

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

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**AUGUSTER S. MORTON, Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Lexington, KY, Employer** )

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**Docket No. 04-1592**  
**Issued: January 4, 2005**

*Appearances:*  
*Auguster S. Morton, pro se*  
*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On June 4, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit denial dated December 18, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award decision.

**ISSUE**

The issue is whether appellant has more than a 19 percent permanent impairment to each of his right and left arms and a 5 percent permanent impairment for each of his right and left legs.

**FACTUAL HISTORY**

Appellant, a 58-year-old letter carrier, filed a Form CA-2 claim for benefits on August 10, 2000 alleging that he sustained a chronic injury to his shoulder causally related to factors of his employment. He underwent cervical surgery on September 26, 2000 which was performed by Dr. William H. Brooks, a Board-certified neurologist. The Office denied the claim by decisions dated November 2, 2000 and April 16, 2001. In a conference dated August 1, 2001,

appellant advised the Office that he had filed a Form CA-1 traumatic injury claim on July 1, 1999 based on a fall he sustained when he fell backwards trying to avoid a dog attack. He stated that he fell on his right elbow, shoulder and entire right side of his body and also experienced pain in his neck. The Office indicated that it would either combine the two claims or delete the occupational disease claim. Appellant was given 15 days to provide additional factual and medical evidence in support of his claim. He submitted a July 2, 2001 accident report and August 13, 2001 statement which supported his account of the July 1, 2001 accident and medical evidence which indicated that he sustained injuries causally related to the accident.

By decision dated August 30, 2001, the Office accepted appellant's August 2000 claim for herniated nucleus pulposus at C3-5 with C4 corpectomy, interbody fusion at C3-5, internal fixation with Atlantic anterior cervical plate. The Office stated that the claim was being accepted as a recurrence of the July 1, 1999 claim, which was combined with the August 2000 claim.

On September 7, 2001 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use, of his right and left lower and upper extremities.

In a report dated February 4, 2004, Dr. Brooks determined that appellant had a 58 percent impairment of the whole person based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition), [the A.M.A., *Guides*]. He, relying on Table 15-6, page 396 of the A.M.A., *Guides*, rated a 39 percent impairment of the whole person for a Class 2 impairment at Table 15-6(b) and a 19 percent impairment of the whole person for a Class 2 impairment at Table 15-6(c).

The Office referred appellant for a second opinion examination with Dr. Russell L. Travis, a Board-certified neurosurgeon, who submitted a report dated June 12, 2002. He rated a 39 percent impairment of the whole person. Dr. Travis declined, based on his interpretation of the A.M.A., *Guides*, to provide a specific rating based on the degree of permanent impairment of the upper extremity due to loss of function for sensory deficit, pain or discomfort or the degree of permanent impairment of lower extremity due to loss of function and decreased strength. In a supplemental report dated June 24, 2002, he stated that he did not do impairment ratings to a specific body part such as the arms, legs, hands, etc., unless the injury only involved an arm, leg or hand.

In an impairment rating dated July 8, 2002, an Office medical adviser found that appellant had sustained no permanent impairment. He noted that Dr. Travis had stated that on physical examination appellant had sensation based on pin prick that was intact in both his upper and lower extremities and in his motor functions. Based on these findings, the Office medical adviser concluded that there was no permanent partial impairment due to motor or sensory impairment of the upper and lower extremities.

The Office determined that there was a conflict in the medical evidence between the opinions of impairment ratings of the Office medical adviser and Dr. Brooks and it referred appellant, together with a statement of accepted facts and the case record, to Dr. Regina M. Raab, a specialist in neurosurgery, for an impartial medical evaluation. In a report dated

October 25, 2002, she determined that appellant had a one percent permanent impairment for loss of use of the right and left lower extremities. Dr. Raab stated:

“I agree with Dr. Travis that [appellant] would probably be classified as a DRE cordical spinal category 4 with 25 percent impairment of the whole person that does not exhibit currently signs and symptoms of spasticity. He certainly does have clear cut evidence of progressive weakness whenever he begins to use upper and lower extremities with significant fatigue noted with increased activity level. This is compatible with the upper extremities which would qualify [appellant] as a Class [1], Table 15-6b and this would award him 19 percent on impairment of the upper extremities. Since he also has similar complaints in the lower extremity, in other words, difficulty with tightness and fatigue in the extremities, especially with activity, I would think that he would probably fall into the category of Class [1] for five percent impairment. Therefore, combining the values of 25 percent, 19 percent and 5 percent would [add] up to 42 [percent] impairment and I believe that I am in agreement with Dr. Travis on this particular matter.”

In an impairment evaluation dated October 23, 2002, an Office medical adviser found that appellant had a 19 percent impairment of his left and right upper extremities and a 5 percent impairment of his left and right lower extremities based on the A.M.A., *Guides*, in accordance with the findings and conclusions of the impartial medical examiner, Dr. Raab. The Office medical adviser stated that appellant had a 19 percent impairment of the upper extremities due to impairment from C3-5 nerve root and a 5 percent lower impairment of the lower extremities due to loss of function from decreased strength.

On November 13, 2002 the Office granted appellant a schedule award for a 19 percent permanent impairment for each of the right and left upper extremities and a 5 percent permanent impairment for each the right and left lower extremities (feet), for the period October 25, 2002 to March 23, 2004, for a total of 73.68 weeks of compensation.

By letter dated December 8, 2002, appellant requested an oral hearing, which was held on September 25, 2003. He submitted a July 8, 2003 report from Dr. Brooks, who noted increasing symptoms of paresthesias, hyperesthesia in his upper extremities as well as pain in his lower extremities which precluded him from standing or walking for any length of time. He recommended that appellant undergo further diagnostic testing, but did not submit any additional impairment ratings.

In a decision dated December 18, 2003, an Office hearing representative affirmed the April 1, 2002 Office decision and denied appellant’s claim for a greater additional award.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees’ Compensation Act<sup>1</sup> sets forth the number of weeks of compensation to be paid for permanent loss or loss of use, of the members of the body listed in the schedule. Where the loss of use, is less than 100 percent, the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

amount of compensation is paid in proportion to the percentage loss of use.<sup>2</sup> However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5<sup>th</sup> ed.) as the standard to be used for evaluating schedule losses.<sup>3</sup>

### ANALYSIS

In this case, Dr. Raab, the impartial medical specialist, calculated a 19 percent impairment for each appellant's right and left upper extremities and a 5 percent impairment for each of the lower extremities. She based these findings on evidence of progressive weakness and significant fatigue noted with increased activity level. With regard to the upper extremities, Dr. Raab rated appellant at Class 1, Table 15-6(b) at page 396 of the A.M.A., *Guides*, which rendered a 19 percent impairment of the upper extremities. This Table of the A.M.A., *Guides* provides a maximum 19 percent impairment value for a Class 1 impairment and the criteria for determining each class of impairment for involvement of two upper extremities. While Dr. Raab noted progressive weakness of the extremities with increased activity level, she did not find that appellant had complete loss of digital dexterity or such difficulty with self-care activities that the impairment would fall into a higher classification scheme. Regarding the lower extremities, she noted that, because appellant had similar complaints of progressive weakness and significant fatigue with increased activity, in addition to tightness in his lower extremities, Dr. Raab rated him at a Class 1 for five percent impairment. Pursuant to Table 15-6(c), while a Class 1 impairment allows for up to a nine percent impairment, the maximum impairment value is allowable upon a showing of a degree of difficulty negotiating elevation, grades, stairs, deep chairs and long distances. An intermediate value was properly selected in this case to correspond with the degree of appellant's difficulty performing these activities.

While Dr. Raab stated that she concurred with Dr. Travis that appellant had 42 percent whole person impairment, the Board has long held that a schedule award is not payable for an impairment of the whole person.<sup>4</sup> In reviewing the report of the impartial medical specialist, the Office medical adviser correctly concluded that appellant had upper extremity impairment based on impairment from the C3-5 nerve root and a five percent lower impairment of the lower extremities due to loss of function from decreased strength. The Office medical adviser, therefore, adopted Dr. Raab's findings and properly supported her rating of a 19 percent impairment of appellant's left and right upper extremities and a 5 percent impairment of his left and right lower extremities based on the A.M.A., *Guides*.

Subsequent to the Office's November 13, 2002 schedule award decision, appellant requested an oral hearing and submitted Dr. Brooks' July 8, 2003 report. This report, however, did not contain any impairment rating, so it has no probative value with regard to the degree of appellant's impairment. As there is no other probative medical evidence establishing that he

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<sup>2</sup> 5 U.S.C. § 8107(c)(19).

<sup>3</sup> 20 C.F.R. §10.404.

<sup>4</sup> *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

sustained any additional permanent impairment, the Office properly found that appellant was not entitled to more than a 19 percent permanent impairment to his right and left arms and a 5 percent permanent impairment to his right and left legs.

**CONCLUSION**

The Board finds that appellant has no more than a 19 percent permanent impairment to his right and left arms and a 5 percent permanent impairment in his right and left legs.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 18, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member