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

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| **A.K., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1672** |
| | ) | **Issued: January 29, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Moorestown, NJ, Employer** | ) | |

*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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On May 27, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated July 20, 2007 and February 12, 2008 denying his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether appellant met his burden of proof to establish that he has an impairment caused by his accepted employment injuries that would entitle him to a schedule award.

### *FACTUAL HISTORY*

On June 11, 2003 appellant, then a 49-year-old letter carrier, filed a Form CA-1, traumatic injury claim, alleging that on that day he hurt his back lifting tubs of mail. He did not stop work but began working limited duty for eight hours a day, five days a week. By letter

dated July 23, 2003, the Office accepted that he sustained an employment-related lumbar sprain and lumbar radiculopathy.[1]

On January 28, 2005 appellant submitted a schedule award claim and an October 19, report in which Dr. David Weiss, an osteopath, provided a history of injury and reported appellant's complaint of daily low back pain and stiffness that caused him to modify his activities of daily living. He stated that he had reviewed the medical record and that sensory examination revealed a "perceived sensory deficit" over the L4-L5-S1 dermatome involving the left lower extremity. Gastrocnemius circumference measurements were 42.5 centimeters on the right and 45 cm. on the left. Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain and sprain; herniated nucleus pulposus L4-5; magnetic resonance imaging (MRI) scan positive; left S1 radiculopathy and right L4 through S2 radiculopathy, electromyography (EMG) positive. He advised that appellant had reached maximum medical improvement and, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had left lower extremity sensory deficits of 4 percent for the L4, L5 and S1 nerve roots respectively plus a pain impairment of 3 percent for a total left lower extremity impairment of 12 percent. Dr. Weiss found a 13 percent right lower extremity atrophy due to calf atrophy and 3 percent impairment for pain, for a total 16 percent right lower extremity impairment.[3] By report dated October 17, 2005, an Office medical adviser reviewed the medical evidence and agreed that, in accordance with the A.M.A., *Guides*, appellant had a 13 percent right lower extremity impairment due to atrophy and a 12 percent left lower extremity impairment due to sensory loss. He found no impairment due to pain.

The Office determined that a conflict in medical evidence existed between the opinions of Dr. Weiss and the Office medical adviser regarding the degree of impairment and on January 10, 2007 referred appellant to Dr. Robert R. Bachman, a Board-certified orthopedic surgeon, for an impartial evaluation.[4] In a January 24, 2007 report, Dr. Bachman noted his review of the medical record including MRI scan studies of 2000, 2003 and 2005, the history of injury, appellant's complaints of low back and leg pain and examination findings. Calf measurements were 17-1/4 inches on the left and 16-1/2 on the right. Neurological examination demonstrated no muscle weakness, intact pinwheel sensation and negative Babinski test. He diagnosed lumbar strain, previous MRI scan report of disc herniation at L4-5, left and degenerative disc disease of the lumbar spine. Dr. Bachman advised that his examination did not

[1] The record reflects that appellant refers to a previous accepted work-related injury in 2000 or 2002, but there is no evidence in the record of the accepted injury by the Office.

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

[3] A January 23, 2000 MRI scan of the lumbosacral spine demonstrated a left foraminal and far lateral herniated disc at L4-5 which could be affecting both the exiting left L5 root and the L4 root and far lateral compartment. A June 12, 2003 lumbar spine MRI scan demonstrated mild disc degenerative changes at L1-2 and L4-5 and a left lateral disc protrusion with annular tear at L4-5. A May 26, 2004 lumbar spine MRI scan showed no interval change. A May 25, 2004 EMG nerve conduction study (NCS) demonstrated left S1 radiculopathy and right L4 through S1 radiculopathies with peripheral neuropathy in the lower extremities which could be related to nerve compression problems at the spinal level.

[4] The Board notes that the January 10, 2007 referral letter contains a typographical error, referring to Dr. Bachman as Dr. Kelly.

reveal any objective findings, stating "in particular there are no objective findings to provide any clinical correlation for the reportedly abnormal EMG/NCS study" which reported left S1 radiculopathy which would be unrelated to the L4-5 level and the other radiculopathies were reported on the right side and appellant's complaints were primarily on the left. He advised that appellant sustained nothing more than a lumbar strain on June 6, 2003, noting that there was no change on MRI scan studies in the interval from 2000 to 2003 and no clinical correlation for radiculopathy. Dr. Bachman concluded that appellant had a zero percent impairment due to the June 6, 2003 employment injury, noting "there are no objective findings to substantiate a radiculopathy or a disc herniation referable to June 6, 2003." In an April 2, 2007 report, an Office medical adviser agreed with Dr. Bachman that there was no impairment in this case, finding the date of maximum medical improvement to be January 14, 2007.

By decision dated July 20, 2007, the Office found that, based on the opinion of Dr. Bachman, appellant was not entitled to a schedule award. On July 26, 2007 appellant, through his attorney, requested a hearing that was held on November 29, 2007. At the hearing appellant described his job duties. He testified that he had previous accepted work-related injuries in 2000 or 2002, after which he had a permanent restriction of not carrying a mailbag. Appellant's attorney argued that Dr. Bachman's opinion should not be credited because he was not aware of the 2000 work-related back injury and his report made no reference to the A.M.A., *Guides*. In a February 12, 2008 decision, an Office hearing representative affirmed the July 20, 2007 decision.

## ***LEGAL PRECEDENT***

Pursuant to section 8107 of the Federal Employees' Compensation Act[5] and section 10.404 of the implementing federal regulations,[6] 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*[7] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[8]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[9] 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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] A.M.A., *Guides*, *supra* note 2.

[8] *See Joseph Lawrence, Jr.*, *supra* note 2; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[9] *Pamela J. Darling*, 49 ECAB 286 (1998).

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.[10]

## ***ANALYSIS***

The Board finds this case is not in posture for decision. The record supports that appellant sustained a previous work-related back injury. Furthermore, while the record includes a cover letter indicating that a statement of accepted facts was forwarded to Dr. Bachman, his January 24, 2007 report makes no mention of a statement of accepted facts. The record contains a statement of accepted facts dated July 23, 2007 and an addendum dated October 13, 2005. Neither, however, mentions any previous employment injuries. Additionally, Dr. Bachman's report supports that appellant had right calf atrophy and section 17.2d and Table 17-6 of the A.M.A., *Guides* provides that an impairment rating can be granted for calf atrophy.[11]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.[12] The Board therefore finds the case must be remanded to the Office. On remand, it should prepare an updated statement of accepted facts to include all accepted injuries and double any records that include a low back injury. The case shall then be forwarded to Dr. Bachman for a supplemental report in which he addresses whether appellant has any impairment in accordance with the A.M.A., *Guides*. Following this and such further development deemed necessary, the Office shall issue a decision on appellant's schedule award claim.

## ***CONCLUSION***

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

[10] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] A.M.A., *Guides*, *supra* note 2 at 530.

[12] *L.R. (E.R.)*, 58 ECAB ____ (Docket No. 06-1942, issued February 20, 2007).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 12, 2008 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: January 29, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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