



## **FACTUAL HISTORY**

On May 24, 2002 appellant, then a 45-year-old letter carrier, filed a claim for compensation for a traumatic injury alleging that on May 22, 2002 he sustained an injury to his left hip and leg when he felt pain while lifting and scanning a parcel. By letter dated July 15, 2002, the Office accepted his claim for lower back strain, left hip and left thigh strain.

On May 6, 2003 Dr. James J. Boyle, appellant's treating physician and a Board-certified specialist in emergency medicine, diagnosed herniated nucleus pulposus and determined that this condition became permanent and stationary on May 6, 2003. He further noted:

**“DISABILITY STATUS/PERMANENT AND STATIONARY DATE:** It is my opinion this patient's condition became permanent and stationary on [May 6, 2003].”

**“FACTORS OF DISABILITY:**

“Objective Factors of Disability -- The patient has lost approximately 25 [percent] of his expected flexion and extension of his lumbosacral spine. Radiologic studies show abnormalities detailed above under [r]eview of [r]adiologic [s]tudies.”

“Subjective Factors of Disability -- It is my opinion that [appellant's] subjective factors of disability can best be characterized as constant slight discomfort in the lower back (left greater than right) with intermittent radiation to the left buttock and both anterior thighs (left greater than right). His discomfort becomes moderate with prolonged standing, repeated bending or heavy lifting.”

**“WORK RESTRICTIONS/PRECLUSIONS:** The patient is precluded from heavy work and from prolonged standing. In addition, I would recommend that when sitting he should use a chair or a stool with a back support.

**“CAUSATION:** More likely than not, the above described disability was the result of the industrial injury of [May 22, 2002].

On May 14, 2003 appellant filed a claim for a schedule award.

On June 30, 2003 appellant filed a claim requesting leave buyback from June 21 to 26, 2003. He submitted a time analysis form, noting that he took 8 hours of sick leave on June 21, 24 and 25, 2003, 4.75 hours of sick leave on June 26, 2003 and 3.75 hours of annual leave on June 26, 2003. Appellant also submitted notes from Dr. Boyle commencing from a March 31, 2003 examination and continuing through a June 24, 2003 examination. Dr. Boyle noted that appellant was off work June 21, 24 and 26, 2003, but that he could return to work on June 27 with the same permanent restrictions.

By letter dated July 3, 2003, the Office referred appellant to Dr. Alan Kimelman, a Board-certified physiatrist, to determine whether he sustained a permanent impairment as a result of his work injury. In a medical report dated July 24, 2003, he discussed appellant's clinical

history and noted that a magnetic resonance imaging conducted on October 1, 2002 revealed degenerative disc disease at L3-4, L4-5 and L5-S1 with marked desiccation absent reduced height at any level. The report also listed clinical findings. No lower extremity atrophy or weakness was noted.

By letter to appellant dated August 21, 2003, the Office requested further information. In a report dated August 23, 2003, an Office medical adviser reviewed Dr. Boyle's May 6, 2003 report and Dr. Kimelman's report of July 24, 2003. He stated:

“[Appellant's] subjective complaints of pain which radiates into the anterior aspects of both thighs and involves the left buttock would be graded a maximal [G]rade IV as per the Grading Scheme<sup>1</sup> (Table 15-15, [p]age 424, fifth edition of the A.M.A., *Guides*). This would be 25 [percent] grade of a maximal 5 [percent] for branches of L3 (Table 15-18), equivalent thus to a 1.25 or rounded off to a 1 [percent] impairment for the bilateral lower extremity symptomatology. Records do not describe any loss of hip range of motion for a 0 [percent] impairment. The records do not indicate any loss of knee, ankle, subtalar or toe range of motion for a 0 [percent] impairment. There was no atrophy or weakness for a 0 [percent] with date of maximum medical improvement reached by the evaluation of [July 24, 2003].”

“It should be noted that this 1 [percent] impairment of each lower extremity or leg represents the permanent partial impairment of each lower extremity or leg as a result of the work-accepted strains, and does not represent a whole-person award.”

By decision dated October 8, 2003, the Office granted a schedule award for a one percent impairment of both lower extremities.

On November 3, 2003 appellant requested reconsideration and submitted a November 12, 2003 work capacity limitations form signed by Dr. Boyle, a statement from Dr. Boyle indicating that appellant was totally disabled from February 20 to 4, 2003 and an industrial injury form in which Dr. Boyle restricted appellant to no lifting over five pounds. Appellant also submitted documents regarding his request for an ergonomic chair. By decision dated December 15, 2003, the Office denied appellant's request for reconsideration.

On November 6, 2003 the Office denied appellant's claim for temporary total disability from June 21 to 26, 2003.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specific members, functions

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<sup>1</sup> Grade 4 is characterized by “Distorted superficial tactile sensibility (diminished light touch) with or without minimal abnormal sensations or pain that is forgotten during activity. A.M.A., *Guides* 424, Table 15-15.

and organs of the body.<sup>2</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, as the appropriate standard for evaluating schedule losses.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has no more than a one percent impairment to each lower extremity. Dr. Boyle opined that appellant became permanent and stationary on May 6, 2003. He noted that appellant had slight discomfort in the lower back with intermittent radiation to the left buttock and both anterior thighs. Dr. Kimelman indicated in his clinical findings that no lower extremity atrophy or weakness was noted. As neither physician indicated a level of impairment, the Office referred appellant's records to the Office medical adviser, who noted that neither physician indicated any loss of hip range of motion, loss of knee, ankle or subtalar range of motion or atrophy or weakness and appellant had no impairment based on these factors. The Office medical adviser proceeded to evaluate impairment by utilizing Table 15-15 at page 424 of the A.M.A., *Guides*, which evaluates appellant's impairment due to sensory loss. He noted that the descriptions with regard to sensory deficit given by Drs. Boyle and Kimelman indicated that appellant had a Grade 4 classification, which is characterized by tactile sensibility that is forgotten during activity.<sup>4</sup> The Office medical adviser noted that this would represent 25 percent grade of the 5 percent impairment allowed for branches of L3 pursuant to Table 15-18 on page 424 and that this equaled a 1.25 percent impairment, which was rounded to a 1 percent impairment of each lower extremity. As the Office medical adviser was the only physician to properly apply the A.M.A., *Guides*, his opinion represent the weight of medical opinion.

### **LEGAL PRECEDENT -- ISSUE 2**

To establish a period of disability, appellant must submit evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history concludes that the disabling condition is causally related to the employment injury and supports the conclusion with sound medical reasoning.<sup>5</sup>

### **ANALYSIS -- ISSUE 2**

In the instant case, the only medical report that appellant submitted with regard to the period of the alleged disability from June 21 to 26, 2003 was the report of Dr. Boyle. Although he noted that appellant was off work for June 21, 24 and 26, 2003, he gave no explanation. Dr. Boyle did not indicate that he medically excused appellant from work during this period; he

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404 (1999).

<sup>4</sup> A.M.A., *Guides* 424, Table 15-15.

<sup>5</sup> See *Carolyn F. Allen*, 47 ECAB 240, 245 (1995); *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

did not explain why appellant was off work during this period and he did not relate appellant's condition at this time to his work-related injury. Accordingly, the medical evidence is not sufficient to establish disability from June 21 to 26, 2003 due to the accepted conditions.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulation provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>6</sup> Section 10.608(b) provide that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>7</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>8</sup>

### **ANALYSIS -- ISSUE 3**

Most of the evidence appellant submitted with his request for reconsideration had already been considered by the Office and accordingly is not sufficient to entitle appellant to merit review. The reports of Dr. Boyle concerning appellant's condition in November 2003 is not relevant to any of the issues at hand. Furthermore, appellant did not contend that the Office erroneously applied or interpreted a specific point of law and he did not advance a relevant legal argument not previously considered by the Office. Accordingly, appellant's request for reconsideration was not require a review on the merits.

### **CONCLUSION**

The Office properly determined that appellant had a two percent impairment to his lower extremities. The Office also properly denied appellant's claim for compensation from June 21 to 26, 2003. Finally, the Office properly denied appellant's request for reconsideration.

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<sup>6</sup> 20 C.F.R. § 10.505(b)(2) (2003).

<sup>7</sup> 20 C.F.R. § 10.608(b) (2003).

<sup>8</sup> *Annette Louise*, 54 ECAB \_\_\_\_ (Docket No. 03-335, issued August 26, 2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 15, November 6 and October 8, 2003 are hereby affirmed.

Issued: August 9, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member