

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

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**R.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 06-1738  
Issued: April 5, 2007**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 24, 2006 appellant filed a timely appeal from a merit decision of an Office of Workers' Compensation Programs' hearing representative dated March 6, 2006 which affirmed a schedule award. 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 an eight percent permanent impairment to her right lower extremity.

**FACTUAL HISTORY**

Appellant, a 46-year-old mail handler, injured her right hip, back and right leg on April 18, 1989 when she stepped on an object and fell to the ground. She filed a claim for benefits, which the Office accepted for lumbosacral strain and contusion of the right hip.

In a report dated December 7, 2004, Dr. David Weiss, an osteopath, found that appellant had a 30 percent right lower extremity impairment pursuant to the American Medical

Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (the A.M.A., *Guides*). He measured a gastrocnemius circumference of 38 centimeters on the right as opposed to 39 centimeters on the left; and a quadriceps circumference of 54 centimeters on the right as opposed to 55 centimeters on the left. Dr. Weiss derived his 30 percent impairment rating from a 4/5 motor strength deficit of the right quadriceps for a 12 percent impairment pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*; a 4/5 motor strength deficit of the right gastrocnemius (ankle plantar/flexion), for a 17 percent impairment pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*; in addition to a 3 percent impairment for pain under Table 18-1 at page 574 of the A.M.A., *Guides*.

On March 29, 2005 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her right lower extremity.

In a report dated May 21, 2005, an Office medical adviser concluded that appellant had an eight percent impairment under the A.M.A., *Guides*. He noted Dr. Weiss' findings of one centimeter of atrophy on the right compared to the left thigh and one centimeter of atrophy on the right compared to the left calf. The Office medical adviser stated:

“Based on the A.M.A., *Guides*, my schedule award is calculated on atrophy rather than weakness because atrophy is more effective -- no surgery [was performed].”

The Office medical adviser derived three percent impairment for atrophy of the right thigh and right calf pursuant to Table 17-6, page 530, in addition to a two percent component for pain at Table 18-1, page 574.

On July 12, 2005 the Office granted appellant a schedule award for an eight percent permanent impairment of the right lower extremity for the period December 4, 2004 to May 30, 2005, for a total of 23.04 weeks of compensation.

By letter dated July 18, 2005, appellant's attorney requested an oral hearing, which was held on December 19, 2005.

By decision dated March 1, 2006, an Office hearing representative affirmed the July 12, 2005 decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>1</sup> set 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 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 ensure equal justice under the law to all claimants, the Office has

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

<sup>2</sup> 5 U.S.C. § 8107(c)(19).

adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.<sup>3</sup>

### ANALYSIS

The Board notes that both Dr. Weiss and the Office medical adviser failed to explain the impairment rating for pain under Chapter 18. Section 18.3b, page 571 of the A.M.A., *Guides*, specifically states that examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ rating systems found in the other chapters.<sup>4</sup> The current record does not support an award for pain under Chapter 18.

In the present case, there is a conflict in the medical evidence between Dr. Weiss, appellant's treating physician, and the Office medical adviser, as to the percentage of permanent impairment to which appellant is entitled based on her accepted conditions in her right lower extremity. Dr. Weiss found that appellant had a 30 percent right lower extremity impairment based on a 27 percent impairment for weakness of the right quadriceps and ankle and a 3 percent impairment for pain. In contrast, the Office medical adviser accorded a five percent impairment based on atrophy, which he determined was a more appropriate basis than weakness because appellant did not undergo surgery, and a two percent impairment for pain.

Furthermore, while Dr. Weiss rated appellant for weakness of the right lower extremity, the Office medical adviser stated that he believed a rating for atrophy would be more appropriate because appellant had not undergone surgery. The A.M.A., *Guides*, however, do not require that the claimant undergo a surgical procedure before an impairment rating can be given for weakness of the lower extremity.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."<sup>5</sup> Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight. On remand, the Office should instruct the referee medical examiner to provide a well-rationalized opinion, to specifically refer to the applicable tables and standards of the A.M.A., *Guides* in making his

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<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>5</sup> Section 8123(a) of the Act provides in pertinent part, "(i) if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." See *Dallas E. Mopps*, 44 ECAB 454 (1993).

findings and conclusions and in rendering his impairment rating and to clearly indicate the specific background upon which he based his opinion. After such development as it deems necessary, the Office shall issue a *de novo* decision.<sup>6</sup>

**CONCLUSION**

The Board finds that the case is not in posture for decision with regard to an impairment based on the right lower extremity and the case is remanded for further development. After such development as it deems necessary, the Office shall issue a *de novo* decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 1, 2006 decision is set aside and the case is remanded to the Office of Workers' Compensation Programs for further action consistent with this decision of the Board.

Issued: April 5, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>6</sup> The Board notes that both physicians accorded appellant an impairment based on pain pursuant to section 18 of the A.M.A., *Guides*. According to section 18.3b of the A.M.A., *Guides*, however, "examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the [A.M.A.,] *Guides*." This chapter is not to be used in combination with other methods to measure impairment due to sensory pain (Chapters 13 and 17). The evidence of record does not explain why appellant would be entitled to an additional rating for pain pursuant to Chapter 18. Therefore, on remand, the referee medical examiner should be instructed to provide an explanation as to why and how appellant's pain may be rated pursuant to Chapter 18.