

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Austin, TX, Employer**

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**Docket No. 06-1730
Issued: January 8, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 24, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 6, 2006 which denied his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he has a permanent impairment caused by his accepted lumbar sprain which would entitle him to a schedule award. On appeal, appellant contends that Dr. Jonathan Clark Race, the referee examiner, performed fitness-for-duty examinations for the employing establishment under the name Dr. Jonathan Clark and should therefore be disqualified.

FACTUAL HISTORY

On April 27, 2000 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that he injured his back that day while stacking mail trays. He stopped work on

May 1, 2000 and returned to limited duty on May 15, 2000. On May 30, 2000 the Office accepted that appellant sustained an employment-related lumbar sprain. A June 15, 2000 lumbar spine magnetic resonance imaging (MRI) scan was interpreted as demonstrating a small disc protrusion at L4-5. Appellant came under the care of Dr. Harold D. Lewis, a Board-certified osteopath specializing in orthopedic surgery, who provided restrictions to appellant's physical activity. In an August 17, 2000 report, Dr. Warran A. Ross, an orthopedic surgeon, reviewed the MRI scan and diagnosed a herniated disc at L4-5 without neuropathy and post-traumatic instability of the lumbar spinal joints. Electromyographic (EMG) testing on July 24, 2003 demonstrated mild L5 radiculopathy. A November 17, 2003 lumbar spine MRI scan revealed a disc herniation at L4-5. Dr. Vivek Mahendru, a Board-certified anesthesiologist, administered steroid injections to appellant's lower back from December 2003 to September 2004.

On October 14, 2004 appellant filed a schedule award claim. He submitted an April 21, 2004 report in which Dr. Lewis advised that he had an eight percent whole person spine impairment. By letter dated October 20, 2004, the Office advised Dr. Lewis that schedule awards were not granted for spinal impairments but could be paid for impairment to the lower extremities. Dr. Lewis was asked to provide an impairment rating using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).¹ In a November 20, 2004 report, Dr. Lewis provided spinal range of motion findings and stated that, in accordance with the spinal impairment summary found at page 384 of the A.M.A., *Guides*, appellant had a 10 percent whole person impairment.

By decision dated July 26, 2005, the Office denied appellant's schedule award claim on the grounds that the medical evidence did not establish impairment to a scheduled member of the body. On August 11, 2005 appellant requested a review of the written record. In a January 13, 2006 decision, an Office hearing representative remanded the case to the Office for referral to a Board-certified specialist to determine whether the disc herniation was related to the April 27, 2000 employment injury and for an impairment evaluation.²

On April 12, 2006 the Office referred appellant to Dr. Race, a Board-certified orthopedic surgeon, who was provided with the medical record, a statement of accepted facts, and a set of questions. In a May 23, 2006 report, he noted the history of injury, his review of the statement of accepted facts and the medical record. Physical examination demonstrated low back tenderness, decreased spinal range of motion, and a positive bilateral straight-leg raising test. Range of motion of the hips, knees and ankles was normal and no atrophy was present. Dr. Race diagnosed chronic low back pain with MRI scan evidence of a minor disc protrusion at L4-5 and bilateral leg pain with no objective evidence of lumbar radiculopathy. In response to specific questions, he opined that the L4-5 disc herniation appeared related to the April 27, 2000 employment injury. Dr. Race advised that maximum medical improvement had been reached on April 21, 2004. Under the fifth edition of the A.M.A., *Guides*, appellant had no impairment rating for the lower extremities as there was no limited range of motion or motor or sensory loss. Although appellant had an abnormal gait, Table 17-5 of the A.M.A., *Guides* stipulates that there

¹ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

² The Board notes that the Office stated that a herniated disc was identified at L5-S1. The MRIs dated June 15, 2000 and November 17, 2003 identify the lesion at L4-5.

be documented evidence of arthritic changes in the hip, knee or ankle, which were not found in this case. Dr. Race concluded that appellant had no lower extremity impairment. In a June 29, 2006 report, an Office medical adviser found that maximum medical improvement was achieved on the date of Dr. Race's evaluation, May 23, 2006. He agreed with Dr. Race's conclusion that appellant had no lower extremity impairment.

By decision dated July 6, 2006, the Office denied appellant's claim for a schedule award.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act³ and section 10.404 of the implementing federal regulations,⁴ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not 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 A.M.A., *Guides*⁵ has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁶

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.⁷ In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁸ An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.⁹

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ A.M.A., *Guides*, *supra* note 1.

⁶ See *Joseph Lawrence, Jr.*, *supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁷ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999). Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve. A.M.A., *Guides*, *supra* note 1 at 423.

⁹ *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the figures and tables found in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.¹⁰ Section 17.2c provides that an impairment due to a gait derangement should be supported by pathologic findings such as x-rays, and Table 17-5 provides impairment percentages due to gait derangement.¹¹

ANALYSIS

Initially, the Board notes that appellant failed to present evidence to support his allegation that Dr. Race provided fitness-for-duty examinations for the employing establishment under another name. Office procedures and Board precedent allow physicians who are regularly involved in performing fitness-for-duty examinations to serve as second opinion specialists.¹² Appellant's argument that Dr. Race's report be excluded is therefore without merit.

It is a claimant's burden to submit sufficient evidence to establish entitlement to a schedule award.¹³ In this case, the Office determined that appellant was not entitled to a schedule award for his accepted lumbar sprain because the medical evidence of record did not establish that he sustained any permanent impairment to his lower extremities. While Dr. Lewis opined in reports dated April 21 and November 20, 2004 that appellant had a whole person impairments of 8 and 10 percent respectively to the spine, the Board finds these reports of no probative value. Dr. Lewis based his impairment rating on decreased spinal range of motion and provided analysis in accordance with the spinal impairment summary found at page 384 of the A.M.A., *Guides*. As noted, a schedule award is not payable for impairment of the spine.¹⁴ Dr. Lewis did not document any lower extremity impairment. Dr. Race, who provided a second opinion evaluation for the Office, advised that, under the provisions of the fifth edition of the A.M.A., *Guides*, appellant had no impairment of his lower extremities. He specifically advised that appellant had no limited range of motion or motor or sensory loss to his lower extremities which would entitle him to a schedule award. Section 17.2c of the A.M.A., *Guides* provides that an impairment due to a gait derangement should be supported by pathologic findings such as x-rays.¹⁵ Dr. Race properly found that, because appellant had no documented evidence of arthritic changes in the hip, knee or ankle, he would not be entitled to an impairment rating for any gait derangement.

¹⁰ *Robert V. Disalvatore*, 54 ECAB 351 (2003).

¹¹ A.M.A., *Guides*, *supra* note 1 at 529.

¹² *Cleopatra McDougal-Saddler*, 50 ECAB 367 (1999).

¹³ *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ *Pamela J. Darling*, *supra* note 7.

¹⁵ *Supra* note 11.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for his accepted lumbar sprain.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 6, 2006 be affirmed.

Issued: January 8, 2007
Washington, DC

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

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

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