

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

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**J.Q., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Kearny, NJ, Employer**

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**Docket No. 06-2152  
Issued: March 5, 2008**

*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 25, 2006 appellant filed a timely appeal from a September 19, 2006 schedule award of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

**ISSUE**

The issue is whether appellant has more than 10 percent impairment of his right lower extremity, for which he received a schedule award.

**FACTUAL HISTORY**

On June 10, 2003 appellant, then a 40-year-old equipment handler, sustained injury to his low back and right leg while trying to open a trailer door. The Office accepted his claim for a lumbosacral strain with sacroiliitis and displaced intervertebral disc. Appellant underwent surgery for a bilateral hemilaminotomy, discectomies at the L4-5 and L5-S1 levels with lumbar fusion at those levels on February 20, 2004 and February 11, 2005. He was placed on the

periodic rolls in receipt of compensation for total disability. Appellant returned to limited-duty work on November 8, 2005.

On March 30, 2006 appellant filed a claim for a schedule award. In a May 8, 2006 report, Dr. Emmanuel E. Jacob, Board-certified in physical medicine and rehabilitation, provided an impairment rating. He noted a history of appellant's medical treatment and surgery for his low back condition and noted complaints of pain with walking and of sexual dysfunction. Dr. Jacob provided findings on physical examination and noted range of motion of the lumbar spine. He diagnosed chronic low back pain with radiculopathy and muscle weakness involving the L5 nerve root to the right lower extremity. In rating appellant's loss of strength, Dr. Jacob provided reference to Table 16-11, page 484, and Table 16-13, page 498, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup> He noted loss of power of 4/5 which he said was equal to 20 percent strength deficit.<sup>2</sup> Dr. Jacob identified the "maximum upper extremity impairment" value as 35 percent under Table 16-13.<sup>3</sup> Multiplying the 20 percent deficit by the 35 percent maximum impairment resulted in 7 percent impairment to the right lower extremity for loss of strength. Dr. Jacob rated sensory loss (pain) for radiculopathy to the right leg, noting that he applied Table 16-10, page 482, to rate the sensory deficit as Grade 3 for which he allowed a 40 percent deficit. He identified the maximum impairment allowed as eight percent.<sup>4</sup> By multiplying the 40 percent deficit with the maximum 8 percent allowed, Dr. Jacob found total sensory impairment of 3.2 percent. He also rated impairment due to sexual dysfunction with reference to Table 13-21, page 342, stating that appellant's symptoms were equivalent to Class 1 impairment for which a nine percent whole man impairment is allowed.<sup>5</sup> Dr. Jacob also rated three percent whole man impairment for pain under Chapter 18, page 573. He advised that appellant's sensory and motor impairments to the right leg totaled 10 percent, which he converted to 4 percent whole man impairment utilizing Table 17-3, page 527.<sup>6</sup> Dr. Jacob combined the 4 percent whole man motor/sensory loss with 9 percent whole man impairment for sexual dysfunction and 3 percent whole man impairment for pain under Chapter 18 to find total whole man impairment of 16 percent.

On August 23, 2006 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical consultant, reviewed the medical opinion of Dr. Jacob. He disagreed with the 16 percent whole man impairment rating, noting that Dr. Jacob identified diminished muscle strength and pain over the L5 dermatome. Dr. Berman stated that, in making the impairment rating, Dr. Jacob had referred to tables of the A.M.A., *Guides* in Chapter 16 which were

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>2</sup> *Id.* at 484, Table 16-11, provides 20 percent motor deficit is Grade 4 for complete active range of motion against gravity with some resistance.

<sup>3</sup> The Board notes that the A.M.A., *Guides* at 489, Table 16-13, rates the cervical nerves, for which a maximum motor deficit of 35 percent is provided for impairment at C6 and C7.

<sup>4</sup> The Board assumes Dr. Jacob was again referring to Table 13, page 489, to rate the sensory impairment. The table allows eight percent maximum sensory impairment for the C6 nerve root.

<sup>5</sup> A.M.A., *Guides* at 342, Table 13-21.

<sup>6</sup> *Id.* at 527, Table 17-3.

applicable to rating upper extremity impairment and not lower extremity impairment. He applied Table 15-18, page 424, which provides maximum values for unilateral nerve root impairment affecting the lower extremity. Table 15-18 provides a maximum of 5 percent impairment for sensory loss (pain) and a maximum of 37 percent impairment for motor loss (strength) of the L5 nerve root. Dr. Berman rated impairment due to loss utilizing Table 15-15, page 424, to rate appellant's pain as Grade 4, which allows a 25 percent deficit. He multiplied the 25 percent deficit by the 5 percent maximum allowed for pain at the L5 nerve root to find 1.25 percent impairment, which he rounded down to 1 percent. Dr. Berman rated impairment for loss of strength utilizing Table 15-16, page 424, to rate appellant's muscle weakness as Grade 4, for which a 25 percent deficit is allowed. He multiplied the 25 percent deficit by the 37 percent maximum allowed for weakness at the L5 nerve root to find 9.25 percent impairment, which was rounded down to 9 percent. Dr. Berman applied the Combined Values Chart to rate total impairment to appellant's right leg at 10 percent. He stated that he disagreed with the impairment allowed for sexual dysfunction under Chapter 13 as there was no medical opinion from an urologist addressing the issue. Moreover, as Dr. Jacob had identified the L5 nerve root as the only nerve involved, the anatomic findings did not justify a schedule award for sexual dysfunction. Dr. Berman concluded that appellant had 10 percent impairment to the right lower extremity, advising that maximum medical improvement was reached as of the May 8, 2006 evaluation by Dr. Jacob.

On September 19, 2006 the Office granted appellant a schedule award for 10 percent impairment to his right lower extremity. The period of the award ran for 28.80 weeks from May 8 to September 2, 2006.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act, and its implementing federal regulations, set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of schedule members or functions of the body.<sup>7</sup> However, the Act does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* (5<sup>th</sup> ed. 2001) as the uniform standard applicable to all claimants.<sup>8</sup>

No schedule award is payable for a member, function or organ of the body not specified under the Act or the implementing regulations.<sup>9</sup> Neither the Act nor the regulations provide for a schedule award for loss of use of the back or to the body as a whole.<sup>10</sup> However, the schedule award provisions of the Act include the extremities and a claimant may be entitled to a schedule

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<sup>7</sup> See 5 U.S.C. § 8107 and 20 C.F.R. § 10.404.

<sup>8</sup> 20 C.F.R. § 10.404(a).

<sup>9</sup> See *Patricia J. Horney*, 56 ECAB 256 (2005).

<sup>10</sup> See *Guiseppe Aversa*, 55 ECAB 164 (2003).

award for permanent impairment to a lower extremity even though the cause of such impairment originates in the spine.<sup>11</sup>

### ANALYSIS

The Board finds that appellant has no more than 10 percent impairment to his right lower extremity, for which he received a schedule award.

The medical evidence of record consists of the May 8, 2006 report of Dr. Jacob, who rated appellant's impairment as 16 percent to the whole person. The Board notes that the impairment rating provided by Dr. Jacob is of diminished probative value because it departs from the A.M.A., *Guides* in several respects.

The whole person impairment rating found by the physician is not consistent with the rating of impairment for a specific body member as listed under section 8107 of the Act. Dr. Jacob described impairment to appellant's right leg due to residuals associated with his accepted low back condition. As noted, a schedule award is not payable for loss of use of the spine or for impairment of the whole person.<sup>12</sup> Section 8107(c)(2) provides that, for total loss of use of a leg, 288 weeks of compensation is payable under a schedule award.<sup>13</sup> The impairment rating by Dr. Jacob, while first addressing strength and sensory loss to the right lower extremity, was ultimately converted to 16 percent "whole person" impairment.<sup>14</sup> This was error on the part of the examining physician. Dr. Jacob also departed from the A.M.A., *Guides* by including three percent whole man impairment with reference to Chapter 18, page 573. He did not give recognition to the *caveat* found at Chapter 18.3b, page 571, that medical 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 rating systems provided in the other chapters of the A.M.A., *Guides*. Having provided a sensory (pain) rating for the right lower extremity prior to converting the impairment to a whole man rating, Dr. Jacob gave no recognition to the fact that he was essentially rating sensory loss (pain) a second time. His medical report did not give any explanation for doing so. Finally, Dr. Jacob's impairment rating included a whole person estimate for impairment of sexual dysfunction under Chapter 13, Table 13-21. The A.M.A., *Guides* note that spinal cord injuries may result in sexual dysfunction. In applying Table 13-21, however, the examining physician is advised under Chapter 13.7d to address certain criteria as outlined in Chapter 7, The Urinary and Reproductive System, in making an impairment rating.<sup>15</sup> Dr. Jacob did not provide any narrative discussion of the factors that went into making his rating

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<sup>11</sup> See *Vanessa Young*, 55 ECAB 575 (2004).

<sup>12</sup> The Act provides at section 8101(20) that the brain, heart and back are excluded under the term "organ." 5 U.S.C. § 8101(20). See *Jesse Mendoza*, 54 ECAB 802 (2003).

<sup>13</sup> 5 U.S.C. § 8107(c)(2).

<sup>14</sup> The Board notes that Dr. Jacob referred to Table 16-13, page 489, in assigning the maximum values for sensory and motor impairment in this case. However, he identified impairment to the right lower extremity due to deficit at L5. A.M.A., *Guides*, Table 16-13 rates impairment to specific cervical and thoracic spinal nerves, not the lumbar nerve roots.

<sup>15</sup> A.M.A., *Guides* 143-71, Chapter 7.

that conforms to the protocols of the A.M.A., *Guides*. For these reasons, his impairment estimate is of reduced probative value.

Dr. Berman, the Office medical consultant, reviewed the findings provided by Dr. Jacob and noted disagreement with the 16 percent whole man impairment rating. He advised that reference to Chapter 16 was not appropriate, as the tables cited by Dr. Jacob were applicable to rating upper extremity impairment and not the lower extremity. Dr. Berman noted that appellant's sensory and motor impairments were described by Dr. Jacob as involving the L5 nerve root. He indicated disagreement in making an impairment rating for any sexual dysfunction based on this anatomic finding, pending any review by a specialist in urology.<sup>16</sup> As the L5 nerve root was the only nerve root involved, he applied Table 15-18, which provides maximum percentages for impairment of unilateral spinal nerves affecting the lower extremities. Dr. Berman multiplied the 5 percent maximum impairment for pain by the 25 percent Grade 4 sensory deficit found under Table 15-15, to find impairment of 1.2 percent, which he rounded down to 1 percent.<sup>17</sup> In determining motor loss, Dr. Berman multiplied the 37 percent maximum impairment for loss of strength by the 25 percent Grade 4 deficit found under Table 15-16, to find 9.25 percent impairment, which he rounded down to 9 percent. He utilized the Combined Values Chart to combine the sensory and motor impairments, finding a total 10 percent impairment to appellant's right leg.

It is well established that, when the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, the Office may rely on the impairment rating provided by a medical adviser.<sup>18</sup> As Dr. Berman properly explained the 10 percent rating made in this case, appellant properly received 10 percent of 288 weeks of compensation under the September 19, 2006 schedule award. There is no evidence of greater impairment.

### **CONCLUSION**

The Board finds that appellant has 10 percent impairment of his right lower extremity, for which he received a schedule award.

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<sup>16</sup> *Id.* at 551, Table 17-8, notes that the genital region is enervated by the L1 and L2 nerve roots.

<sup>17</sup> The policy of the Office is to round the calculated percentage of impairment to the nearest whole number. See *Robert E. Cullison*, 55 ECAB 570 (2004).

<sup>18</sup> See *Tommy R. Martin*, 56 ECAB 273 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 19, 2006 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 5, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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