United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 08-1086**
	)	**Issued: May 21, 2009**
DEPARTMENT OF THE TREASURY, BUREAU OF THE MINT, Philadelphia, 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:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 4, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 22, 2008 merit decision concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a 10 percent permanent impairment of his left leg and a 0 percent permanent impairment of his right leg.

FACTUAL HISTORY

This is the second appeal in this case. In the first appeal,[1] the Board issued a decision on October 25, 2007 in which it set aside the Office's December 6, 2005 and October 3, 2006

[1] Docket No. 07-244 (issued October 25, 2007).

decisions and remanded the case to the Office for further development regarding whether appellant has more than a 10 percent permanent impairment of his left leg and a 0 percent permanent impairment of his right leg.[2] The Office accepted that appellant sustained lumbar and thoracic strains and lumbar stenosis at L4-5 on July 6, 1998 and authorized multiple surgeries for bulging or herniated discs at L3-4, L4-5 and LS-S1. It awarded appellant a schedule award for a 10 percent permanent impairment of his left leg and determined that he had a 0 percent permanent impairment of his right leg. The Office had based its schedule award determination on the opinions of Dr. Howard Levin, a Board-certified neurologist, who ostensibly served as an impartial medical specialist, and Dr. Morley Slutsky, a Board-certified occupational medicine physician who served as an Office medical adviser. The Board found, however, that Dr. Levin actually served as an Office referral physician rather than an impartial medical specialist because there was no conflict in the medical evidence at the time of appellant's referral to him. The Board determined that the October 16, 2003 opinion of Dr. George L. Rodriguez, an attending Board-certified physical medicine and rehabilitation physician, and the August 26, 2004 opinion of Dr. Stanford Feinberg, a Board-certified neurologist serving as an Office referral physician, were of limited probative value regarding appellant's permanent impairment and therefore could not create a conflict in the medical evidence.[3] The opinions of Dr. Rodriguez and Dr. Feinberg were not made in accordance with the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

The Board further found that Dr. Levin's March 9, 2006 opinion was in need of clarification. Dr. Levin concluded that appellant had a "permanent impairment disability of 10 percent whole person due to the weakness he is experiencing in his left lower extremity as a result of the injury he reportedly sustained to his lumbar spine on July 6, 1998" and that there "was no evidence that he is suffering from any permanent impairment in his right lower extremity." The Board noted that it was inappropriate for Dr. Levin to calculate a whole person impairment[4] and indicated that he did not appropriately evaluate appellant for possible permanent impairment due to sensory loss in his legs or weakness in his ankles and feet.[5]

[2] The Board also determined that appellant had not met his burden of proof to establish that he has more than a 36 percent permanent impairment of his penis, for which he received a schedule award. This matter is not currently before the Board.

[3] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1075 (1989). In situations 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. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[4] Neither the Act nor its implementing regulation provides for a schedule award for impairment to the back or to the body as a whole. *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[5] The Board noted, for example, that Dr. Levin did not make reference to the A.M.A., *Guides* to apply methods for measuring ankle weakness deficits such as those found in Table 17-8. This table assigns impairment ratings for weakness found upon various ankle motions. *See* A.M.A., *Guides* 532, Table 17-8. The Board further noted that the reports of Dr. Slutsky did not support the Office's determination as Dr. Slutsky actually indicated that Dr. Levin's calculation was not appropriate.

Therefore, the case was remanded to the Office for clarification of whether appellant had more than a 10 percent permanent impairment of his left leg and a 0 percent permanent impairment of his right leg. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand to the Office, appellant and the case record were referred to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for evaluation of the permanent impairment of his legs. On February 5, 2008 Dr. Stark provided a description of appellant's factual and medical history including the treatment of his back and legs since his July 6, 1998 injury. He undertook an extensive review of the medical reports in the record including the results of magnetic resonance imaging (MRI) scan testing of appellant's back and an October 3, 2007 report of Dr. Frederick S. Lieberman, an attending Board-certified orthopedic surgeon.[6] Physical examination revealed that appellant was able to walk with a reciprocating heel/toe gait although he complained of pain in his thighs and back when ambulating. Dr. Stark indicated that examination of appellant's mid and lower back revealed a well-healed operative scar over the midline in the lower back with tenderness on palpation over the midline and local tenderness over the paradorsal and paralumbar musculature without spasm on palpation. Range of motion of the lumbosacral spine was 40 degrees upon flexion and extension and lateral rotation were normal. The sitting root test was negative and straight leg raising was 80 degrees bilaterally.

Dr. Stark indicated that there was no sensory deficit in appellant's lower extremities and found that there was no atrophy of the musculature of his lower extremities. There was no reduced muscle power of the quadriceps muscles, extensor hallucis longus muscles or ankle plantar flexors as all measured four over five upon manual muscle testing. Dr. Stark noted that there was no tenderness over the joint lines of the hips, the McMurray, Apley, and Lachman tests were negative, and there were no signs of varus or valgus instabilities. The motion of appellant's ankles was the same on both sides -- 25 degrees of plantar flexion and 20 degrees of dorsiflexion. Dr. Stark determined that appellant reached maximum medical improvement by June 2003. He found that, on physical examination, appellant had no restriction of motion, sensory deficits, decreased strength or atrophy in his lower extremities. Dr. Stark indicated that, according to the standards of the A.M.A., *Guides*, including Tables 17-6, 17-7, 17-8 and 17-37, appellant had a zero percent permanent impairment of his right leg and a zero percent permanent impairment of his left leg.

In a February 22, 2008 decision, the Office found that appellant did not meet his burden of proof to establish that he has more than a 10 percent permanent impairment of his left leg and a 0 percent permanent impairment of his right leg. It based its determination on the opinion of Dr. Stark.

[6] On October 3, 2007 Dr. Lieberman stated that the September 13, 2007 MRI scan testing showed maintained discs from L1-2 to L5-S1. He indicated that sensory examination showed a mild right-sided L5 sensory deficit and a mild right-sided anterior femoral cutaneous nerve sensory deficit. Dr. Lieberman did not provide any further details of this sensory examination. He indicated that appellant had lower leg weakness but did not explain how the testing was performed.

LEGAL PRECEDENT

The schedule award provision of the Act[7] and its implementing 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 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9]

ANALYSIS

The Office accepted that appellant sustained lumbar and thoracic strains and lumbar stenosis at L4-5 on July 6, 1998 and authorized multiple surgeries for bulging or herniated discs at L3-4, L4-5 and LS-S1. It awarded appellant a schedule award for a 10 percent permanent impairment of his left leg and determined that he had a 0 percent permanent impairment of his right leg. The Office had based its schedule award determination on the opinions of Dr. Howard Levin, a Board-certified neurologist. In an October 25, 2007 decision, the Board remanded the case to the Office for further development of appellant's entitlement to schedule award compensation. The Board found that Dr. Levin served as an Office referral physician rather than an impartial medical specialist and that his opinion on permanent impairment was not sufficiently explained to constitute the weight of the medical evidence.[10]

In accordance with the remand instructions, the Office referred appellant and the case record to Dr. Stark, a Board-certified orthopedic surgeon, for evaluation of the permanent impairment of his legs. In a February 5, 2008 report, Dr. Stark properly found that appellant did not have impairment of either leg under the standards of the A.M.A., *Guides.* As the report of Dr. Stark provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[11] Therefore, the Office correctly found that there was no

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *Id*.

[10] On appeal appellant's attorney argued that after Dr. Levin was unable to clarify his opinion on permanent impairment the case should have been referred to another impartial medical specialist. He made reference to precedent that provided that, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue. *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989). However, this precedent would not be relevant to the facts of the present case as Dr. Levin served as an Office referral physician rather than an impartial medical specialist.

[11] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989). The record contains an October 3, 2007 report in which Dr. Lieberman, an attending Board-certified orthopedic surgeon, indicated that appellant had sensory loss in his right leg and weakness in both legs. However, he did not explain what tests were used to find these deficits, the precise amounts of the deficits and how they were obtained according to the standards of the A.M.A., *Guides*.

evidence to show that appellant had more than a 10 percent permanent impairment of his left leg, for which he received schedule award compensation, or more than a 0 percent permanent impairment of his right leg.

Dr. Stark's examination on February 5, 2008 revealed that appellant was able to walk with a reciprocating heel/toe gait although he complained of pain in his thighs and back when ambulating. He indicated that examination of appellant's mid and lower back showed a well-healed operative scar over the midline in the lower back with tenderness on palpation over the midline and local tenderness over the paradorsal and paralumbar musculature without spasm on palpation. Range of motion of the lumbosacral spine was 40 degrees upon flexion and extension and lateral rotation were normal. The sitting root test was negative and straight leg raising was 80 degrees bilaterally. There was no reduced muscle power of the quadriceps muscles, extensor hallucis longus muscles or ankle plantar flexors as all measured four over five upon manual muscle testing. The motion of appellant's ankles was the same on both side -- 25 degrees of plantar flexion and 20 degrees of dorsiflexion.

Based on these findings, Dr. Stark properly determined that appellant did not have sensory loss in his legs which stemmed from his employment-related back problems and that he did not have range of motion, atrophy or weakness deficits in his legs under the standards of the A.M.A., *Guides.* He noted that, in reaching this determination, he applied various tables of the A.M.A., *Guides*, including Tables 17-7 and 17-8 regarding muscle weakness and Table 17-37 regarding sensory loss.[12] For these reasons, the Office properly found that appellant does not have more than a 10 percent permanent impairment of his left leg, for which he received schedule award compensation, or more than a 0 percent permanent impairment of his right leg.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 10 percent permanent impairment of his left leg and a 0 percent permanent impairment of his right leg.

[12] *See* A.M.A., *Guides* 531-32, 552, Tables 17-7, 17-8 and 17-37. The Board notes that under Table 17-11 appellant also would not have any range of motion impairment when applying the ankle motion findings obtained by Dr. Stark. *See* A.M.A., *Guides* 537, Table 17-11.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 22, 2008 decision is affirmed.

Issued: May 21, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board