



The findings of magnetic resonance imaging (MRI) scan testing from August 31, 1997 showed that appellant had a left paracentral disc herniation at L5-S1. The Office accepted that he sustained an employment-related L5-S1 herniated disc and paid compensation for periods of disability.

On March 23, 1998 Dr. Mark A. Capehart, an attending Board-certified orthopedic surgeon, performed a left L5-S1 hemilaminectomy with excision of the herniated nucleus pulposus. On December 11, 2000 Dr. James C. Mayoza, another attending Board-certified orthopedic surgeon, performed a repeat L5-S1 laminectomy and disc excision.<sup>1</sup> Both procedures were authorized by the Office.

In July 2002 appellant claimed entitlement to schedule award compensation due to his accepted employment injury, an L5-S1 herniated disc.

In a report dated July 10, 2002, Dr. Mayoza stated, "It is my opinion that [appellant] sustained 15 percent permanent disability to the body as a whole for the injury he sustained in 1997, and 15 percent permanent disability to the body as a whole, for the injury sustained January 31, 2000."<sup>2</sup>

By decision dated December 19, 2002, the Office denied appellant's schedule award claim on the grounds that the permanent impairment rating of Dr. Mayoza was not derived in accordance with the relevant standards for evaluating impairment.

In a report dated March 25, 2003, Dr. Mayoza described appellant's surgical procedures and noted, "In substantial accordance with the [American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001)], I am of the impression that this patient has residual permanent partial disability which I would assess to be 18 percent of the body as a whole."

By decision dated May 19, 2003, the Office affirmed its December 19, 2002 decision denying appellant's schedule award claim.

The Office requested that Dr. Mayoza provide additional clarification of his opinion regarding the extent of appellant's permanent impairment. In a report dated May 15, 2003, Dr. Mayoza described appellant's surgical procedures and indicated that he reached maximum medical improvement as of February 23, 2003. He stated that appellant continued with occasional complaints of fatigue or a "dead foot" feeling about the left foot, a cramping or numb feeling radiating from the left knee into the left foot, and occasional pain which radiated into both lower extremities, left greater than the right. Dr. Mayoza stated, "After reviewing Tables 15-15, 15-16, and 15-18 in the [A.M.A., *Guides* (5<sup>th</sup> ed. 2001)], I am of the impression that this patient has residual permanent partial disability which I would assess to be 40 percent of the left lower extremity and 35 percent of the right lower extremity."

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<sup>1</sup> The record reveals that appellant was involved in a nonwork-related vehicular accident on January 31, 2000.

<sup>2</sup> In a July 2, 2002 form report, Dr. Mayoza recommended work restrictions, including no lifting more than 10 pounds and no repetitive lifting.

The Office referred appellant to Dr. Robert Shackelford, a Board-certified orthopedic surgeon for a second opinion regarding the extent of the permanent impairment of his lower extremities. In a report dated June 24, 2004, Dr. Shackelford discussed appellant's factual and medical history, including his two low back surgeries. He noted that on examination the range of motion of appellant's hips, knees and ankles on both sides was normal, but that strength testing revealed a 4/5 grade of the left hamstring.<sup>3</sup> Dr. Shackelford noted that on sensory examination appellant reported a feeling of hip anesthesia and dysesthesia in the medial aspect of the lower extremities extending down from the right knee into the right foot and extending down from a point a bit above the left knee into the left foot. He indicated, however, that these findings seemed to be subjective and that two-point discrimination testing was equivocal. Dr. Shackelford stated that the current impairment rating was for the lower extremities rather than the back and stated, "According [to the A.M.A., *Guides* (5<sup>th</sup> ed. 2001)], there is zero permanent partial impairment of either the right or the left lower extremity." He indicated that appellant's pathology was clearly located in the spine and associated structures.

By decision dated December 16, 2003, the Office affirmed its prior schedule award decisions. Appellant requested a hearing before an Office hearing representative which was held on May 25, 2004. He argued that there was a conflict in the medical evidence concerning his entitlement to schedule award compensation.

Appellant submitted a June 24, 2004 report in which Dr. Mayoza indicated that he disagreed with Dr. Shackelford's opinion that appellant had no permanent impairment of his lower extremities. He stated that appellant continued with occasional complaints of fatigue or a "dead foot" feeling about the left foot, a cramping or numb feeling radiating from the left knee into the left foot, and occasional pain which radiated into both lower extremities, left greater than the right and noted that these lower extremity problems were directly attributable to his employment-related "lumbar spine injury and resulting surgery." He again noted that he had reviewed Tables 15-15, 15-16 and 15-18 of the fifth edition of the A.M.A., *Guides* and found that appellant had a 40 percent permanent impairment of the left lower extremity and a 35 percent permanent impairment of the right lower extremity.

In a decision the Office hearing representative determined that there was a conflict in the medical evidence between Dr. Mayoza and Dr. Shackelford regarding appellant's entitlement to schedule award compensation and remanded the case to the Office for referral to an impartial medical specialist.<sup>4</sup>

On remand appellant and the case record were referred to Dr. Sami Framjee, a Board-certified orthopedic surgeon, for an impartial medical evaluation and opinion regarding the extent of appellant's permanent impairment.

In a report dated November 29, 2004, Dr. Framjee discussed appellant's factual and medical history, including his two low back surgeries. He noted that on examination appellant

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<sup>3</sup> Dr. Shackelford indicated that the left hamstring was functional but that it was weak compared to the right side. Testing for all other muscles in both legs revealed strength testing revealed grades of 5/5.

<sup>4</sup> The decision of the Office hearing representative was inadvertently left undated.

complained that he had numbness in both legs, the left greater than the right, as well as pain in the left calf. Dr. Framjee indicated that there was “no history of motor weakness” and that neurological examination did not reveal any motor deficits.<sup>5</sup> He stated that straight leg raising produced low back pain and some discomfort in the left leg and noted that sensory examination revealed S1 hypoesthesia on the left side.<sup>6</sup> Dr. Framjee found that, according to the fifth edition of the A.M.A., *Guides*, appellant had a five percent impairment of the left leg due to sensory loss associated with the S1 nerve root. He further concluded that he did not see any neurological deficit of the right leg and that appellant had no impairment of the right leg.<sup>7</sup>

By award of compensation dated January 20, 2005, the Office granted appellant a schedule award for a five percent impairment of the left leg. The award ran for 14 weeks from November 29, 2004 to March 9, 2005.

The record contains a letter dated January 25, 2005 in which appellant, through his attorney, requested an oral hearing before an Office hearing representative.<sup>8</sup>

By decision dated September 20, 1995, the Office denied appellant’s request for an oral hearing as untimely.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking compensation under the Federal Employees’ Compensation Act<sup>10</sup> has the burden of establishing the essential elements of his claim, including that she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.<sup>11</sup>

The schedule award provision of the Act<sup>12</sup> and its implementing regulation<sup>13</sup> sets forth the number of weeks of compensation payable to employees sustaining permanent impairment

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<sup>5</sup> Dr. Framjee indicated that motor power was 4+ bilaterally.

<sup>6</sup> Dr. Framjee conducted range of motion testing for the back but it does not appear that he performed such testing for the lower extremities.

<sup>7</sup> In a report dated January 13, 2005, an Office district medical adviser stated that he agreed with Dr. Framjee’s impairment rating.

<sup>8</sup> The letter was received by the Office on April 25, 2006 and bears the handwritten notation “Second request, April 19, 2005.” The record also contains a hearing request form dated January 24, 2005 which was added to the record on May 3, 2005.

<sup>9</sup> Appellant submitted additional evidence after the Office’s September 20, 2005 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> *See Bobbie F. Cowart*, 55 ECAB \_\_\_\_ (Docket No. 04-1416, issued September 30, 2004).

<sup>12</sup> 5 U.S.C. § 8107.

<sup>13</sup> 20 C.F.R. § 10.404.

from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>14</sup>

Section 8123(a) of the Act provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”<sup>15</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>16</sup> In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion.<sup>17</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained employment-related L5-S1 herniated disc and he claimed entitlement to a schedule award due to this employment-related condition. Based on the opinion of Dr. Framjee, a Board-certified orthopedic surgeon who served as an impartial medical specialist, the Office determined that appellant had a five percent permanent impairment of his left leg.

The Board notes that the Office properly determined that there was a conflict in the medical evidence regarding appellant’s entitlement to schedule award compensation between Dr. Mayoza, an attending Board-certified orthopedic surgeon, and Dr. Shackelford, a Board-certified orthopedic surgeon who served as an Office referral physician.

In reports dated May 15, 2003 and June 24, 2004, Dr. Mayoza concluded that, under Tables 15-15, 15-16 and 15-18 of the fifth edition of the A.M.A., *Guides*, appellant had a 40 percent permanent impairment of the left lower extremity and a 35 percent permanent impairment of the right lower extremity.<sup>18</sup> He noted his opinion that appellant had various objective findings that affected his lower extremities. In contrast, Dr. Shackelford determined in an October 16, 2003 report that appellant did not have any permanent impairment of his lower extremities. He concluded that appellant’s medical condition was located in his back and did not

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<sup>14</sup> *Id.*

<sup>15</sup> 5 U.S.C. § 8123(a).

<sup>16</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>17</sup> *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

<sup>18</sup> A.M.A., *Guides* 424, Tables 15-15, 15-16 and 15-18.

extend into his lower extremities. The Office properly referred appellant and the case record to Dr. Framjee for an impartial medical evaluation and opinion on this matter.<sup>19</sup>

In a November 29, 2004 report, Dr. Framjee concluded that appellant had a five percent impairment of the left leg due to sensory loss associated with the S1 nerve root but had no impairment of the right leg. The Board notes that there are various deficiencies in Dr. Framjee's evaluation. Although he did not indicate so, it appears that Dr. Framjee applied Tables 15-15 and 15-18 of the fifth edition of the A.M.A., *Guides* to determine that appellant had a five percent impairment of the left leg due to sensory loss associated with the S1 nerve root.<sup>20</sup> However, he did not fully explain how he applied these standards to find that appellant had no sensory loss impairment of the right leg.<sup>21</sup> He did not provide a clear opinion that he conducted all the appropriate testing for evaluating lower extremity impairment. The medical record contains indications that appellant had weakness in his legs, particularly on the left, but it is unclear whether Dr. Framjee evaluated these matters under the relevant testing regimens and standards of the A.M.A., *Guides*.<sup>22</sup> He indicated that appellant had "no history of motor weakness" and that neurological examination did not reveal any motor deficits, but the findings of Dr. Shackelford indicated that strength testing revealed a 4/5 grade of the left hamstring and his own testing suggested some weakness in both legs.<sup>23</sup> Moreover, Dr. Framjee did not provide a clear opinion that he conducted all the appropriate testing for evaluating lower extremity range of motion impairment under the relevant standards of the A.M.A., *Guides*.<sup>24</sup>

For these reasons, the opinion of the impartial medical specialist, Dr. Framjee, is in need of clarification and elaboration. In order to resolve the conflict in the medical opinion, the case will be remanded for the Office to obtain a supplemental report from Dr. Framjee regarding the extent of appellant's permanent impairment. After such further development as the Office deems necessary, an appropriate decision should be issued regarding appellant's entitlement to schedule award compensation.

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<sup>19</sup> See *supra* notes 15 and 16 and accompanying text.

<sup>20</sup> A.M.A., *Guides* 424, Tables 15-15 and 15-18. It appears that Dr. Framjee multiplied the 5 percent maximum value for sensory loss associated with the S1 nerve root (Table 15-18) times a 100 percent sensory loss grade (Table 15-15). Moreover, he did not explain why the L5 nerve root would not be involved.

<sup>21</sup> The medical record shows that appellant also experienced pain and numbness in his right leg.

<sup>22</sup> See A.M.A., *Guides* 424, 531-33, Tables 15-16, 15-18 and 17-7.

<sup>23</sup> Dr. Mayoza indicated that appellant had complaints of fatigue or a "dead foot" feeling about the left foot.

<sup>24</sup> Dr. Framjee conducted range of motion testing for the back but it does not appear that he performed such testing for the lower extremities. See A.M.A., *Guides* 533-43 concerning guidelines for conducting range of motion testing for the lower extremities.

**CONCLUSION**

The Board finds that, due to an unresolved conflict in the medical evidence, the case is not in posture for decision regarding whether appellant has more than a five percent permanent impairment of his left leg.<sup>25</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 20, 2005 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 15, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>25</sup> Due to the Board's disposition of the merit issue of the present case, it is not necessary to consider the nonmerit issue, *i.e.*, whether the Office properly denied appellant's request for an oral hearing.