

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

J.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Philadelphia, PA, Employer**

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**Docket No. 07-2237
Issued: October 7, 2008**

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 September 4, 2007 appellant, through counsel, filed a timely appeal of an Office of Workers' Compensation Programs' September 6, 2006 merit decision, which found that he had no more than a four percent impairment of the right upper extremity; October 16, 2006 and June 20, 2007, which found that he had no more than a four percent impairment of the right lower extremity; and March 15, 2007 which found that he was not entitled to schedule award compensation for his right upper and lower extremities at a recurrent pay rate. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant has more than a four percent impairment of the right upper extremity and a four percent impairment of the right lower extremity, for which he received schedule awards; and (2) whether appellant was entitled to a recurrent pay rate for his right upper and lower extremity schedule awards. On appeal, counsel contends that there is a conflict in the medical opinion evidence between appellant's attending physician and an Office referral physician regarding the extent of permanent impairment. He also contends that the

recurrent rate of pay on August 14, 1995 should have been applied in issuing appellant's schedule award payments for the right and left upper extremities.

FACTUAL HISTORY

This case has previously been before the Board. In an August 5, 1988 decision, the Board affirmed the Office's loss of wage-earning capacity determination.¹ In decisions dated November 2, 1993 and September 29, 2003, the Board reversed the Office's termination of appellant's compensation benefits.² In the September 29, 2003 decision, the Board found a conflict in medical opinion between Dr. Parviz Kambin, an attending Board-certified orthopedic surgeon, and Dr. Steven Valentino, an Office referral physician, as to whether appellant had any continuing employment-related residuals. The facts and history of the case are set forth in the Board's prior decisions and are incorporated herein by reference.³ The facts relevant to the present appeal are set forth.

On June 7, 2002 appellant filed a claim for a schedule award. In a March 25, 2002 medical report, Dr. David Weiss, an attending osteopath, reviewed a history of appellant's November 14, 1980 and April 12, 1982 employment-related injuries and medical records. On physical examination of the lumbar spine, he reported a well-healed laminectomy scar over the posterior midline, muscle spasm and tenderness. Dr. Weiss stated that appellant had a chronic post-traumatic lumbosacral strain and sprain, a herniated nucleus pulposus at L4-5, right lumbar radiculopathy and chronic bicipital tendinitis of the right arm. He noted that appellant was status post bilateral hemilaminectomy, decompression of the L5 nerve root, rotator cuff tear to the right shoulder and arthroscopic surgery with rotator cuff repair by history. Dr. Weiss stated that the accepted employment-related injuries caused appellant's subjective and objective findings.

Dr. Weiss utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) rate appellant's permanent impairment. Regarding the right shoulder, he determined that appellant's flexion constituted a one percent motor deficit impairment (A.M.A., *Guides* 476, Figure 16-40) and pain represented a three percent impairment (A.M.A., *Guides* 574, Figure 18-1), totaling a four percent impairment of the right upper extremity. Regarding the right lower extremity, Dr. Weiss found that 4/5 motor strength deficit of the right gastrocnemius (ankle plantar flexion) constituted a 17 percent impairment, 3/5 motor strength deficit of the right hip flexors constituted a 15 percent impairment (A.M.A., *Guides* 532, Table 17-8) and sensory deficit of the right S1 nerve root constituted a 4 percent impairment (A.M.A., *Guides* 424, Tables 15-15 and 15-18), totaling a 32 percent impairment. He determined that appellant's pain represented a 3 percent impairment

¹ Docket No. 88-598 (issued August 5, 1988).

² Docket No. 93-606 (issued November 2, 1993); Docket No. 03-1191 (issued September 29, 2003). The November 2, 1993 decision is not contained in the case record.

³ Appellant, a refrigeration, heating and air conditioning trainee, filed a claim alleging that on November 14, 1980 he hurt his back at work. The Office accepted the claim for a lumbar sprain. Subsequently, appellant filed a claim alleging that on April 12, 1982 he hurt his right shoulder and back while pulling file cabinet drawers. The Office accepted the claim for tendinitis of the right shoulder, myositis and lumbar sprain. On June 11, 1991 it authorized a bilateral hemilaminectomy and decompression of the L5 root on both sides.

(A.M.A., *Guides* 574, Figure 18-1), resulting in a 35 percent impairment of the right lower extremity. Dr. Weiss concluded that appellant reached maximum medical improvement on March 25, 2002.

On March 10, 2004 the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. E. Balasubramanian, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Balasubramanian was asked to determine whether appellant had any residuals from his employment-related injuries and any permanent impairment of one or both of his lower extremities based on the A.M.A., *Guides*.

In a March 30, 2004 report, Dr. Balasubramanian diagnosed cervical degenerative disc disease and thigh pain due to appellant's two back surgeries and some neuralgia paraesthetica in the right leg. He opined that appellant's low back pain and employment-related herniated disc were still present. Dr. Balasubramanian stated that appellant was not able to return to his normal activity but could return to light-duty activities. He related that his cervical degenerative disc disease and neuralgia were related to the accepted employment-related injuries. Dr. Balasubramanian concluded that appellant did not require any active treatment.

On August 4, 2004 the Office requested that Dr. Balasubramanian address whether appellant had any permanent impairment and, if so, to provide an impairment rating based on the A.M.A., *Guides*. Dr. Balasubramanian did not respond.

By decision dated October 29, 2004, the Office denied appellant's schedule award claim. It found the medical evidence of record insufficient to establish that he had reached maximum medical improvement. In a November 2, 2004 letter, appellant, through counsel, requested an oral hearing before an Office hearing representative.

By decision dated December 23, 2005, an Office hearing representative set aside the October 29, 2004 decision. He found that Dr. Weiss' March 25, 2002 report stated that appellant had reached maximum medical improvement and that he sustained a 4 percent impairment of the right upper extremity and a 19 percent impairment of the left lower extremity. The Office hearing representative noted that Dr. Balasubramanian did not address whether appellant had reached maximum medical improvement and described an essentially stable condition for which appellant did not require any active treatment. The hearing representative remanded the case for further development of the evidence.

On August 23, 2006 Dr. Morley Slutsky, an Office medical adviser, recommended that appellant undergo a second opinion medical examination based on the inconsistent findings of Dr. Weiss and Dr. Balasubramanian. He stated that Dr. Weiss found a four percent impairment of the right upper extremity while Dr. Balasubramanian did not document range of motion measurements for the right shoulder or discuss the extremity in the history he provided. Dr. Slutsky noted that neither examining physician documented significant left lower extremity motor impairment secondary to appellant's accepted work-related back surgery.

By decision dated September 6, 2006, the Office granted appellant a schedule award for a four percent impairment of the right upper extremity. The period of the award was from March 25 to June 20, 2002 for a total of 12.48 weeks of compensation based on appellant's

weekly pay rate of \$224.70 as of April 12, 1982, the date of his second employment-related injury and when disability commenced. The Office noted that the weekly pay rate was calculated as \$299.60 per week multiplied by the augmented, three-quarters compensation rate for a weekly pay rate of \$224.70 which was increased by a cost-of-living adjustment to \$383.25 per week.

By letter dated September 7, 2006, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a September 28, 2006 report, Dr. Draper reviewed a history of the November 14, 1980 and April 12, 1982 employment-related injuries and appellant's medical treatment. He reported normal findings on physical examination of the lumbar spine. Dr. Draper found 30 degrees of forward flexion, 10 degrees of right lateral tilting, 10 degrees of left lateral tilting and 0 degrees of hyperextension. Appellant had a normal stance and gait. On physical examination of the lower extremities, Dr. Draper reported +5 for each muscle of the right and left leg. Straight leg raising tests were negative bilaterally at 90 degrees in the sitting position. Reflex testing of the right and left lower extremities resulted in +2 each for the patella and Achilles tendons. Light touch sensory testing was normal for the right and lower extremities. On physical examination of the cervical spine, Dr. Draper found no muscle spasm or tenderness. Appellant had the presence of normal cervical lordosis. He had 80 degrees of flexion, 60 degrees of extension, 45 degrees each of right and left lateral flexion and 80 degrees each of right and left rotation. Testing of the right and left upper extremities was +5 for each muscle tested. The reflex function was zero for the right and left upper extremities. Dr. Draper stated that appellant had normal light touch sensation test results for the C2, C3, C4, C5, C6, C7, C8 and T1 dermatomes. He had a negative vertical compression test with tilt to the right and left. On physical examination of the right shoulder, Dr. Draper reported 170 degrees of abduction, 170 degrees of forward flexion, 80 degrees of internal rotation and 80 degrees of external rotation. A Hawkins' test and Yergason's sign were negative. Dr. Draper diagnosed low back pain syndrome which included degenerative lumbar disc disease at L5-S1, anterior spondylolisthesis of L5 and S1 with marked bilateral foraminal narrowing and nerve root impingement at this level and right subarticular stenosis and preexisting degenerative lumbar disc disease at T12-L1, L3-4, L4-5 and L5-S1 as demonstrated by a May 10, 2003 magnetic resonance imaging scan. Appellant's unrelated diagnoses included cervical spondylosis and degenerative cervical disc disease, impingement syndrome of the right shoulder and status post right shoulder arthroscopy which was performed in 1999.

Dr. Draper determined that appellant had no impairment of the left lower extremity since he did not have paresthesias or any pathology. Appellant had a four percent impairment of the right lower extremity as he had paresthesias and no sensory deficit (A.M.A., *Guides* 552, Table 17-37). Dr. Draper stated that appellant had no physical evidence of a sensory deficit in the right lower extremity. He just had paresthesias which was not complete but involved a lateral aspect of the right thigh. Dr. Draper opined that appellant reached maximum medical improvement on June 11, 1992, one year following his back surgery. In a September 28, 2006 work capacity evaluation, he stated that appellant could not perform his usual work duties but he could work eight hours per day with restrictions.

On October 6, 2006 Dr. Slutsky agreed that appellant had a four percent impairment of the right lower extremity based on the A.M.A., *Guides*. He stated that Dr. Draper conducted a thorough medical evaluation and provided a well-rationalized medical opinion. Appellant's physical examination findings were consistent with those of other physicians, including Dr. Balasubramanian. Dr. Slutsky disagreed with Dr. Weiss' impairment rating for the right lower extremity regarding motor strength deficit of the right gastrocnemius and hip flexor, sensory deficit for the right S1 nerve root and pain as his findings were not consistent with the other physicians of record. He concluded that appellant reached maximum medical improvement on June 11, 1991.

By decision dated October 16, 2006, the Office granted appellant a schedule award for a four percent impairment of the right lower extremity. The period of the award was from June 21 through September 9, 2002 for a total of 80.64 weeks of compensation based on his weekly rate of pay of \$224.70 as of April 12, 1982, the date of appellant's second employment-related injury and where disability commenced. The Office noted that the weekly pay rate was calculated as \$299.60 per week multiplied by the augmented, three-quarters compensation rate for a weekly pay rate of \$224.70 which was increased by a cost-of-living adjustment to \$383.25 per week. In an October 20, 2006 letter, appellant, through counsel, requested an oral hearing regarding the schedule for the right lower extremity.

In a March 1, 2007 letter, appellant, through counsel, requested reconsideration of the September 6, 2006 schedule award for the right upper extremity. Counsel contended that appellant's schedule award compensation should have been paid at the recurrent pay rate beginning August 14, 1995 based on the Office's December 21, 1995 decision, which found that appellant sustained a recurrence of disability on April 12, 1982 due to the employing establishment's withdrawal of his light-duty work assignment.

By decision dated March 15, 2007, the Office denied modification of the September 6, 2006 decision. It found that appellant was not entitled to schedule award compensation based on a recurrent pay rate because he did not work a full eight-hour workday when he was reinjured on April 12, 1982, his first day back at work after following the November 14, 1980 injury.

In a June 20, 2007 decision, an Office hearing representative affirmed the October 16, 2006 right leg schedule award. He found that Dr. Draper's September 28, 2006 report constituted the weight of the medical evidence in finding that appellant had no more than a four percent impairment of the right lower extremity.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ 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

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

⁵ 20 C.F.R. § 10.404.

percentage of loss of use.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar sprain, tendinitis of the right shoulder and myositis while working at the employing establishment. Dr. Weiss, an attending physician, determined in a March 25, 2002 report that appellant's right shoulder flexion constituted a one percent motor deficit impairment (A.M.A., *Guides* 476, Figure 16-40) and pain represented a three percent impairment (A.M.A., *Guides* 574, Figure 18-1). He combined the impairment ratings for diminished range of motion and pain to calculate a four percent impairment of the right upper extremity (A.M.A., *Guides* 604, Combined Values Chart). The Board notes, however, that Chapter 18 should not be used for condition that can be adequately rated on the rating systems given in other Chapters.⁸ Dr. Weiss did not address why Chapter 16 was not adequate to rate pain. Appellant did not submit any medical evidence establishing greater than the four percent impairment of the right upper extremity allowed. The Board finds that he has no more than a four percent impairment of the right upper extremity.

Regarding the right lower extremity, Dr. Weiss determined that 4/5 motor strength deficit of the right gastrocnemius (ankle plantar flexion) constituted a 17 percent impairment, 3/5 motor strength deficit of the right hip flexors constituted a 15 percent impairment (A.M.A., *Guides* 532, Table 17-8) and 4/5 sensory deficit of the right S1 nerve root constituted a 4 percent impairment (A.M.A., *Guides* 424, Tables 15-15 and 15-18), totaling a 32 percent impairment of the right lower extremity. He also found that appellant was entitled to an additional three percent impairment for pain (A.M.A., *Guides* 574, Figure 18-1). Dr. Weiss combined the impairment ratings for motor strength and sensory deficits and pain to total 35 percent impairment of the right lower extremity (A.M.A., *Guides* 604, Combined Values Chart). However, the impairment rating for pain does not conform to the procedures of the Office in making schedule award ratings. As noted, examining physician is cautioned under Chapter 18 of the A.M.A., *Guides*, not to use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and oral impairment rating systems given in other chapters of the A.M.A., *Guides*.⁹ Chapter 18 was formulated to assess impairment due to excess pain in the context of verifiable medical conditions that cause pain.¹⁰ In this case, Dr. Weiss did not provide any rationale for finding an additional impairment rating for pain conforming to the procedures outlined in Chapter 18. There was no discussion by him as to why Chapters 15 or 12 did not adequately rate pain to right lower extremity found or how there was any excess pain due to the

⁶ 5 U.S.C. § 8107(c)(19).

⁷ See *supra* note 5.

⁸ See A.M.A., *Guides* 571 at 18.36.

⁹ *Id.* at 571, 18.3b.

¹⁰ *Id.* at 570.

accepted back condition.¹¹ The A.M.A., *Guides* note that an explanation by the examining physician should be provided in writing to support a rating made under Chapter 18. In the absence of such rationale, the three percent impairment rating provided by Dr. Weiss artificially inflated the rating for pain already provided under Table 15-18. Moreover, in combining the impairment ratings for muscle weakness under Table 17-8 with sensory deficit Chapter 15, Dr. Weiss did not address the Cross Usage Chart at Table 17-2 which notes that impairment for muscle strength may not be confirmed with sensory impairment. As the impairment rating of Dr. Weiss does not fully comply with the applicable protocols for determining lower extremity permanent impairment, his rating is of diminished probative value.

Dr. Draper, an Office referral physician, provided an accurate medical background of the accepted employment injury. He found that appellant did not have any sensory deficit in the right lower extremity. Dr. Draper diagnosed paresthesias which was not complete but involved the a lateral aspect of the right thigh. Based on his findings, he determined that appellant sustained a four percent impairment of the right lower extremity (A.M.A., *Guides* 552, Table 17-37). Dr. Slutsky, an Office medical adviser, agreed with Dr. Draper that appellant sustained a four percent impairment of the right lower extremity.

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

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act¹² provides that compensation for a schedule award shall be based on the employee's monthly pay.¹³ Section 8105(a) of the Act provides: If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.¹⁴

¹¹ The Board notes that a claimant is not entitled to a schedule award for the back as neither the Act nor the Office's regulations provide for the payment of a schedule award for the permanent loss of use of the back. *George E. Williams*, 44 ECAB 530 (1993). However, an award may be payable for permanent impairment of the lower extremities that is due to an employment-related back condition. *Thomas J. Engelhart*, 50 ECAB 319 (1999). Section 15.12 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* 424.

¹² 5 U.S.C. §§ 8101-8193; *see also R.S.*, 58 ECAB ___ (Docket No. 06-1346, issued February 16, 2007).

¹³ 5 U.S.C. § 8107.

¹⁴ 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as follows: The monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.¹⁵ The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).¹⁶ The Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without a new or intervening injury.¹⁷

The Board has held that where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury.¹⁸ In schedule award claims, the issue is the permanent impairment sustained resulting from such injury. Under the Act, the possibility of a future injury does not constitute an injury.¹⁹ In schedule award claims where the injury is sustained over a period of time, the Board has recognized that the claim covers all exposures which occurred up to the filing of the claim.²⁰

The Office's implementing regulations²¹ provide that the pay rate for compensation purposes means the employee's pay, as determined under 5 U.S.C. § 8114.²²

Section 8114(d) of the Act²³ provides:

“Average annual earnings are determined as follows --

(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately

¹⁵ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

¹⁶ *Robert A. Flint*, 57 ECAB 369 (2006).

¹⁷ 20 C.F.R. § 10.5(x).

¹⁸ *Id.* at § 10.5 defines the terms traumatic injury and occupational disease or illness. Traumatic injury is defined by section 10.5(ee) as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected. Occupational disease or illness is defined by 20 C.F.R. § 10.5(q) as a condition produced by the work environment over a period longer than a single workday or shift.

¹⁹ *Id.*

²⁰ See *Patricia K. Cummings*, 53 ECAB 623 (2002).

²¹ 20 C.F.R. § 10.5(s).

²² 5 U.S.C. § 8114.

²³ *Id.*

preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay.”

ANALYSIS -- ISSUE 2

On appeal, appellant contends that the pay rate for his schedule awards should have been based on his salary at the time he sustained a recurrence of disability on August 14, 1995, which was approved by the Office on December 21, 1995. The Board finds that the case is not in posture for decision on the issue of appellant’s pay rate. The record does not contain the Office’s December 21, 1995 decision or evidence related to his pay rate and his return to work following the November 14, 1980 and April 12, 1982 employment injuries. As such, the Board cannot adequately review the Office’s basis for finding that appellant’s schedule award should be paid at the recurrent pay rate. As the record before the Board is incomplete and does not permit a fully informed adjudication of the pay rate issue, the case will be remanded to the Office for reconstruction and proper assemblage of the record, to be followed by a *de novo* decision on the merits of the claim to protect appellant’s appeal rights.

CONCLUSION

The Board finds that appellant has no more than a four percent impairment of the right upper extremity and a four percent impairment of the right lower extremity. The Board further finds that the case is not in posture for decision to the pay rate for which the schedule awards should be paid.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2007 and October 16 and September 6, 2006 decisions of the Office of Workers' Compensation Programs are affirmed. The March 15, 2007 decision is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 7, 2008
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