

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

J.C., Appellant)	
)	
and)	Docket No. 09-834
)	Issued: November 24, 2009
U.S. POSTAL SERVICE, POST OFFICE,)	
Baltimore, MD, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 9, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated October 24, 2008 determining his permanent impairment. 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 more than three percent impairment of his left lower extremity and 12 percent impairment of his right lower extremity for which he has received schedule awards.

FACTUAL HISTORY

On December 22, 1986 appellant, then a 32-year-old carrier, filed a traumatic injury claim alleging that he sustained low back pain as a result of a motor vehicle accident on December 10, 1986. On January 13, 1987 the Office accepted his claim for sprained back. Appellant filed an occupational disease claim on June 7, 1999 alleging that on March 11, 1999

he realized that his right lateral disc herniation at L5-S1 was due to his employment duties of lifting heavy boxes and climbing stairs. A magnetic resonance imaging (MRI) scan dated February 8, 1999 demonstrated a right lateral disc herniation at the L5-S1 level with encroachment of the S1 nerve root and annular bulging at L4-5. Appellant underwent a lumbar discectomy in July 1999. The Office accepted appellant's claim for lumbar disc herniation on August 2, 1999. It entered appellant on the periodic rolls on December 21, 1999. Appellant returned to light-duty work and alleged that he sustained a recurrence of total disability on March 9, 2000. The Office returned appellant to the periodic rolls on April 13, 2000. Dr. Massimo S. Fiandaca, a Board-certified orthopedic surgeon, performed a right L5-S1 far lateral discectomy, right L5 hemilaminectomy and right L5-S1 foraminotomy on May 9, 2000.

By decision dated September 8, 2003, the Office terminated appellant's wage-loss and schedule award benefits effective September 7, 2003 on the grounds that he refused suitable work. Appellant requested an oral hearing and by decision dated July 22, 2004, the Branch of Hearings and Review reversed the Office's decision.

Appellant requested a schedule award on November 4, 2005. In a report dated December 7, 2005, Dr. Rodney Brooks, a Board-certified internist, opined that appellant reached maximum medical improvement on August 22, 2005 and that he continued to experience back pain radiating into both legs with muscle weakness in both lower extremities and severe impairment of the hips of 20 percent due to loss of range of motion.

By decision dated December 27, 2005, the Office found that appellant's position as a modified letter carrier fairly and reasonably represented his wage-earning capacity and that he was not entitled to further compensation for wage loss.

The Office granted appellant a schedule award on June 9, 2006 awarding him 17.28 weeks of compensation. Appellant requested an oral hearing on June 24, 2006 and by decision dated November 7, 2006 the Branch of Hearings and Review set aside the Office's decision and remanded for issuance of a detailed schedule award determination. By decision dated November 16, 2006, the Office granted appellant a schedule award for three percent impairment of the right lower extremity and three percent impairment of the left lower extremity. Appellant again requested an oral hearing.

Appellant submitted a report dated April 19, 2007 from Dr. Brooks opining that he reached maximum medical improvement on October 3, 2002 and that he experienced low back pain radiating into both legs with muscle weakness and sensory deficits. Dr. Brooks diagnosed sciatic with lumbar radiculopathy. He stated that based on Table 15-15 of the A.M.A., *Guides* appellant had a Grade 2 sensory loss or a 61 to 80 percent impairment. Dr. Brooks also noted motor impairments and hip flexion of less than 50 percent in accordance with Table 17-9, page 537 of the fifth edition of the A.M.A., *Guides*.

By decision dated May 16, 2007, the Branch of Hearings and Review vacated the Office's November 16, 2006 decision and remanded the case for further review by the district medical adviser. In a report dated May 18, 2007, the district medical adviser concluded that appellant had three percent impairment of each lower extremity due to sensory impairment of the S1 nerve root which did not impact the hip. He disagreed with the Grade 2 sensory impairment

as found by Dr. Brooks and instead found it more likely that appellant had a Grade 4 impairment. The Office issued a schedule award decision on June 1, 2007 finding appellant had three percent impairment of each of the lower extremities. Appellant requested an oral hearing.

Appellant underwent a nerve conduction study and electromyography on June 29, 2007 which demonstrated the presence of a long-standing chronic left L5 radiculopathy. In a report dated July 30, 2007, Dr. Michael S. Sellman, a Board-certified neurologist, noted appellant's history of injury and noted his complaints of back pain radiating into his lower extremities. On examination he found that appellant was uncomfortable, had trouble bending forward in an attempt to reach his toes and had a positive straight leg raising test at 45 degrees on the left. Dr. Sellman found that appellant had depressed reflexes with no major abnormality of sensation and no muscular atrophy. He opined that appellant had reached maximum medical improvement and that appellant had 12 percent impairment of the whole person due to his March 11, 1999 employment injury.

By decision dated January 3, 2008, the Branch of Hearings and Review set aside the Office's June 1, 2007 decision finding that the physicians had not properly applied the A.M.A., *Guides* and that the Office should refer appellant, a statement of accepted facts and a list of specific questions to a Board-certified orthopedic surgeon for a second opinion evaluation and an impairment rating in accordance with the A.M.A., *Guides* and a *de novo* decision.

On January 16, 2008 the Office referred appellant for a second opinion evaluation with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon. In the accompanying statement of accepted facts, the Office stated that appellant had a "preexisting arthritic condition" which was not further identified. In a report dated February 8, 2008, Dr. Hanley noted appellant's symptoms of weakness on the right side with "dragging of the right foot" and numbness in the lateral aspect of the left calf and foot. He found that appellant had decreased sensation and tingling in both the L5 and S1 distributions along the left lateral calf down to the foot and across the top of the foot. Appellant exhibited similar numbness on the right to a lesser degree and weakness of dorsiflexion. He had no calf atrophy. Dr. Hanley diagnosed bilateral lumbar radiculopathy, L5-S1 with motor elements at the L5 level on the right and sensory only on the left. He found a Grade 4 weakness in accordance with Table 15-16 of 25 percent. Dr. Hanley multiplied the value of the L5 nerve root found at Table 15-18 of 37 percent by 25 percent impairment to reach an impairment of 9.25 percent. He found a Grade 4 sensory loss as well of 25 percent, or 2.5 percent impairment of the L5 and S1 nerve roots for 12 percent impairment of the right lower extremity. In appellant's left lower extremity, Dr. Hanley found Grade 4 or 25 percent sensory loss in both the L5 and S1 distributions for 3 percent of the left lower extremity. He concluded that appellant reached maximum medical improvement on August 22, 2005.

The district medical adviser reviewed Dr. Hanley's report on February 13, 2008 and concurred with his impairment ratings finding that appellant had 12 percent impairment of his right lower extremity and three percent impairment of his left lower extremity.

The Office issued a schedule award decision on March 11, 2008 finding that appellant had an additional nine percent impairment of his right lower extremity. Appellant requested an oral hearing on April 1, 2008.

Appellant filed a recurrence of disability claim on July 11, 2008 noting that he returned to light-duty work on August 22, 2005 as an acting supervisor and alleging on June 13, 2008 he stopped work due to a recurrence of total disability with numbness in his left leg. He stated that on June 12, 2008 he lifted a tub of mail and felt a pull in his left lower back with numbness and weakness of his left leg from the hip to the foot. A diagnostic report dated June 19, 2008 demonstrated moderate degenerative disc disease at L5-S1 with moderate narrowing of the disc as well as marked narrowing of the left hip with cystic changes involving the left femoral head suggestive of subcondral cyst and severe arthritis. In a letter dated July 29, 2008, the Office suggested that appellant's claim should be developed as a new traumatic injury. Appellant requested compensation beginning August 8, 2008. In a letter dated October 24, 2008, the Office requested additional medical evidence in support of appellant's claim for total disability.¹

Appellant testified at the oral hearing on August 13, 2008 and alleged that his left hip arthritis should be considered in his permanent impairment rating. The hearing representative stated that additional medical evidence was needed to determine whether appellant's left hip condition was a consequence of the work injury and noted that the Office had not yet accepted this condition as employment related. By decision dated October 24, 2008, the Branch of Hearings and Review affirmed the Office's December 12, 2007 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ 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 regulations 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

¹ As the Office has not issued a final decision on this issue, the Board will not address it for the first time on appeal. 20 C.F.R. § 501.2(c).

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).

claimant is entitled to such an award.⁶ However, 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.⁷

It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.⁸ The Board has further held that when a claimant has two independent impairment components from one injury resulting in impairment to the same scheduled member, each of which were due to separate pathomechanics which occurred at separate times, then the components must both be evaluated under the A.M.A., *Guides* to ascertain the claimant's total impairment to the scheduled member.⁹

ANALYSIS

The Board finds this case not in posture for decision. The Office accepted that appellant sustained a herniated disc at L5-S1 due to his accepted employment injury on June 7, 1999. Appellant alleged that he had permanent impairment to his lower extremities as a result of this condition. The Office granted appellant a schedule award which considered the sensory and motor deficits of his lower extremities due to nerve root impairment in his lumbar spine as a result of his accepted employment injury. However, the record supports that appellant has left hip impairment due to arthritis and a subchondral cyst. Beginning in 2005 appellant's physicians supported that he had limited range of motion of the left hip.

The statement of accepted facts developed by the Office for referral to the second opinion physician included the statement that appellant had a preexisting arthritic condition, but did not identify the location of this condition. The Office medical examiner excluded hip impairment from his schedule award rating in May 2007 noting that the hip impairment was not due to the accepted herniated disc. At his most recent oral hearing on August 13, 2008, appellant asserted that his left hip conditions should be included in his permanent impairment rating. The Office has not developed the issue of whether appellant's left hip arthritis preexisted his June 7, 1999 employment injury and should be included in his schedule award determination based on Board precedent. Furthermore, appellant indicated at the oral hearing that his left hip arthritis was caused or aggravated as a consequence of his accepted back injury.

The extent of appellant's permanent impairment of his lower extremities cannot be definitively determined until the Office develops and issues appropriate decisions determining whether or not appellant's left hip arthritis preexisted his accepted employment injury. If this condition preexisted the employment injury, then the Office should include any impairment resulting from this condition in determining appellant's permanent impairment in accordance with the provisions of the A.M.A., *Guides* and Board precedent. If appellant's hip arthritis did not preexist his employment injury, the Office should determine whether or not appellant's left

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

⁷ *Id.*

⁸ *Michael C. Milner*, 53 ECAB 446, 450 (2002).

⁹ *Cristeen Falls*, 55 ECAB 420 (2004).

hip arthritis developed or was aggravated as a consequence of his accepted back injury. If appellant's left hip condition is a consequential injury, the Office should then determine whether appellant is entitled to an additional impairment rating based findings of whether separate pathomechanics occurred at separate times which resulted in the left lower extremity impairments.

After this and such further development as the Office deems necessary, the Office should issue an appropriate decision considering all applicable impairment of appellant's lower extremities.

CONCLUSION

The Board finds that the case is not in posture for decision as the record strongly suggests that appellant had a preexisting or consequential injury to his left hip which the Office has not appropriately developed in determining his permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: November 24, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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