.

Appellant requested a schedule award on April 8, 2004 and submitted an attending physician's report from Dr. McCabe diagnosing lumbar disc herniation at L5 and spinal stenosis.

The Office referred appellant for a second opinion evaluation on April 14, 2004. Dr. Alice M. Martinson, a Board-certified orthopedic surgeon, completed a report on May 24, 2004. She reviewed appellant's history of injury and noted that appellant walked with a broad-based waddling gait and had limited range of motion of the lumbar spine. Dr. Martinson found stocking hypoesthesia to light touch accompanied by loss of temperature in the lower extremities. She stated that appellant had reached maximum medical improvement and discussed impairments to appellant's spine. On September 22, 2004 Dr. Martinson responded to the Office's request for a supplemental report, stating that appellant had no ratable impairment attributable to her lower extremities. She stated, "Spinal stenosis produced leg pain, but the pathology is 100 percent in the spine."

By decision dated December 29, 2004, the Office denied appellant's request for a schedule award on the grounds that she did not have a ratable impairment of her lower extremities due to her accepted back injuries.

Appellant requested reconsideration of her schedule award on December 12, 2005. In a report dated December 6, 2005, Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, examined appellant and diagnosed sciatic and failed low back surgery syndrome. He found that appellant had L4 and L5 spinal nerve root involvement bilaterally and depressed reflexes

¹ Docket No. 01-1256 (issued June 12, 2002).

involving the S1 nerve root. Dr. Tauber stated that this represented 15 percent impairment of each lower extremity. He opined that appellant had 20 percent impairment of the whole person.

The Office referred appellant for a second opinion evaluation on March 31, 2006. In a report dated May 2, 2006, Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, examined appellant and reported limited range of motion of the lumbar spine and mild sensory reduction in both feet which he attributed to diabetic neuropathy. Dr. Ha'Eri noted that appellant reported slight lower back pain and that her motor examination of the lower extremities revealed 4/5 strength. The Office requested a supplemental report on May 26, 2006 addressing whether appellant's accepted low back condition had affected her lower extremities. Dr. Ha'Eri responded on August 3, 2006 and stated, "The bilateral lower extremity impairment is 50 percent due to the lumbar discopathy and 50 percent due to diabetic neuropathy." The Office medical adviser reviewed the medical evidence on August 30, 2006 and stated that Dr. Ha'Eri failed to list the specific nerve root which resulted in appellant's weakness in the lower extremities. She stated, "Either more information is needed or there is no ratable impairment."

By decision dated December 1, 2006, the Office denied modification of the December 29, 2004 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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 to 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴ Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁵

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.⁶ However, as the schedule award provisions of the Act

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

⁶ *George E. Williams*, 44 ECAB 530, 533 (1993).

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.⁷

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description 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.⁸

ANALYSIS

Appellant requested a schedule award alleging that she sustained permanent impairment to her lower extremities as a result of her accepted low back conditions and surgeries. The Office referred her for a second opinion evaluation with Dr. Martinson, a Board-certified orthopedic surgeon. On September 22, 2004 Dr. Martinson stated that appellant's spinal stenosis was producing leg pain and that the pathology was in appellant's spine. He did not describe the nerve roots involved in causing appellant's leg pain and did not supply sufficient findings on examination to rate any permanent impairment to the lower extremities due to her spinal injuries.

Appellant submitted a report from Dr. Tauber, a Board-certified orthopedic surgeon, noting that she had 15 percent impairment of each lower extremity due to L4 and L5 nerve root involvement. Dr. Tauber did not comply with the requirements of the A.M.A., *Guides* as he only listed the nerve roots involved. He did not apply the tables of the A.M.A., *Guides* to grading the extent of the impairment due to sensory loss or loss of power and motor deficits.⁹

The Office referred appellant to Dr. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Ha'Eri provided findings of motor deficits on physical examination. In a May 26, 2006 supplemental report, Dr. Ha'Eri stated that appellant's bilateral lower extremity impairment was due in part to her lumbar discopathy. Dr. Ha'Eri did not identify the nerve root involved, the extent of the impairment or address the grading scheme provided by the A.M.A., *Guides*.¹⁰

The Office medical adviser reviewed the medical evidence on August 30, 2005 and noted that Dr. Ha'Eri had not provided the necessary medical evidence to evaluate appellant's permanent impairment for schedule award purposes. She stated, "Either more information is needed or there is no ratable impairment."

⁷ *Id.*

⁸ *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

⁹ A.M.A., *Guides* 424, Table 15-15 and Table 15-16.

¹⁰ *Id.*

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter.¹¹ In a case where the Office proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner.¹² The Office referred appellant to two second opinion physicians in an attempt to ascertain any permanent impairment due to her accepted back injury. None of the examining physicians have provided the necessary details for the claims examiner, the Office medical adviser or the Board to accurately visualize the extent of any permanent impairment. The Office medical adviser noted the deficiencies in the record in her October 30, 2006 report. The medical evidence of record reflects that appellant may have sustained permanent impairment of her lower extremities due to her accepted injury. On remand, the Office should refer appellant and the statement of accepted facts to an appropriate physician to determine the extent of any permanent impairment to her lower extremities. It should provide the necessary citations to the A.M.A., *Guides* and apprise the physician of the provisions of the Act relating to schedule awards. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the extent of permanent impairment resulting from appellant's accepted back condition.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2006 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further development consistent with this decision of the Board.

Issued: July 16, 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

¹¹ *Anthony P. Silva*, 55 ECAB 179, 180 (2003)

¹² *Melvin James*, 55 ECAB 406, 411 (2004).