

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

A.T., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
TRAINING COMMAND, San Antonio, TX,
Employer**

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**Docket No. 07-2027
Issued: March 20, 2008**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2007 appellant, through counsel, filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated September 14, 2006 granting him an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that he is entitled to a greater than 23 percent permanent impairment for his right lower extremity and 15 percent permanent impairment for his left lower extremity, for which he received schedule awards.

FACTUAL HISTORY

On January 14, 1983 appellant, then a 42-year-old heating mechanic, filed a traumatic injury claim alleging that on November 10, 1982 he injured his hip when he slipped while using a pipe wrench. The Office accepted the claim for herniated nucleus pulposus (HNP) at L4-5 and

authorized lumbar laminectomy facetectomy at L5-S1 and disc excision, which occurred on February 12, 1988. Subsequently, the Office placed appellant on the periodic rolls for temporary total disability.¹ Appellant returned to light-duty work on October 4, 1993.²

On October 31, 2002 appellant filed a claim for a schedule award and submitted an August 12, 2002 report by Dr. David Weiss, an examining osteopath, in support of his request. Dr. Weiss provided findings on physical examination and noted that appellant had been treated for back pain and L4-5 laminectomies and “[p]ostoperative x-rays revealed pseudoarthrosis L3-4 and L5-S1.” He indicated that the November 10, 1982 injury was the competent producing factor for appellant’s subjective and objective findings. Based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, he determined that appellant had 25 percent permanent impairment of the right lower extremity, including 2 percent for a Grade 4 motor strength deficit of the right extensor hallucis longus muscle, 12 percent for a Grade 4 to 5 motor strength deficit of the right gastrocnemius muscle, based on Table 17-8 at page 532. Dr. Weiss found four percent impairment of the right L4 nerve root due to sensory deficit.³ He further found that appellant had three percent impairment for pain using Figure 18-1, page 574. With respect to the left lower extremity, Dr. Weiss determined that appellant had 26 percent impairment including 17 percent for a Grade 4 to 5 motor strength deficit of the left gastrocnemius muscle, based on Table 17-8 at page 532. Dr. Weiss found a four percent impairment of the left L4 nerve root and a four percent impairment of the left L5 nerve root due to sensory deficit. He further found that appellant had three percent impairment for pain using Figure 18-1, page 574.

On May 31, 2005 Dr. Willie E. Thompson, an Office medical adviser, reviewed Dr. Weiss’ report. The medical adviser found that appellant reached maximum medical improvement on August 1989. Utilizing Tables 15-15 and 15-18 on page 424 of the A.M.A., *Guides*, Dr. Thompson concluded that appellant had 10 percent impairment of the right lower extremity and 10 percent impairment of the left lower extremity. In reaching this conclusion, Dr. Thompson multiplied appellant’s loss of function due to sensory deficit or pain in the L5 and S1 nerve roots by a Grade 1 impairment (5 percent x 99 percent = 5 percent for each nerve root).

By decision dated February 1, 2006, the Office granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity. The period of the award ran for 57.60 weeks from October 5, 1993 to November 12, 1994.

In a letter dated February 3, 2006, appellant’s counsel requested an oral hearing before an Office hearing representative, which was held on June 7, 2006.

¹ Appellant was approved for disability retirement effective March 31, 1990, but elected to receive benefits under the Federal Employees’ Compensation Act.

² A loss of wage-earning capacity decision was issued on November 1, 1993, which found no loss of wage-earning capacity in the new light-duty position.

³ Dr. Weiss did not provide any information as to how he arrived at this figure. No reference was made to the fifth edition of the A.M.A., *Guides* for this impairment rating.

By decision dated August 21, 2006, an Office hearing representative remanded the case for the Office medical adviser to address the issue of motor impairment.

On September 7, 2006 Dr. Arnold T. Berman, an Office medical adviser, reviewed Dr. Weiss' August 12, 2002 report and the May 31, 2005 report by Dr. Thompson. He concluded that appellant was entitled to 23 percent impairment of the right lower extremity and 15 percent impairment of the left lower extremity. In reaching this determination, the calculations are as follows:

“Utilizing [T]able 15-16 and page [T]able 424, [T]able 15-18, for L5 [G]rade 4/5 deficit, it would require calculation by multiplying 25 percent for [G]rade 4, [T]able 15-16, times L5 maximum motor deficit of 37 percent for the right-sided L5 motor deficit which is equal to 9.35 percent or 9 percent impairment. On the left 20 percent and maximum for S1 is multiplied times 25 percent based on [G]rade 4, [T]able 15-16, and 25 percent times 20 percent equals 5 percent impairment for the left lower extremity and 5 percent impairment to the right lower extremity.

“Therefore combining the motor deficit for the right lower extremity, 9 percent and 5 percent equals 14 percent motor loss for the right lower extremity, and 5 percent motor loss for the left lower extremity.

Dr. Berman then utilized the Combined Values Chart on page 604 to find that 14 percent motor loss impairment combined with a 10 percent sensory loss impairment resulted in 23 percent right lower extremity impairment, and 5 percent motor loss impairment plus 10 percent sensory loss impairment resulted in 15 percent impairment of the left lower extremity.

On September 14, 2006 the Office granted appellant a schedule award for an additional 13 percent impairment of the right lower extremity and an additional 5 percent impairment of the left lower extremity, for a total additional award of 18 percent for both lower extremities. The award covered a period of 51.84 weeks from November 13, 1994 to November 10, 1995.⁴

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁵ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁶ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of

⁴ Appellant filed a request for an oral argument before the Board which he subsequently withdrew.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8107.

uniform standards applicable to all claimants.⁷ The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁸

ANALYSIS

Drs. Thompson and Berman, Office medical advisers, based their impairment rating on Chapter 15 of the A.M.A., *Guides* which addresses impairment of the spine, rather than using Chapter 17 which addresses lower extremity impairment. Under the Act, a schedule award is not payable for the loss or loss of use of any member of the body or function that is not specifically enumerated in section 8107 of the Act or its implementing regulations.⁹ The back is specifically excluded from coverage of the schedule award provisions of the Act.¹⁰ Although a schedule award may not be issued for an impairment to the back under the Act, such an award may be payable for permanent impairment of the lower extremities that is due to an employment-related back condition.¹¹ Additionally, Chapter 15 provides for determination of impairment based on the whole person. The Act does not provide for a schedule award based on permanent impairment of the whole person.¹² Therefore, it was inappropriate for Drs. Berman and Thompson to evaluate the permanent impairment of appellant's lower extremities by using a section of the A.M.A., *Guides* pertaining to the back alone.¹³ The Office medical advisers should have used Chapter 17 in determining whether appellant had any lower extremity impairment.¹⁴

Dr. Weiss indicated that sensory examination revealed a perceived sensory deficit over the L4 and L5 dermatomes involving the right and left lower extremities and concluded that appellant had a four percent impairment due to sensory loss associated with the L4 nerve root for the right lower extremity and four percent impairment due to sensory loss associated with the L5 nerve root for the left lower extremity. However, he did not clearly explain the basis for this perceived sensory deficit. Moreover, Dr. Weiss' addition of impairment ratings for loss of muscle strength and peripheral nerve deficits would not generally be allowed under the relevant

⁷ *Ausbon N. Johnson*, 50 ECAB 304 (1999).

⁸ A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

⁹ See *R.S.*, 58 ECAB ____ (Docket No. 06-1346, issued February 16, 2007); *Leroy M. Terska*, 53 ECAB 247 (2001).

¹⁰ 5 U.S.C. § 8101(19); see also *Richard R. LeMay*, 56 ECAB 341 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

¹¹ *Vanessa Young*, *supra* note 10; *Gordon G. McNeill*, 42 ECAB 140 (1990).

¹² *Tania R. Keka*, 55 ECAB 354 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹³ *Guiseppe Aversa*, *supra* note 12 (the Board found that the impartial medical specialist improperly used Chapter 15 in evaluating right leg impairment caused by a spinal injury).

¹⁴ The introduction to Chapter 17 at page 523 states that this chapter provides criteria for evaluating permanent impairment of the lower extremities. Impairment of the lower extremities is based on anatomic changes, diagnostic categories, and functional changes. A.M.A., *Guides* 523, 525; see also 555, 17.3, Lower Extremity Impairment Evaluation Procedure Summary and Examples.

standards,¹⁵ and he did not adequately explain why he assigned a three percent impairment rating to each leg for pain-related impairment.¹⁶

For these reasons, the medical evidence requires further development. The Office should refer appellant and the case record to an appropriate specialist for examination and evaluation of the permanent impairment of his lower extremities. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than 23 percent permanent impairment for his right lower extremity and 15 percent permanent impairment for his left lower extremity, for which he received a schedule award, including the proper application of the A.M.A., *Guides*, to be followed by an appropriate decision. The case is remanded to the Office for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2006 is set aside and the case remanded for further development consistent with this decision.

Issued: March 20, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ See A.M.A., *Guides* 526, Table 17-2.

¹⁶ See *id.* at 573-81, sections 18.3d through 18.3f.