United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 07-1374**
	)	**Issued: November 23, 2007**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONS INSTITUTION, Sandstone, MN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 25, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated August 23, 2006 and February 2, 2007. 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 met his burden of proof to establish that he has additional lower extremity impairment caused by his accepted back conditions which would entitle him to an additional schedule award.

FACTUAL HISTORY

This case has been before the Board on three prior occasions. In an April 8, 1999 decision, the Board found that appellant was entitled to a three percent right lower extremity impairment. The Board found that a conflict in medical evidence existed regarding the extent of

appellant's lower extremity impairments caused by his accepted herniated disc at L5-S1.[1] On August 18, 1999 the Office granted appellant a schedule award for 11 percent left lower extremity impairment. By decision dated January 27, 2003, the Board affirmed the Office decisions dated January 22 and May 2, 2002 which denied appellant's request for reimbursement of travel expenses.[2] In a March 15, 2007 decision, the Board found that appellant had not established that his cardiac condition was a consequence of his accepted herniated disc at L5-S1 or caused by employment factors.[3] The facts of the previous Board decisions are incorporated herein by reference.[4]

On April 18, 2003 appellant filed a schedule award claim. He submitted an April 20, 2005 impairment rating from Dr. Fozia A. Abrar, Board-certified in occupational medicine, who diagnosed work-related chronic low back pain with bilateral radicular symptoms, status post multilevel fusion and decompressive surgery. Dr. Abrar advised that, in accordance with Table 15-3 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[5] appellant had 28 percent whole person impairment due to his lumbar spine injury. On September 12, 2005 an Office medical adviser reviewed Dr. Abrar's report. He advised that maximum medical improvement was reached on June 28, 2005 and that, pursuant to Figure 17-10 of the A.M.A., *Guides*, appellant had no ratable impairment.

Dr. Bryan L. Lynn, Board-certified in orthopedic surgery, provided treatment notes dated June 27, 2005 to May 8, 2006 in which he reviewed the history of injury and appellant's medical history. He diagnosed status post remote anterior posterior fusion, L4 to sacrum, degenerative changes L2-3 and L3-4 and left-sided L3-4 neural foraminal stenosis.

Dr. Beth A. Baker, Board-certified in occupational medicine, provided an impairment rating dated March 7, 2006. She noted that appellant had a broad-based gait and used a walker or grocery cart to balance when walking although he did not use a cane or crutch at home and opined that his gait disturbance was caused by both arthritis in the hip and appellant's surgical procedures and subsequent radiculopathy. Dr. Baker found that, under Table 17-5 of the A.M.A., *Guides*, appellant had a 15 percent whole person impairment due to gait derangement. She also advised that appellant had decreased sensation to pinprick over the dorsum of both feet in the distributions of the lateral femoral cutaneous, sural and superficial peroneal nerves which, pursuant to Table 17-37, represented one percent, one percent and two percent impairment of each lower extremity, respectively, for a total four percent impairment. Dr. Baker found that, under Table 16-10, appellant had a Grade 4 impairment or 25 percent which, when multiplied by

[1] Docket No. 97-1861 (issued April 8, 1999).

[2] Docket No. 02-1628 (issued January 27, 2003).

[3] Docket No. 06-2009 (issued March 15, 2007).

[4] The Office accepted that appellant, a former cook foreman, sustained an employment-related herniated disc at L5-S1. He retired from the employing establishment on December 3, 1998 and underwent surgical procedures in 1999, 2000 and 2002.

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

the 4 percent found for each lower extremity, equaled a 1 percent impairment on the right and a 1 percent impairment on the left. She then combined the total 2 percent sensory lower extremity impairment with the 15 percent whole body impairment, to total a 15 percent whole body impairment. On June 28, 2006 the Office medical adviser reviewed Dr. Baker's report. He noted her opinion that appellant's gait impairment was due to both arthritis of the hip and secondary to surgery with subsequent radiculopathy and advised that, as this was a nonspecific rating, appellant would not be entitled to an additional impairment for gait derangement. The Office medical adviser agreed with Dr. Baker's findings pursuant to Tables 17-37 and 16-10 that appellant had one percent impairment of each lower extremity.

By decision dated August 23, 2006, the Office found that appellant was not entitled to an increased schedule award.

On September 12, 2006 appellant requested a review of the written record and resubmitted the reports from Dr. Abrar and Dr. Baker and the July 15, 1999 report of Dr. Glenn R. Butterman that had previously been reviewed by the Office prior to the August 18, 1999 schedule award decision. In a May 15, 2003 report, Dr. John G. Stark referred appellant to an occupational therapist or rehabilitation specialist for an impairment rating. In a December 16, 2003 report, Courtney L. Scott, PA-C, advised that, under Minnesota law, appellant would have received a total of 26 percent in state workers' compensation. On December 8, 2006 Ben Waxman, PA-C, with Dr. Lynn's office, noted appellant's complaints of lumbosacral pain. He diagnosed L4 to sacrum fusion, degenerative changes at L2-3 and L3-4 and moderate pain control.

By decision dated February 2, 2007, an Office hearing representative affirmed the August 23, 2006 decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[6] and section 10.404 of the implementing federal regulations,[7] 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 A.M.A., *Guides*[8] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[9]

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] A.M.A., *Guides*, *supra* note 5.

[9] *See Joseph Lawrence, Jr., supra* note 5; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

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.[10] 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.[11] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[12]

A claimant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.[13] Where a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his or her condition, the claimant bears the burden of proof to establish a greater impairment causally related to the employment injury.[14]

Chapter 17 of the A.M.A., *Guides* set forth the tables and grading schemes used to evaluate impairments of the lower extremities. Section 17.2l, instructs that partial peripheral nerve injuries causing sensory or motor deficits should be rated as in the upper extremities.[15] The examiner first identifies the injured nerve and finds the maximum allowed for the lower extremity at Table 17-37, entitled "Impairments Due to Nerve Deficits."[16] The examiner then refers to Table 16-10 to determine impairment of the extremity due to sensory deficit or pain[17] and consults Table 16-11 to evaluate impairment due to motor deficits based on individual muscle ratings.[18] Once the examiner has graded the severity of sensory and motor deficits and identified the proper percentages under Tables 16-10 and 16-11, those percentages are to be combined, as demonstrated in example 17-17.[19]

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

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

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

[13] *Tommy R. Martin*, 56 ECAB ____ (Docket No. 03-1491, issued January 21, 2005).

[14] *Edward W. Spohr*, 54 ECAB 806 (2003).

[15] A.M.A., *Guides*, *supra* note 5 at 550.

[16] *Id.* at 552.

[17] *Id.* at 482.

[18] *Id.* at 484.

[19] *Id.; see Catherine M. Milano*, 55 ECAB 637 (2004).

Section 17.2c of the fifth edition of the A.M.A., *Guides,* precludes the use of gait derangement to calculate impairment if a more specific method is available to assess the impairment. An impairment due to a gait derangement should be supported by pathologic findings such as x-rays.[20]

ANALYSIS

The Board finds that appellant has not established that he has more than 11 percent impairment of his left lower extremity due to his injury.

The only reports that provided an impairment analysis were those of Drs. Butterman, Abrar and Baker.[21] Dr. Butterworth's report had previously been reviewed by the Office and provided the basis for appellant's 1999 schedule award. It is not probative medical evidence regarding his condition in 2005-06.[22] Dr. Abrar utilized Chapter 15 of the A.M.A., *Guides,* which provides impairment ratings for the spine. A schedule award is not payable under the Act for injury to the spine.[23] His report is therefore of diminished probative value. Schedule awards, however, may be awarded 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. 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.[24] As noted, appellant previously was rated as having 11 percent of his left lower extremity. Dr. Baker advised that, under Table 17-5, appellant had a 15 percent whole person impairment based on gait derangement. Section 17.2c of the fifth edition of the A.M.A., *Guides,* precludes the use of gait derangement to calculate impairment if a more specific method is available to assess the impairment. Moreover, any impairment rating due to a gait derangement should be supported by pathologic findings, such as x-rays.[25] Dr. Baker opined that both hip arthritis and appellant's previous surgery and radiculopathy caused his gait derangement. She, however, did not provide objective evidence such as x-ray findings to support her conclusion that appellant had a 15 percent whole person impairment based on his gait impairment. Therefore, the Office medical adviser properly found that appellant was not entitled to a schedule award for this impairment.

The Office medical adviser properly utilized Dr. Baker's physical findings, however, to determine appellant's impairment rating for his lower extremity sensory deficits of the lateral

[20] A.M.A., *Guides, supra* note 5 at 529; *see Rose V. Ford*, 55 ECAB 449 (2004).

[21] The Board also notes that the reports of Ms. Scott and Mr. Waxman would not be considered probative medical evidence in any case as a physician's assistant is not considered a physician under the Act. *Ricky S. Storms*, 52 ECAB 349 (2001).

[22] *See generally Conard Hightower*, 54 ECAB 796 (2003).

[23] *Pamela J. Darling, supra* note 10.

[24] *Thomas J. Engelhart, supra* note 11.

[25] A.M.A., *Guides, supra* note 5 at 529; *see Rose V. Ford, supra* note 20.

femoral, sural and superficial peroneal nerves. He agreed with Dr. Baker that under Tables 17-37 and 16-10 of the A.M.A., *Guides*, appellant would be entitled to one percent, one percent and two percent impairment of each lower extremity for these nerves respectively, for a total one percent impairment to his right lower extremity and a one percent impairment of his left lower extremity.[26] Because these impairments are less than the 3 percent and 11 percent previously awarded for his lower extremities, appellant has not established that he is entitled to an additional schedule award.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to greater schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 2, 2007 and August 23, 2006 be affirmed.

Issued: November 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[26] The Board notes that the Office medical adviser's June 28, 2006 report also includes contradictory conclusions that appellant had left lower extremity impairments of two percent for the lateral femoral cutaneous and sural nerves and a five percent impairment of the superficial peroneal nerve, for a total two percent left lower extremity impairment. This, however, does not comport with Dr. Baker's findings and is considered a typographical error. Nonetheless, as the 2 percent found is also less than the schedule awards for 3 percent on the right and 11 percent on the left previously awarded, using these figures would not entitle appellant to an increased award.