

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

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D.G., Appellant )

and )

DEPARTMENT OF LABOR, OFFICE OF )  
ASSISTANT SECRETARY FOR )  
ADMINISTRATION & MANAGEMENT, )  
Kansas City, MO, Employer )

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**Docket No. 07-1353**  
**Issued: October 9, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 24, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 13, 2007 finding that she had permanent impairment entitling her to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has more than nine percent impairment of her right lower extremity for which she received a schedule award; and (2) whether the Office compensated appellant at the correct pay rate.

**FACTUAL HISTORY**

On April 26, 2004 appellant, then a 45-year-old senior claims examiner, sustained a low back injury when she prepared training materials for a three-day workshop which included lifting,

stacking and arranging boxes on a dolly. In her narrative statement, she noted that she had a prior back injury in April 1987 involving the left side of her low back which the Office denied. Appellant sustained a second injury to her low back on October 9, 2003. The Office accepted a claim for a herniated disc on June 8, 2004. It accepted appellant's October 9, 2003 claim for aggravation of herniated disc on June 8, 2004.

In a letter dated October 5, 2004, appellant requested a schedule award and contended that her pay rate should be based on her September 2, 2004 earnings. She requested a lump sum payment. In a report dated September 2, 2004, Dr. George Varghese, Board-certified in physical medicine and rehabilitation, noted appellant's history of injury on October 9, 2003 and her complaints of low back pain with radiation into the left leg. He reviewed the medical records and found sensory loss in the L5 distribution and residual weakness and numbness in the S1 distribution on the left side. Dr. Varghese reported no objective findings on the right side. He opined that appellant reached maximum medical improvement on August 23, 2004. Dr. Varghese found that she had 30 percent impairment of the S1 nerve root due to pain and sensory deficits in the left lower extremity or 2 percent impairment of the extremity. He found 20 percent weakness in the S1 distribution or 4 percent impairment of the left lower extremity. Dr. Varghese stated that the L5 nerve root had 20 percent sensory impairment of 1 percent impairment of the left lower extremity and that appellant had no weakness in the L5 nerve root distribution. He concluded that appellant had seven percent impairment of the left lower extremity due to L5-S1 radiculopathy. Dr. Varghese did not find any impairment of the right lower extremity.

On November 9, 2006 appellant again submitted evidence regarding her permanent impairment and requested a schedule award. In a report dated October 18, 2006, Dr. Pedro A. Murati, Board-certified in physical medicine and rehabilitation, noted history of injury of a fall from her chair in 2003. He reported that appellant's magnetic resonance imaging (MRI) scan revealed left paracentral disc extrusion at L5-S1. Nerve conduction studies in April 2004 revealed evidence of chronic bilateral L5-S1 radiculopathy which were worse on the left. Dr. Murati diagnosed low back pain secondary to radiculopathy and left S1 joint dysfunction.<sup>1</sup> He opined that appellant reached maximum medical improvement on September 9, 2006. Dr. Murati found that appellant had three percent impairment of the right lower extremity due to pain and numbness from the L5 nerve root. He further found that appellant had weakness of the right toe extensors due to the L5 nerve root resulting in nine percent impairment of the right lower extremity. Dr. Murati found that appellant had a combined 12 percent impairment of the right lower extremity. In regard to appellant's left lower extremity, Dr. Murati found that appellant had four percent impairment of the left lower extremity due to injury to the sensory impairment left S1 nerve root. He further found that appellant had weakness of the left toe extensors due to the L5 nerve root resulting in nine percent impairment of the left lower extremity. Dr. Murati concluded that appellant had 13 percent impairment of the left lower extremity.

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<sup>1</sup> Dr. Murati also discussed appellant's permanent impairment due to carpal tunnel syndrome. The Office has not accepted this condition under the claim before the Board and the Board will not address this issue. 20 C.F.R. § 501.2(c).

The Office referred appellant's claim for a schedule award to the Office medical adviser for review. It noted that appellant's claim had not been accepted for diabetes, lumbar radiculopathy, degenerative disc disease and right carpal tunnel syndrome. In a report dated February 21, 2007, the Office medical adviser agreed with Dr. Murati that appellant had nine percent impairment due to sensory loss and weakness of the right toe extensors. He found that, as appellant had experienced pain in the right lower extremity on March 24, 2003 her right leg condition was due to her employment. The Office medical adviser found that there was no evidence in the record that appellant sustained injury to her left lower extremity. He noted that appellant's lumbar radiculopathy was not an accepted condition and opined that appellant's left lower extremity symptoms were due solely to this condition. The Office medical adviser concluded that appellant had no impairment rating to her left lower extremity. He stated that the date of maximum medical improvement was October 9, 2004.

By decision dated March 13, 2007, the Office granted appellant a schedule award for nine percent impairment of her right lower extremity. It found that appellant had reached maximum medical improvement on October 9, 2004 and that she was entitled to compensation based on her pay rate effective March 24, 2003.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</sup> set 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup> Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>5</sup>

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.<sup>6</sup> However, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent

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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> *Id.*

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

<sup>6</sup> *George E. Williams*, 44 ECAB 530, 533 (1993).

impairment to an extremity even though the cause of the impairment originated in the spine.<sup>7</sup> It is well established that in determining entitlement to a schedule award, preexisting impairment to the schedule member is to be included.<sup>8</sup>

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. The Board has defined maximum medical improvement as meaning “that the physical condition of the injured member of the body has stabilized and will not improve further.” The Board has also noted a reluctance to find a date of maximum medical improvement, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of maximum medical improvement in the selection of a retroactive date of maximum medical improvement.<sup>9</sup> The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.<sup>10</sup>

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

Appellant submitted medical evidence regarding her permanent impairment due to her accepted back injuries from Dr. Murati, Board-certified in physical medicine and rehabilitation. Dr. Murati noted appellant’s initial history of injury on October 9, 2003 and reported findings of sensory loss and weakness in both lower extremities as a result of the back injuries. He found that appellant had sensory impairment of the L5 nerve root which resulted in three percent impairment of the right lower extremity due to pain and numbness. Dr. Murati further found that appellant had loss of strength due to impairment of the L5 nerve root resulting in nine percent impairment of the right lower extremity. The Office medical adviser reviewed this report and agreed that appellant had nine percent impairment of the right lower extremity due to loss of strength. He did not discuss the additional three percent impairment rating for appellant’s sensory impairment as found by Dr. Murati. As the Office medical adviser did not address sensory loss as noted, the Board will remanded the case for the Office to consider whether appellant is entitled to any impairment rating to the right lower extremity due to pain and loss of sensation due to impairment of the L5 nerve.

The Office medical adviser also failed to provide any medical reasoning for the selection of October 9, 2004 as the date of maximum medical improvement. As noted, the Board requires persuasive proof of maximum medical improvement when a retroactive date of maximum medical improvement is selected.<sup>11</sup> The date of maximum medical improvement is usually

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<sup>7</sup> *Id.*

<sup>8</sup> *Michael C. Milner*, 53 ECAB 446, 450 (2002).

<sup>9</sup> *J.C.*, 58 ECAB \_\_\_\_ (Docket No. 06-1018, issued January 10, 2007); *D.R.*, 57 ECAB \_\_\_\_ (Docket No. 06-668, issued August 22, 2006); *James E. Earle*, 51 ECAB 567 (2000).

<sup>10</sup> *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

<sup>11</sup> *Supra* note 9.

considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office, which in this case would be October 18, 2006. The Office did not offer any discussion or proof that appellant had reached maximum medical improvement before this date.<sup>12</sup>

**CONCLUSION**

The Board finds that the case is not in posture for decision. The medical evidence supports that appellant has sensory impairment of her right lower extremity not considered by the Office medical adviser. The Board further notes that the Office did not adequately address the selected retroactive date of maximum medical improvement. For these reasons, the Office's March 13, 2007 decision will be set aside and the case remanded for further consideration of the extent of appellant's permanent impairment and the date of maximum medical improvement.<sup>13</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 13, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this opinion of the Board.

Issued: October 9, 2007  
Washington, DC

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

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

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

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<sup>12</sup> Due to the disposition of the issue, it is not necessary for the Board to address whether the Office compensated appellant at the correct pay rate.

<sup>13</sup> The Board notes that the Office has not issued a final decision addressing appellant's entitlement to a schedule award for any employment-related permanent impairment of her left lower extremity. Therefore, the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).