

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

A.M., Appellant

and

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

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**Docket No. 07-464
Issued: December 10, 2007**

Appearances:

*Jeffrey P. Zeelander, 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 December 1, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' schedule award decision dated November 28, 2006. 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 a three percent permanent impairment to his right lower extremity and a three percent impairment for the left lower extremity.

FACTUAL HISTORY

Appellant, a 57-year-old mail processor, injured his neck, right shoulder, lower back, both knees, both wrists, both hips and left ankle when he slipped on a wet floor on October 23, 2000. He filed a claim for benefits on October 26, 2000 which the Office accepted for lumbar sprain, right knee sprain and right leg sprain.

On February 7, 2006 appellant filed a Form CA-7 claim for a schedule award.

By decision dated June 1, 2006, the Office denied appellant's claim finding that he failed to submit medical evidence sufficient to establish that he sustained permanent impairment causally related to his accepted conditions.

In a report dated May 19, 2006, Dr. George L. Rodriguez, Board-certified in physical and rehabilitative medicine, related complaints of back pain of varying intensity. He stated that this pain was aggravated by prolonged postures or activities including ambulation, sitting, standing and twisting at the waist. Dr. Rodriguez also noted intermittent numbness involving the right lower extremity along the lateral aspect at the level of the proximal, lateral leg. With regard to the left side, he advised that appellant experienced bilateral buttock pain, particularly when he attempted to perform activities in the standing position. Dr. Rodriguez stated that appellant had difficulty walking and exhibited bilateral antalgic with bilateral Trendelenburg stances, which represented weakness in the gluteus medius muscles bilaterally.

Dr. Rodriguez found that appellant had a 15 percent bilateral lower extremity impairment pursuant to Table 16-11, at page 484 and 17-37 of the (fifth edition) of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, page 556 and a 15 percent deficit for motor nerve impairment at Tables 16-11 and 17-37. He derived this rating based on what he characterized as a superior gluteal impairment, rated Grade 4, a 25 percent deficit which translated to a 62 percent deficit and resultant 15 percent lower extremity impairment.

In a letter dated August 30, 2006, appellant's attorney requested reconsideration.

The Office referred appellant for a second opinion examination with Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, who rated seven percent whole person impairment under the A.M.A., *Guides* in an October 12, 2006 report. Dr. Mandel stated that, with regard to the accepted lumbar injury of lumbar sprain, appellant showed evidence on three separate occasions of multiple bulging annuli on a degenerative basis as well as a slightolisthesis at L4-5. He advised that appellant's three percent lumbar injuries, combined with his obesity were contributory factors to the spondylolisthesis. Dr. Mandel determined that appellant had a seven percent impairment based on Table 15-7, page 404, based on a Grade 1 or 2 spondylolisthesis with pain, with or without muscle spasm.

In a report dated November 8, 2006, an Office medical adviser found that appellant had a three percent impairment of his right lower extremity and a three percent impairment of his left lower extremity based on the A.M.A., *Guides*. He rejected Dr. Rodriguez's impairment rating based on a superior gluteal nerve injury, noting that there was no evidence in the record that appellant had sustained such an injury causally related to employment factors. He stated:

"If Dr. Rodriguez is referring to lumbar spine radiculopathy, this is somewhat difficult to justify since the electromyogram showed polyneuropathy and not a radiculopathy and the magnetic resonance imaging [MRI] [scan] of the lumbar spine showed more degenerative disc abnormalities than herniated disc abnormalities. There is no evidence of any herniation. Clearly, the superior gluteal nerve calculation is not justified because there is no basis for it. However, based on the A.M.A., *Guides* it would be my recommendation that [appellant] be granted a schedule award based upon pain and sensory abnormalities of L5 and

S1 nerve roots bilaterally. This can be justified by the MRI [scans] and can also be justified on the basis of the MRI [scans] as well as clinical findings.

“Therefore, based upon page 424, Table 15-18, entitled *Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity*, the L5 maximum percent loss of function due to sensory deficit or pain, five percent and S1 nerve root maximum percent loss of function due to sensory deficit or pain, five percent.

“Utilizing page 424, Table 15-15 entitled *Determining Impairment Due to Sensory Loss*, [appellant] would have a Grade 4 loss described as: Distorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensations or pain that is forgotten during activity; 25 percent, therefore, 5 percent multiplied times 25 percent equals 1.25 percent. Therefore, for the right lower extremity S1 nerve root equals 1.25 percent and L5 nerve root represents 1.25 percent. These can be added since they are from the same pie chart and this equals 2.5 percent or rounded off to 3 percent.

“The same calculation would apply to the left lower extremity.”

On November 28, 2006 the Office granted appellant a schedule award for a three percent permanent impairment of the right lower extremity and a three percent impairment of the left lower extremity for the period May 19 to September 16, 2006, for a total of 17.28 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act¹ 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.² 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 adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.³

ANALYSIS

The Board notes initially that Dr. Mandel’s October 12, 2006 report presented an impairment rating for the whole person which is not provided for under the Act.⁴ In this case, the Office medical adviser was able to utilize findings made by Dr. Rodriguez in his May 3,

¹ 5 U.S.C. §§ 8101-8193; see 5 U.S.C. § 8107(c).

² 5 U.S.C. § 8107(c)(19).

³ 20 C.F.R. § 10.404.

⁴ *Dennis R. Blackwell*, 41 ECAB 98 (1989).

2006 report. He relied on subsection 15.12, *Nerve Root and/or Spinal Cord*, Chapter 15 of the A.M.A., *Guides*; this subsection stipulates that the extent of any sensory loss due to nerve impairment should be based on Table 15-15 and that the maximum impairment due to nerve dysfunction for the lower extremity is located at Table 15-18. Subsection 15.12 further indicates that the severity of the sensory deficit should be multiplied by the maximum value of the relevant nerve, pursuant to Table 15-18. Relying on these guidelines, the Office medical adviser derived his three percent impairment rating based on Dr. Rodriguez's examination findings of L5 and S1 nerve root involvement and sensory deficit or pain. He calculated a Grade 4 loss at Table 15-15, which amounted to a 25 percent impairment. Relying on Table 15-18, the Office medical adviser took the maximum loss function due to sensory deficit or pain, 5 percent, which he multiplied times 25 percent for a total 1.25 percent impairment for S1 nerve root deficit and for L5 nerve root deficit. He then added these figures, which amounted to a 2.5 percent impairment then rounded them off, for a total three percent bilateral lower extremity impairment under the A.M.A., *Guides*. The Office medical adviser properly determined that these findings applied to appellant's condition.

However, the Office medical adviser did not properly evaluate appellant's lower extremity impairments due to his gluteal nerve injury. He indicated that the superior gluteal nerve injury was a degenerative condition and was not accepted by the Office and was therefore not to be evaluated for schedule award purposes. The Board notes that a gluteal nerve injury is evaluated pursuant to Table 37, of the A.M.A., *Guides*⁵ which evaluates lower extremity impairments caused by nerve deficits. The Board also notes that in determining entitlement to a schedule award, preexisting impairments to the scheduled member are to be included in the permanent impairment evaluation.⁶ Accordingly, the Board finds that the case is not in posture for decision. The Office improperly found that the opinion of the Office medical adviser constituted sufficient medical rationale to support the Office's November 28, 2006 schedule award decision. The Office medical adviser should be asked to clarify if appellant is entitled to an additional schedule award for the gluteal nerve injury if preexisting impairments are to be included in the evaluation of impairment. The Board therefore sets aside the November 28, 2006 schedule award decision of the Office, granting appellant an award for a three percent permanent impairment to his right lower extremity and three percent impairment for his left lower extremity and remands this case to the Office for further proceedings consistent with this opinion.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁵ A.M.A., *Guides* 552.

⁶ *Michael C. Milner*, 53 ECAB 446 (2002).

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2006 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further proceedings consistent with this opinion to be followed by an appropriate decision.

Issued: December 10, 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