

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARK D. STRADER and U.S. POSTAL SERVICE,  
POST OFFICE, Youngstown, OH

*Docket No. 99-24; Submitted on the Record;  
Issued August 10, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant has established that he has greater than a five percent permanent impairment of his right leg, for which he received a schedule award.

On October 22, 1992 appellant, a 34-year-old superintendent, injured his hip, low back and thigh when he was struck by a car. He filed a claim for benefits on October 23, 1992, which was accepted by the Office of Workers' Compensation Programs for lumbosacral strain, contusion to the right leg and hip, herniated nucleus pulposus at L4-5, pain disorder and major depressive disorder. The Office paid appellant compensation for the appropriate periods. Appellant returned to work on light duty from January 11 through March 21, 1994 and from April 10 through July 5, 1994 in addition to subsequent, intermittent periods. He underwent spinal fusion surgery at the L5 level on October 3, 1994 and returned to work on full duty on March 13, 1995. Following surgery for removal of a prosthesis on November 27, 1995, he returned to work on December 10, 1995.

On January 10, 1996 appellant filed a Form CA-7 claim for a schedule award based on partial loss of use of his right lower extremity.

Dr. Moses Leeb, a Board-certified orthopedic surgeon, performed an examination and impairment evaluation on June 11, 1996. Based on findings and conclusions stated in a June 13, 1996 report, Dr. Leeb concluded that "[t]he slight hypesthesiae that was described, involving the second and third toes of the right foot, based on the [American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition)], would constitute a five percent ... impairment of the foot, due to sensory deficit, which would translate to a two percent ... impairment of the lower extremity."

In a report dated August 27, 1996, Dr. Harvey A. Popovich, a Board-certified family practitioner, concluded that appellant had a two percent permanent impairment based on loss of

use of his right lower extremity. Relying on Dr. Leeb's findings and conclusions, Dr. Popovich found that appellant had a two percent impairment of the right lower extremity and stated:

"According to the June 27, 1996 addendum to the June 13, 1996 report of [Dr. Leeb], [appellant's] permanent partial impairment of his lower extremity due to the sensory loss of his right second and third toes equaled two percent. Review of his medical file does not reveal any other evidence in support of functional loss of the use of his right lower extremity and no evidence in support of functional loss of his left lower extremity. Dr. Leeb's report also advises that [appellant] had reached maximum medical improvement.

"It is my independent medical opinion based upon review of the file with which I was provided that the permanent functional loss of use of the right lower extremity equals two percent. Review of the medical file does not reveal any evidence in support of permanent functional loss of use of the left lower extremity. Since [appellant] returned to full duty as of December 10, 1995, I believe that he reached maximum medical improvement as of that date."

By decision dated October 4, 1996, the Office granted appellant a schedule award for a two percent permanent impairment of the right lower extremity for the period from December 10, 1995 to January 19, 1996 for a total of 5.76 weeks of compensation.

By letter dated October 29, 1996, appellant requested an oral hearing.<sup>1</sup>

In support of his request, appellant submitted an October 23, 1996 report from Dr. John J. Vargo, an osteopath. After examining appellant and reviewing his medical records, Dr. Vargo rated appellant at a 38 percent impairment of the whole person pursuant to the A.M.A., *Guides*. He indicated the following findings and conclusions in calculating his impairment rating:

"With regard to deficit in range of motion of the hip: On the right due to deficit in adduction, [appellant] has a two percent whole person impairment. With regard to deficit in abduction in the right hip, [appellant] has a two percent impairment of the whole person. With regard to deficits in internal rotation, [appellant] has a two percent impairment of the whole person. With regard to deficits in external rotation of the right hip, [appellant] has a two percent impairment of the whole person. With regard to deficit in flexion of the right hip, [appellant] has a two percent impairment of the whole person. With regard to deficits in extension of the right hip, [appellant] has a two percent impairment of the whole person. This gives a total of 12 percent impairment of the right hip with regard to the whole person.

"Using the Combined Value Tables, the following is determined: The patient has a 38 percent impairment of the whole person which bears a direct and causal relationship to the industrial injury."

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<sup>1</sup> A hearing was not scheduled in this case. An Office hearing representative reviewed the written record.

In a report dated March 18, 1997, the Office medical adviser found that appellant had a five percent impairment of the right lower extremity based on Dr. Vargo's report. The Office medical adviser stated:

“[Appellant's] available medical record was reviewed. The [A.M.A., *Guides* were] used for impairment estimates.

“The medical report by Dr. J. Vargo, dated October 23, 1996, [cites] range of motion ... for the right hip. Using those measurements and the A.M.A., *Guides*, Table 40 on ... page 78, the right hip motion impairment rating of 5 percent (mild) is obtained. This is also equal to the two percent rating of the whole person. According to the [A.M.A., *Guides*] and the example presented [page 77, paragraph 3.2e and page 78], the values for motion impairment are not added or combined but the motion impairment [is] rated in categories as mild (5 percent extremity impairment) to severe (20 percent extremity impairment).”

By decision dated March 31, 1997, an Office hearing representative found that appellant was entitled to an additional three percent impairment, for a total five percent impairment of the right lower extremity and remanded for an award based on this determination.

By decision dated May 8, 1997, the Office granted appellant an additional award of three percent impairment, for a total of five percent of the right lower extremity, for the period from October 23 through December 16, 1996.

By letter dated May 5, 1998, appellant's attorney requested reconsideration. In support of his claim, appellant submitted a May 20, 1997 report from Dr. Vargo, who stated that he had reviewed the report from the Office medical adviser and opined that he disagreed with his conclusions in certain respects. He stated:

“First of all, it states very clearly that the arcs listed are examples of ‘mild,’ ‘moderate,’ and ‘severe’ impairment and are to be used as guides. It does not indicate in any way, shape, or form, that the different impairments cannot be added. In fact, it would seem somewhat unusual for the [A.M.A., *Guides*] not to consider the fact that a single deformity in a range of motion as complex as the hip would not be increased by the fact that multiple areas within that motion were altered. In essence, they are using only one of the areas and saying that it does n[o]t make any difference whether one area is affected or numerous areas, as long as they [are] all ‘mild,’ it [i]s the same result. When one goes to page 79 of the [A.M.A., *Guides*] and reads under the hip about anklyosis, they indicate that you combine extension, abduction and adduction. However, this area of the [A.M.A., *Guides*] is more explicit than the previous section.

“The main problem we have here is that the [A.M.A., *Guides*] in some areas, such as the axial spine, are very detailed and in other areas, they are less detailed which give[s] more variance to interpretation than the other areas. I still believe that my original report is valid.”

By decision dated August 18, 1998, the Office denied modification of the March 31, 1997 decision.

The Board finds that appellant has no more than a five percent permanent impairment for loss of use of the right lower extremity, for which he received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</sup> 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 percentage loss of use.<sup>4</sup> However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>5</sup>

In the instant case, the Office determined that appellant had a five percent permanent impairment of his right lower extremity by adopting the findings of the Office medical adviser. The Office medical adviser determined the precise impairment rating by taking Dr. Vargo's findings, which were contained in his August 23, 1996 report, and then applying these findings to the applicable figures and tables of the A.M.A., *Guides* to arrive at the total percentage of impairment in appellant's right lower extremity. The Office medical adviser applied Dr. Vargo's findings to Table 40, page 78 of the A.M.A., *Guides*, which translated to a mild impairment of 5 percent based on loss of motion in the right hip. The Office medical adviser correctly stated that, pursuant to page 77 and page 78 of the A.M.A., *Guides*, the values for motion impairment are not added or combined; rather, they are rated in categories as mild to severe and that a mild impairment such as that sustained by appellant translates to a total five percent impairment of the right lower extremity.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a five percent permanent impairment for loss of use of his right lower extremity, for which he has received a schedule award from the Office and that appellant has failed to provide probative, supportable medical evidence that he has greater than the five percent impairment already awarded.

Dr. Vargo's May 20, 1997 report does not present medical opinion sufficient to modify the Office's May 8, 1997 schedule award of five percent permanent impairment of the right lower extremity. He merely reiterated and expounded on the findings and conclusions upon

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<sup>2</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>3</sup> 20 C.F.R. § 10.304.

<sup>4</sup> 5 U.S.C. § 8107(c)(19).

<sup>5</sup> *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

which he based his previously stated 38 percent whole person impairment. This rating, however, was not calculated in accordance with the Act, which requires that an impairment rating be calculated in regard to the percentage loss of use of a bodily member.<sup>6</sup> The March 18, 1997 report from the Office medical adviser, who determined that appellant had a five percent impairment of the right lower extremity, is the only impairment evaluation of record which calculated appellant's impairment pursuant to the fourth edition of the A.M.A., *Guides*, under the protocols set forth above. The Board therefore finds that the Office's August 18, 1998 decision denying modification based on Dr. Vargo's May 20, 1997 report was proper. Appellant has no more than a five percent impairment of the right leg.

The decision of the Office of Workers' Compensation Programs dated August 18, 1998 is hereby affirmed.

Dated, Washington, D.C.  
August 10, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> 5 U.S.C. § 8107(c)(19).