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

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| **V.L., Appellant** | ) | |
| **and** | ) | **Docket No. 08-466** |
| | ) | **Issued: October 17, 2008** |
| **DEPARTMENT OF AGRICULTURE, DEADWOOD RESERVOIR, Lowman, ID, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

### ***JURISDICTION***

On December 5, 2007 appellant filed a timely appeal of a July 24, 2007 merit decision of the Office of Workers' Compensation Programs, which granted a schedule award for a three percent impairment each of the right and left lower extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

### ***ISSUE***

The issue is whether appellant has more than a three percent impairment of the right lower extremity and a three percent impairment of the left lower extremity, for which he received a schedule award.

### ***FACTUAL HISTORY***

This case has previously been before the Board on four occasions. In a June 11, 2002 decision, the Board affirmed the Office's May 10 and December 21, 2000 decisions.[1] The Board

[1] Docket No. 01-1685 (issued June 11, 2002).

found that the Office properly reduced appellant's compensation based on its determination that the constructed position of lot attendant represented his wage-earning capacity. The Board, however, reversed the Office's May 3, 2001 decision, denying appellant's request for reconsideration. The Board found that he submitted relevant and pertinent new evidence and remanded the case to the Office for further merit review of his claim pursuant to 5 U.S.C. § 8128(a). By order dated June 25, 2002, the Board dismissed appellant's second appeal of the Office's May 3, 2001 decision as a duplicate docket.[2] The Board stated that this appeal was inadvertently docketed as he had previously filed an appeal of the May 3, 2001 decision, which the Board had already assigned a docket number. In a January 10, 2003 order, the Board dismissed appellant's appeal of the Office's October 9, 2002 decision, denying modification of its wage-earning capacity determination as appellant had already filed an appeal of this decision which was pending before the Board.[3] In a decision dated March 11, 2003, the Board affirmed the Office's October 9, 2002 decision.[4] The Board found the evidence submitted by appellant insufficient to establish that the Office's wage-earning capacity determination was erroneous. In an order dated December 8, 2003, the Board denied appellant's petition for reconsideration of its June 25, 2002 decision on the grounds that it did not establish any error of fact or law warranting further consideration.[5] The facts and the circumstances of the case as set forth in the Board's prior decisions and orders are incorporated herein by reference.[6] The facts and the history relevant to the present issue are hereafter set forth.

In a March 12, 2007 medical report, Dr. John C. Steinmann, an attending Board-certified orthopedic surgeon, reviewed the history of appellant's September 12, 1997 employment injury and noted his complaints of pain in his lower back, left hip and both legs. On physical examination, he reported essentially normal findings with the exception of limited lumbar range of motion. Dr. Steinmann reviewed an x-ray which demonstrated advanced degenerative disc disease at L5-S1. He also reviewed a magnetic resonance imaging (MRI) scan which revealed the same results as the x-ray with three millimeter disc herniation. Dr. Steinmann stated that there was no significant central or neuroforaminal stenosis. He diagnosed discogenic low back pain. Dr. Steinmann stated that appellant was status post revision laminotomy and discectomy at L5-S1 for recurrent disc herniation which was performed on July 22, 2004. He opined that appellant had reached maximum medical improvement. Dr. Steinmann further opined that appellant could work with restrictions.

On June 9, 2007 Dr. Arthur S. Harris, an Office medical adviser, reviewed appellant's case record including, Dr. Steinmann's March 12, 2007 report. He stated that appellant was

[2] Order Dismissing Appeal, Docket No. 02-1335 (issued June 25, 2002).

[3] Order Dismissing Appeal, Docket No. 03-216 (issued January 10, 2003). The Board notes that the January 10, 2003 order is not contained in the case record.

[4] Docket No. 03-165 (issued March 11, 2003).

[5] Order Denying Petition for Reconsideration, Docket No. 03-165 (issued December 8, 2003).

[6] On September 13, 1997 appellant, then a 34-year-old forestry technician, filed a traumatic injury claim alleging that on September 12, 1997 he hurt his back when he bent over to pick up his saw from an uphill side slope. The Office accepted the claim for low back sprain and L5-S1 disc herniation. It authorized a L5-S1 discectomy and laminectomy and a revision laminectomy.

status post L5-S1 laminectomy and discectomy, which was performed on April 30, 1998 and noted the July 22, 2004 surgery. Dr. Harris stated that appellant had chronic lumbar radiculopathy. He determined that appellant had Grade 3 pain or decreased sensation of the bilateral S1 nerve root that interfered with some activity based on Table 16-10 and Table 15-18 on page 482 and 424, respectively, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), resulting in a three percent impairment of the right lower extremity. Dr. Harris opined that appellant's impairment was causally related to the accepted September 12, 1997 employment-related injuries. He stated that appellant reached maximum medical improvement on March 12, 2007.

By letter dated June 15, 2007, the Office advised appellant that he was entitled to schedule award compensation. It further advised him and the employing establishment to complete an enclosed schedule award claim (Form CA-7).

On June 25, 2007 appellant filed a CA-7 form.

On July 2, 2007 the Office requested clarification from Dr. Harris as to whether appellant sustained a three percent impairment of the left lower extremity, as well as, the right lower extremity.

In a July 14, 2007 report, Dr. Harris stated that appellant sustained a three percent impairment of each lower extremity.

By decision dated July 24, 2007, the Office granted appellant a schedule award for a three percent impairment of the right lower extremity and a three percent impairment of the left lower extremity for 17.28 weeks of compensation for the period July 8 through November 5, 2007.[7]

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulation[9] sets 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 of loss of use.[10] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[11]

[7] On July 8, 2007 the Office terminated appellant's compensation for loss of wage-earning capacity.

[8] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[9] 20 C.F.R. § 10.404.

[10] 5 U.S.C. § 8107(c)(19).

[11] *See supra* note 9.

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[12]

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the protocols of the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. In such cases, the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[13]

## ***ANALYSIS***

The Office accepted that appellant sustained low back sprain and disc herniation at L5-S1 while working at the employing establishment on September 12, 1997. Dr. Steinmann, appellant's attending physician, stated in a March 12, 2007 report that an x-ray and an MRI scan demonstrated advanced degenerative disc disease at L5-S1 with three millimeter disc herniation. He diagnosed appellant as having discogenic low back pain. Dr. Steinmann stated that appellant was status post revision at L5-S1 laminotomy and discectomy for recurrent disc herniation which was performed on July 22, 2004. He opined that appellant had reached maximum medical improvement and that he could work with restrictions. However, Dr. Steinmann did not provide an impairment rating based on the tables and figures of the A.M.A., *Guides*. Therefore, the Board finds that his report is insufficient to establish that appellant has more than a three percent impairment of each lower extremity.

Dr. Harris, an Office medical adviser, reviewed appellant's case record including Dr. Steinmann's March 12, 2007 findings and provided an accurate medical background of the accepted employment injuries. He stated that appellant suffered from chronic lumbar radiculopathy. Dr. Harris determined that his continuing lumbar symptoms constituted a Grade 3 level of pain or sensory deficit at the bilateral S1 nerve root that interfered with some activity (A.M.A., *Guides* 482, 424, Table 16-10 and Table 15-18) which represented a three percent impairment of the right lower extremity.

In a supplemental report, Dr. Harris opined that appellant also sustained a three percent impairment of the left lower extremity.

Dr. Harris properly applied the A.M.A., *Guides* and provided rationale for rating a three percent impairment of the right lower extremity and a three percent impairment of the left lower extremity. The Board finds that Dr. Harris' opinion represents the weight of the medical evidence of record. Appellant has no more than a three percent impairment of each lower extremity.

[12] *See Paul A. Toms*, 28 ECAB 403 (1987).

[13] *See John L. McClanic*, 48 ECAB 552 (1997); *see also Paul R. Evans*, 44 ECAB 646, 651 (1993).

On appeal, appellant contends that his schedule award which expired on November 5, 2007 should be reinstated. Under the Act, the maximum award for an impairment of the leg is 288 weeks of compensation.[14] The three percent impairment of the right lower extremity entitled appellant to three percent of 288 weeks or 8.64 weeks of compensation. Appellant was also entitled to compensation for the same number of weeks for a three percent impairment of the left lower extremity. Calculated together, his schedule award equaled 17.28 weeks of compensation. Therefore, the Board finds that the Office correctly determined appellant's schedule award to be 17.28 weeks of compensation. Appellant is entitled to no more under the Act.[15]

## ***CONCLUSION***

The Board finds that appellant has failed to establish that he has more than a three percent impairment of the right lower extremity and a three percent impairment of the left lower extremity, for which he received a schedule award.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 24, 2007 decision of Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[14] 5 U.S.C. § 8107(c)(2).

[15] The Board notes that, upon expiration of appellant's schedule award, the Office reinstated his compensation for loss of wage-earning capacity. The Board has consistently held that compensation under a schedule award and compensation for a loss of wage-earning capacity cannot be paid for the same period of time. *Joseph R. Waples*, 44 ECAB 936, 939 (1993); *Benjamin Swain*, 39 ECAB 448 (1988); *Andrew B. Poe*, 27 ECAB 510 (1976); *Stanley F. Stuczynski*, 12 ECAB 159 (1960).