

FACTUAL HISTORY

This is appellant's second appeal before the Board. By decision issued February 11, 1999,¹ the Board affirmed a January 28, 1997 decision of the Office denying appellant's December 19, 1996 request for reconsideration on the grounds that the evidence submitted was immaterial in nature and therefore insufficient to warrant a merit review. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference. The facts of the case relevant to the present appeal are set forth.

The Office accepted that on December 28, 1990 appellant, then a 40-year-old equipment specialist, sustained a lumbar sprain while unloading equipment from his truck while on temporary duty in Saudi Arabia. The Office subsequently accepted a herniated nucleus pulposus at L5-S1. On May 25, 1994 Dr. Theodore Zaleski, an attending Board-certified orthopedic surgeon, performed lumbar laminectomies at L4-5 and L5-S1 and foramenotomies at L5-S1 to correct spinal stenosis and multilevel lumbar radiculopathies. The Office approved this procedure. The Office found that the effects of the herniated lumbar disc ceased after January 28, 1997. The Office also accepted that appellant sustained a cervical sprain on February 14, 1992.²

On September 9, 2000 appellant claimed a schedule award. He submitted a March 17, 2000 report and schedule award evaluation from Dr. Diamond, an attending osteopath Board-certified in pain management, who provided a history of injury and treatment and found that appellant reached maximum medical improvement as of March 2, 2000. He related appellant's complaints of significant pain in the low back and lower extremities. On examination, Dr. Diamond found lumbar paravertebral spasm and tenderness, restricted lumbar motion, bilaterally positive straight leg raising tests and bilaterally positive sitting root signs. He also observed a 40.5 centimeter circumference of the right lower leg as compared to a 43 centimeter circumference on the left, 4/5 motor strength in the right quadriceps and 4+/5 strength in the left quadriceps. Dr. Diamond noted that appellant had an abnormal gait. He diagnosed post-traumatic lumbar radiculopathies and spinal stenosis, chronic pain syndrome and post-surgical status. Referring to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,³ (A.M.A., *Guides*) Dr. Diamond found a 13 percent impairment of the right lower extremity due to calf atrophy according to Table 37, page 77⁴ and a 12 percent impairment of the right lower extremity due to a 4/5 motor strength deficit in the

¹ Docket No. 97-1545 (issued February 11, 1999).

² The record contains a September 28, 2000 decision approving appellant's counsel's request for an attorney's fee. Appellant approved the fee in a May 10, 1999 letter. The September 28, 2000 decision is not before the Board on the present appeal as it was issued more than one year prior to appellant filing his appeal with the Board on September 28, 2005. 20 C.F.R. §§ 501.2(c), 501(d)(3).

³ The Board notes that, as of March 17, 2000, the Office was using the fourth edition of the A.M.A., *Guides*. See FECA Bulletin No. 94-04. FECA Bulletin No. 01-05 was issued on January 29, 2001 and it provided that the fifth edition of the A.M.A., *Guides* was to be used effective February 1, 2001.

⁴ Table 37, page 77 of the fourth edition of the A.M.A., *Guides* is entitled "Impairments from [l]eg [m]uscle [a]trophy." Section b of the Table 37 pertains to the calf and provides that 2 to 2.9 centimeter calf atrophy equals an 8 to 13 percent impairment of the lower extremity.

quadriceps. He then used the Combined Values Chart to arrive at a 23 percent impairment to the right lower extremity. Regarding the left lower extremity, Dr. Diamond found a 12 percent impairment due to a 4+/5 motor strength deficit in the quadriceps according to Table 39, page 77.

On June 27, 2001 the Office referred Dr. Diamond's report to an Office medical adviser for review and calculation of a schedule award. In a July 2, 2001 report, an Office medical adviser found that appellant reached maximum medical improvement as of August 22, 1994, the date he resumed work following the May 1994 lumbar surgery. Referring to the fifth edition of the A.M.A., *Guides*, the medical adviser found that a 1.5 centimeter calf atrophy equaled an 11 percent impairment of the right lower extremity according to Table 17-6b, page 530.⁵ The 4/5 motor strength deficit in the right quadriceps equaled an additional 12 percent impairment of the right lower extremity according to Table 17-8, page 532.⁶ The medical adviser combined the 11 and 12 percent impairments to equal a 22 percent impairment of the right lower extremity. Regarding the left lower extremity, the Office medical adviser found a 12 percent impairment due to 4/5 motor strength deficit in the quadriceps according to Table 17-8, page 532.

On May 2, 2002 the Office referred appellant, the record and a statement of accepted facts to Dr. Maslow, a Board-certified orthopedic surgeon. In a June 6, 2002 report, Dr. Maslow provided a history of injury and treatment, reviewed the medical record and the statement of accepted facts. He related appellant's complaints of constant lumbar pain and stiffness with numbness and paresthesias into both lower extremities. Dr. Maslow noted that appellant had diabetes mellitus and was on oral medication. On examination, Dr. Maslow found a full range of motion of the cervical spine with no signs or radiculitis or thoracic outlet impingement. He found mild lumbar paravertebral tenderness, full range of lumbar motion, diminished reflexes throughout the lower extremities "consistent with the diabetes" and a one centimeter atrophy of the right calf when compared to the left. He opined that there was no evidence of the December 28, 1990 injury other than the one centimeter calf atrophy. Dr. Maslow noted that according to Table 17-6b of the fifth edition of the A.M.A., *Guides*, one centimeter calf atrophy equaled a three percent impairment of the right lower extremity.

In a June 18, 2002 letter, appellant contended that Dr. Maslow did not have the medical record at the time of the June 6, 2002 appointment.

In a July 1, 2002 letter, the Office requested that Dr. Maslow clarify his report regarding the edition of the A.M.A., *Guides* to which he referred and whether appellant had reached maximum medical improvement. Dr. Maslow submitted a July 9, 2002 report, stating that he used the fifth edition of the A.M.A., *Guides*.

The Office referred Dr. Maslow's reports to an Office medical adviser for review and calculation of a schedule award. In an August 21, 2002 report, the Office medical adviser opined

⁵ Table 17-6, page 530 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment due to Unilateral Leg Muscle Atrophy." Section b of Table 17-6 provides that a 1 to 1.9 centimeter atrophy of the calf equals a 3 to 8 percent impairment of the lower extremity.

⁶ Table 17-8, page 532 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment [d] to [l]ower [e]xtremity [m]uscle [w]eakness."

that appellant had reached maximum medical improvement as of June 5, 2000. He noted that according to Table 17-6, page 530 of the A.M.A., *Guides*, calf atrophy of one centimeter equaled a three percent impairment of the lower extremity. The medical adviser stated that the calf atrophy was the sole finding and there was “no motor deficit ... found.” (Emphasis in the original).

By decision dated October 8, 2002, the Office granted appellant a schedule award for a three percent impairment to the right lower extremity. The period of the award ran from June 15 to August 14, 2000.

Appellant requested an oral hearing, held February 23, 2005. At the hearing, counsel contended that the Office provided no justification for abandoning the July 2, 2001 report of the Office medical adviser, who applied the fifth edition of the A.M.A., *Guides* to the findings of Dr. Diamond. He asserted that Dr. Maslow only examined appellant for 15 minutes and had not received the medical record as of the June 6, 2002 examination. Appellant also contended that Dr. Maslow’s report was incomplete as he did not provide any range of motion measurements for the lower extremities, ratings for the diminished reflexes observed or for pain.

By decision dated and finalized May 19, 2005, the Office hearing representative affirmed the October 8, 2002 decision, finding that the weight of the medical evidence continued to rest with Dr. Maslow.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees’ Compensation Act⁷ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.⁸

The schedule award provision of the Act⁹ and its implementing regulation¹⁰ sets 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.¹¹ Office procedures direct the use of the fifth edition of the A.M.A., *Guides* for all decisions made after February 1, 2001.¹²

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404 (2003).

¹¹ *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

¹² *Jesse Mendoza*, 54 ECAB 802 (2003).

The Board notes that, although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.¹³ In 1960, however, 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, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine.¹⁴

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office 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.¹⁵

ANALYSIS

The Office accepted that on December 28, 1990, appellant sustained a lumbar sprain and a herniated nucleus pulposus at L5-S1. On October 8, 2002 appellant received a schedule award for a three percent permanent impairment of the right lower extremity. The Office based the award on the June 6 and July 9, 2002 reports of Dr. Maslow, a Board-certified orthopedic surgeon and second opinion physician, as interpreted on August 21, 2002 by an Office medical adviser.

The Board notes that Dr. Diamond's March 17, 2000 report was based on the fourth edition of the A.M.A., *Guides*, then in effect. While medical opinion not based on the appropriate edition of the A.M.A., *Guides* may be of diminished probative value in determining the extent of permanent impairment,¹⁶ an Office medical adviser reviewed Dr. Diamond's evaluation and submitted a July 2, 2001 report applying the fifth edition of the A.M.A., *Guides*. The Office medical adviser found a 22 percent impairment of the right lower extremity and a 12 percent impairment of the left lower extremity. The Office subsequently referred appellant to Dr. Maslow, who found a three percent permanent impairment of the right lower extremity. An Office medical adviser concurred with the rating based only on the right calf atrophy, stating in an August 21, 2002 report that there was no motor deficit found. However, the Board finds that this statement is incorrect.

Dr. Maslow noted that appellant had diabetes mellitus causing diminished reflexes throughout the lower extremities. However, Dr. Maslow did not specify the nature of the diminished reflexes, provide an impairment rating or opine that these abnormalities were not ratable. It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting or

¹³ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁴ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

¹⁶ *Carolyn E. Sellers*, 50 ECAB 393, 394 (1999).

subsequently acquired impairments are to be included.¹⁷ As Dr. Maslow did not include an impairment rating for diminished lower extremity reflexes, his schedule award rating is incomplete and cannot constitute the weight of the medical evidence in this case.

The case will be remanded to the Office for further development of the medical evidence of the extent of permanent impairment. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2005 is set aside and the case remanded for further development consistent with this opinion.

Issued: February 21, 2006
Washington, DC

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

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

¹⁷ *Lela M. Shaw*, 51 ECAB 372 (2000).