United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 12-377**
	)	**Issued: July 5, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 13, 2011 appellant, through his attorney, filed a timely appeal from a September 20, 2011 decision of the Office of Workers' Compensation Programs (OWCP) that denied his claim for an additional schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 sustained permanent impairment to his left lower extremity or more than 36 percent impairment of the right lower extremity, 38 percent for the right upper extremity and 7 percent for the left upper extremity.

On appeal, appellant's attorney contends that the medical evidence of record establishes increased impairment to appellant's left arm, right leg and of his left leg.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case was previously before the Board. In a September 1, 2005 decision, the Board affirmed OWCP's finding that appellant had 36 percent right leg impairment.[2] In an August 3, 2006 decision, the Board affirmed an OWCP finding that he had no more than seven percent impairment of the left arm and that the case not in posture for decision regarding his right arm.[3] The Board noted that an OWCP medical adviser did not sufficiently explain why the right upper extremity impairment rating of Dr. Perry Stein, an attending Board-certified physiatrist, was not correct. The law and the facts of the previous Board decisions are incorporated herein by reference.

On October 2, 2006 Dr. Henry J. Magliato, an OWCP medical adviser Board-certified in orthopedic surgery, reviewed the medical evidence and explained his disagreement with Dr. Stein's ratings. By decision dated October 11, 2006, OWCP found that appellant did not have right upper extremity impairment greater than the 38 percent.

On September 5, 2009 appellant filed a schedule award claim. He submitted an October 15, 2009 functional capacity evaluation (FCE) that provided range of motion findings for his upper and lower extremities. The report indicated that range of motion was done in conformance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In accordance with the fifth edition of the A.M.A., *Guides*, appellant had a 34 percent right upper extremity impairment, a 30 percent left upper extremity impairment, a 21 percent right lower extremity impairment, a 24 percent left lower extremity impairment, an 11 percent impairment of the cervical spine and a 12 percent impairment of the lumbar spine.

In a November 5, 2009 report, Dr. Igor Stiler, an attending Board-certified neurologist, noted appellant's complaint of severe neck and low back pain radiating to the extremities with numbness and tingling on a constant basis. He provided physical examination findings including cervical and lumbar range of motion measurements. Dr. Stiler reviewed the October 15, 2009 FCE and advised that appellant had a previous test on March 27, 2003. He stated that, "Using the current accepted A.M.A., *Guidelines*," appellant's cervical spine impairment had increased from 11 percent in 2003 to 24 percent; his lumbar spine impairment had increased from 6 percent to 12 percent; his right upper extremity impairment decreased from 38 percent to 34 percent; his left upper extremity impairment increased from 7 percent to 30 percent; and his left lower extremity impairment increased from 14 percent to 45 percent. Dr. Stiler listed a total body impairment of 69 percent in 2009. He concluded that appellant had reached maximum medical

[2] Docket No. 05-787 (issued September 1, 2005). On December 11, 1991 appellant, a special delivery messenger, was injured when a cement step collapsed under him as he delivered mail. He stopped work and did not return. Appellant received appropriate compensation until he retired on October 31, 2002. He elected retirement benefits under the Office of Personnel Management. The accepted conditions are multiple site contusions, lumbar and cervical radiculitis, concussion with cerebral vestibulopathy and depressive disorder. Under a separate claim for a July 12, 1976 injury, appellant had a work-related right ankle sprain and osteochondritis dessicans.

[3] Docket No. 06-421 (issued August 3, 2006). On November 18, 2005 appellant was granted a schedule award for 38 percent right upper extremity impairment and a 7 percent left upper extremity impairment.

improvement with an overall worsening of his functional capacity based on decreased range of motion, muscular weakness and sensory abnormalities.

In a December 10, 2009 report, Dr. Magliato reviewed the medical records and Dr. Stiler's November 5, 2009 report. He found that the report was of no value as Dr. Stiler did not identify any of the tables he used in the sixth edition of the A.M.A., *Guides*[4] to assess the degree of impairment for appellant's upper and lower extremities. The medical adviser explained that Dr. Stiler should have identified a diagnostic class, provided appropriate modifiers and applied the net adjustment formula.

In a February 19, 2010 report, Dr. Michael Chillemi, a chiropractor, provided an impairment evaluation under the sixth edition of the A.M.A., *Guides*, based on a February 4, 2010 physical examination. Dr. Chillemi advised that appellant had 25 percent upper extremity impairments of both arms and lower extremity impairments of 49 percent to both legs. He also rated cervical, thoracic and lumbar spine impairments of 30 percent each.

On April 16, 2010 Dr. Magliato again reviewed the record and reiterated his conclusion that Dr. Stiler's November 5, 2009 ratings were of no value. He recommended a second-opinion evaluation.

On May 14, 2010 OWCP referred appellant to Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 14, 2010 report, Dr. Rubinfeld reviewed the statement of accepted facts, medical records and set forth findings of his June 7, 2010 examination. He advised that appellant was unable to walk on his heels and toes but could get on and off the examination table unassisted and demonstrated a normal gait pattern. Examination of the shoulders demonstrated decreased range of motion and discomfort with motion. Examination of both elbows and wrists demonstrated normal range of motion. Phalen's and Tinel's signs were negative. The hands revealed no atrophy with good grip strength, full range of motion in all fingers and no sensory deficit. Range of motion of the hips was normal and diminished in both knees. Lachman's sign and McMurray's test were negative bilaterally. The feet revealed normal arches and normal range of motion. The cervical and lumbar spine demonstrated decreased range of motion. Motor strength was normal in the upper and lower extremities. Sensation was decreased in both upper extremities and lower extremities which, Dr. Rubinfeld advised, was a nonphysiologic finding. He indicated that appellant's complaints of pain appeared to be well beyond those expected in a chronic orthopedic condition involving the neck or back. Dr. Rubinfeld diagnosed status post right ankle surgery in 1977, lumbar radiculitis, cervical radiculitis and contusion. He advised that appellant had reached maximum medical improvement as of the date of his examination and had no impairment of any extremity. Dr. Rubinfeld completed an impairment worksheet, advising that appellant had no impairment. In a supplementary report dated July 12, 2010, he stated that, Table 15-19, Table 15-20,

[4] A.M.A., *Guides* (6th ed. 2008).

Table 5-21, Table 16-11 and Table 16-12 of the sixth edition of the A.M.A., *Guides* would be applicable but for the lack of physical findings; therefore, appellant had no impairment.[5]

By report dated September 1, 2010, Dr. Magliato, the medical adviser, reviewed Dr. Rubinfeld's June 14 and July 12, 2010 reports. He advised that maximum medical improvement was reached on June 10, 2010 and found that Dr. Rubinfeld's examination of the upper and lower extremities revealed no objective abnormal neurological findings or radiculopathy. Dr. Magliato contended that appellant had no impairment of any upper or lower extremity.

By decision dated September 22, 2010, OWCP found the weight of the medical evidence rested with the opinion of Dr. Rubinfeld, as reviewed by the medical adviser and concluded that appellant was not entitled to an additional schedule award for his accepted conditions.

On June 16, 2011 appellant, through his attorney, requested reconsideration. Counsel asserted that the medical evidence of record, including the February 4, 2010 FCE and Dr. Stiler's reports, established entitlement to increased schedule awards. In a November 9, 2010 report, Dr. Stiler noted that appellant was seen in follow up. He noted appellant's complaints of radiating neck and low back pain and provided physical examination findings. In a June 7, 2011 report, Dr. Stiler reiterated appellant's complaints of neck and low back pain. He advised that appellant had difficulty using his hands due to weakness and pain. Dr. Stiler provided cervical and lumbar spine range of motion findings and strength testing results for appellant's upper and lower extremities, all of which were 5/5 except hand grip which he graded as 4+/5. He advised that sensory examination demonstrated no abnormalities, deep tendon reflexes were 2+/4 bilaterally in the upper and lower extremities and there was no dysmetria, ataxia or dysdiadochokinesis.

In a September 20, 2011 decision, OWCP denied modification of the September 22, 2010 decision. It found that Dr. Stiler's reports did not comport with the A.M.A., *Guides* and were, therefore, of diminished probative value and insufficient to establish a conflict in medical evidence. OWCP concluded that appellant had not established entitlement to schedule awards greater than 36 percent for the right lower extremity, 38 percent for the right upper extremity and 7 percent for the left upper extremity, previously awarded.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing federal regulations,[6] 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, FECA does not specify the manner in which the percentage of loss shall be determined. For

[5] In a July 19, 2010 report, Dr. Robert Pick, a Board-certified orthopedic surgeon and an OWCP medical adviser, advised that a supplementary report was needed from Dr. Rubinfeld as he did not reference the A.M.A., *Guides* by using a regional diagnostic grid and consequently his report was of no probative value. Dr. Rubinfeld, however, had already prepared his supplementary report.

[6] 20 C.F.R. § 10.404.

consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] For decisions issued after May 1, 2009, the sixth edition will be used.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[13]

ANALYSIS

The Board finds that appellant has not established that he has greater impairment of his upper extremities or his right lower extremity or established any impairment of his left lower extremity. Appellant received schedule awards for 36 percent impairment of the right leg, 7 percent impairment of the left arm and 38 percent impairment of the right arm. On September 15, 2009 he filed a claim for additional schedule awards.

It is appellant's burden to submit sufficient evidence to establish the extent of permanent impairment.[14] The accepted conditions are multiple site contusions, lumbar and cervical radiculitis, concussion with cerebral vestibulopathy, depressive disorder, right ankle sprain and osteochondritis dessicans.

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[7] *Id*. at § 10.404(a).

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

[9] FECA Bulletin No. 09-03 (issued March 15, 2009).

[10] A.M.A., *Guides, supra* note 4 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[11] *Id*. at 385-419.

[12] *Id*. at 411.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[14] *See Annette M. Dent*, 44 ECAB 403 (1993).

The Board finds that the weight of the medical evidence rests with the June 14 and July 12, 2010 reports of Dr. Rubinfeld, a Board-certified orthopedic surgeon and OWCP referral physician, who found that appellant had no impairment of his extremities. Dr. Rubinfeld provided range of motion findings for all extremities. While he noted diminished range of motion in appellant's shoulders and knees, he also explained that appellant had discomfort with motion and that his complaints of pain were well beyond those expected in a chronic orthopedic condition involving the neck or back. Phalen's, Tinel's, Lachman's and McMurray's tests were all normal. Dr. Rubinfeld found a normal strength examination and indicated that, since appellant had decreased sensation over all extremities, this was a nonphysiologic finding. He advised that, although Table 15-19, Table 15-20, Table 15-21, Table 16-11 and Table 16-12 could be applicable, since appellant demonstrated no impairment on physical examination, he had no basis to provide a rating under the A.M.A., *Guides*.

On September 1, 2010 Dr. Magliato, an OWCP medical adviser, reviewed Dr. Rubinfeld's reports. The medical adviser indicated that, as Dr. Rubinfeld's examination of appellant's upper and lower extremities revealed no objective abnormal neurological findings and no radiculopathy, with a zero percent impairment, there was no basis to assess appellant's impairment under the A.M.A., *Guides*.

Appellant submitted an October 15, 2009 FCE that included an impairment rating. This report, however, does not indicate who performed the study and indicated that it was done under the fourth and fifth editions of the A.M.A., *Guides*. FCE also included impairment ratings for appellant's cervical and lumbar spine. Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[15] In 1960, amendments to FECA 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 FECA 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.[16] As noted above, for decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[17]

While Dr. Stiler noted on November 5, 2009 that he had reviewed the October 15, 2009 FCE and stated that he was using the accepted A.M.A., *Guides*, he did address the sixth edition of the A.M.A., *Guides* or refer to any specific figures or tables to support his findings that appellant had impairments of his spine and each extremity. In a November 9, 2010 report, he merely noted appellant's complaints and provided physical findings. Thus, neither FCE nor Dr. Stiler's reports constitute probative medical evidence regarding the degree of appellant's impairment to his extremities. Moreover, in his June 7, 2011 report, Dr. Stiler advised that strength tests were 5/5 in appellant's upper and lower extremities except hand grip which was

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

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

[17] FECA Bulletin No. 09-03 (issued March 15, 2009).

4+/5. Sensory examination also demonstrated no abnormalities. Dr. Stiler provided no impairment rating or explained the discrepancies noted on physical examination of appellant.

Appellant also submitted a February 19, 2010 impairment evaluation from Dr. Chillemi, a chiropractor. Under section 8101(2) of FECA, chiropractors are considered physicians and their reports considered medical evidence, only to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[18] Dr. Chillemi's report is of no probative medical value on the issue of the extent of permanent impairment to appellant's arms or legs.[19]

As there is no probative medical evidence of record, other than Dr. Rubinfeld's reports, that, addresses the extent of appellant's permanent impairment under the appropriate edition of the A.M.A., *Guides*, appellant has not established that he is entitled to schedule awards greater than those previously received.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established entitlement to an additional schedule award for his bilateral upper extremities or his right lower extremity and has not established entitlement to a schedule award for his left lower extremity.

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[18] 5 U.S.C. § 8101(2).

[19] *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2012
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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