

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. DAY and DEPARTMENT OF THE ARMY,
FORT SILL FIRE DEPARTMENT, Fort Sill, OK

*Docket No. 02-412; Submitted on the Record;
Issued September 6, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issue is whether appellant has more than a six percent permanent impairment of the left lower extremity for which he received a schedule award.

On May 21, 1998 appellant, then a 47-year-old firefighter, sustained an employment-related low back strain and aggravation of degenerative disc disease for which he underwent hemilaminotomy and decompression at L4-5 and L5-21 on June 28, 1999. He returned to full duty on January 5, 2000 and on February 28, 2000 filed a claim for a schedule award. By decision dated August 14, 2000, the Office of Workers' Compensation Programs granted appellant a schedule award for a six percent permanent impairment for loss of use of the left lower extremity, for a total of 17.28 weeks of compensation, to run from January 5 to May 4, 2000.

By letter dated August 14, 2000, appellant requested a hearing that was held on March 27, 2001. At the hearing he testified regarding his condition and in a decision dated May 18 and finalized May 21, 2001, an Office hearing representative affirmed the prior decision. On August 24, 2001 appellant requested reconsideration. By decision dated November 21, 2001, the Office denied modification of the prior decision, noting that appellant stated in his request for reconsideration that he was attaching new medical evidence but it was not submitted to the Office. The instant appeal follows.

The Board finds that appellant failed to establish that he is entitled to greater than a six percent impairment of the left lower extremity.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.404 of the implementing federal regulations,² schedule awards are payable for permanent impairment of

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

specified body members, functions or organs. 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 under the law for 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 Office³ and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴

The relevant medical evidence includes a January 31, 2000 report, in which Dr. Shawn Smith, appellant's treating Board-certified physiatrist, advised that appellant had reached maximum medical improvement and stated that he evaluated appellant in accordance with the A.M.A., *Guides* and determined that he had a 10 percent impairment related to 2-level disc disease with surgery and residual symptoms and a 6 percent impairment related to abnormal range of motion of the back which, under the Combined Values Table, would equal a 15 percent total impairment. In a March 16, 2000 report, Dr. Smith advised that he utilized Chapter 3.3 of the A.M.A., *Guides* in reaching his impairment determination and further stated that appellant had zero percent impairment of his lower extremities.

Dr. Thomas J. Eiser, a Board-certified orthopedic surgeon, provided a second opinion evaluation for the Office. In a report dated May 12, 2000, he noted that appellant continued to complain of some chronic back pain with referred pain to the lower extremities, particularly on the left. Dr. Eiser advised that, under Table 83 of the fourth edition of the A.M.A., *Guides*, appellant had a 5 percent impairment for persistent L5 pain and a 5 percent impairment for persistent S1 pain, which totaled a 10 percent permanent impairment. In an August 2, 2000 report, an Office medical adviser evaluated appellant's impairment and found that maximum medical improvement had been reached on January 5, 2000. He further noted that, while Dr. Eiser recommended the maximum impairment for sensory loss of the L5 and S1 nerve roots, from his description of residual pain, utilizing Table 20 of the A.M.A., *Guides*, Grade 3 was appropriate. He thus awarded appellant a three percent impairment for sensory loss at L5 and a three percent impairment for sensory loss at S1.

The Board finds that the Office medical adviser properly rated appellant's permanent impairment. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole.⁵ A schedule award is, however, payable for a permanent impairment of the legs that is due to an employment-related back condition.⁶ In this case, while Dr. Smith provided reports indicating that appellant had a 15 percent impairment of the left lower extremity and Dr. Eiser indicated that appellant had a 10 percent impairment, their

³ At the time of the April 18, 2000 schedule award, the Office utilized the fourth edition of the A.M.A., *Guides*. See *John Yera*, 48 ECAB 243 (1996). Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards. FECA Bulletin No. 01-05 (issued January 29, 2001).

⁴ See *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002); *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ See *Terry E. Mills*, 47 ECAB 309 (1996).

⁶ See *Denise D. Cason*, 48 ECAB 530 (1997).

findings are not supported by the instructions provided by the A.M.A., *Guides* and, therefore, would not indicate that appellant was entitled to a greater award.

Table 83 of the A.M.A., *Guides* provides guidelines for determining impairment of the lower extremity⁷ and indicates that the maximum percent for the impaired nerve root should be multiplied by a percent that represents the degree of nerve impairment.⁸ The Office medical adviser, therefore, properly utilized the A.M.A., *Guides*⁹ and determined that appellant had a Class 3 impairment under Table 20 and granted him the maximum allowable, 60 percent. He then multiplied the 60 percent by Dr. Eiser's findings of a 5 percent impairment for persistent pain of the L5 and S1 nerve roots, to equal 3 percent for each, which the Office medical adviser added, to equal a 6 percent impairment of the left lower extremity.

The Board notes that the Office was correct in finding that the record does not contain a new report from Dr. Smith, as referred to in appellant's request for reconsideration. The Office, therefore, properly granted appellant a schedule award for a six percent permanent impairment of the left lower extremity.¹⁰

The decisions of the Office of Workers' Compensation Programs dated November 21 and May 21, 2001 are hereby affirmed.

Dated, Washington, DC
September 6, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

⁷ A.M.A., *Guides*, *supra* note 3 at 130.

⁸ The Board notes that, while the language found in this section of the A.M.A., *Guides* refers to Tables 11 and 12, these are regarding sensory or motor impairment and Table 20 at page 151 of the A.M.A., *Guides* provides guidelines for classifying impairment due to pain.

⁹ *Id.* at 151.

¹⁰ See *Luis Chapa, Jr.*, 41 ECAB 159 (1989).