

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of SYLVESTER ALLEN and U.S. POSTAL SERVICE,
POST OFFICE, Cinnaminson, NJ

*Docket No. 00-858; Submitted on the Record;
Issued October 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a two percent impairment of his left lower extremity for which he received a schedule award.

The Board has duly reviewed the case on appeal and finds that appellant has a six percent permanent impairment of his left lower extremity.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.400 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. 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 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 American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*² has been adopted by the Office of Workers' Compensation Programs and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.³

In this case, on January 21, 1992 appellant, then a 33-year-old postal clerk, sustained a back injury when he lifted a tub of magazines while in the performance of duty. The Office accepted appellant's claim for thoracic and lumbar strains.

¹ 5 U.S.C. § 8107.

² A.M.A., *Guides*, (4th ed. 1993).

³ See *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

On September 12, 1996 appellant filed a claim for a schedule award and submitted a July 19, 1996 medical report from Dr. David Weiss, an osteopath, who opined that appellant had a two percent impairment of his right lower extremity and a 23 percent impairment of his left lower extremity, due to radiculopathy from spinal nerve root injuries.⁴ The Office found that the report of Dr. Weiss created a conflict in medical opinion with the report of Dr. Robert H. Brown, a Board-certified orthopedic surgeon, who examined appellant at the request of the Office and stated in his September 18, 1995 report that appellant had no evidence of any neurologic deficits. Accordingly, the Office referred appellant, together with a statement of accepted facts and a list of questions to be answered, to Dr. Bruce W. Wulfsberg, a Board-certified orthopedic surgeon.⁵ In a report dated August 19, 1997, Dr. Wulfsberg stated that electromyography confirmed the presence of mild left S1 radiculopathy, resulting in some loss of sensation and motor weakness and concluded that appellant had a three percent impairment of the whole body, pursuant to the A.M.A., *Guides*.

As the Act does not provide a schedule award for whole person impairments,⁶ the Office forwarded Dr. Wulfsberg's reports to an Office medical adviser for proper correlation of his findings with the A.M.A., *Guides*. In a report dated December 17, 1997, based on Dr. Wulfsberg's findings, an Office medical adviser calculated that appellant had a two percent permanent impairment of the left lower extremity.

By decision dated December 22, 1997, the Office granted appellant a schedule award for a two percent impairment for loss of use of the left lower extremity. By letter dated December 31, 1997, appellant requested an oral hearing before an Office hearing representative.

In a decision dated July 9, 1998, the Office set aside the December 22, 1992 decision, finding that the Office medical adviser's report required clarification. In a supplemental report dated August 7, 1998, the Office medical adviser clarified his report as requested and again concluded that appellant had a two percent permanent impairment of the left lower extremity. In a decision dated October 15, 1998, the Office granted appellant an award for a two percent permanent impairment for loss of use of the left lower extremity.

By letter dated October 20, 1998, appellant requested an oral hearing before an Office representative and submitted additional medical evidence in support of his claim. In a decision

⁴ No schedule award is payable, however, for a member, function, or organ of the body not specified in the Act or in the regulations. *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see Terry E. Mills*, 47 ECAB 309 (1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions). This principle applies to body members that are not enumerated in the schedule award provision before the 1974 amendment as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment. *John F. Critz*, 44 ECAB 788, 792-93 (1993) (brain disorder); *Ted W. Dietderich*, 40 ECAB 963, 965 (1989) (gallbladder); *Thomas E. Stubbs*, 40 ECAB 647, 649 (1989) (spleen). The Act itself, however, specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

⁵ Section 8123(a) of the Act provides: "If there is a 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." 5 U.S.C. § 8123(a); *see also Brady L. Fowler*, 44 ECAB 343 (1992); *George A. Johnson*, 43 ECAB 712 (1992); *Melvina Jackson*, 38 ECAB 443 (1987).

⁶ 5 U.S.C. § 8107(c).

dated September 16, 1999, an Office hearing representative found that appellant had a two percent permanent impairment of his left lower extremity.

In his reports dated April 29 and August 19, 1997, Dr. Wulfsberg, the impartial medical examiner, found that appellant had no atrophy of the calf or quadriceps muscles and good range of motion, but noted that appellant had a mild loss of sensation, characterized by the A.M.A., *Guides* as Class 2, or 25 percent, due to his S1 radiculopathy. With respect to loss of muscle strength due to the S1 radiculopathy, Dr. Wulfsberg stated that appellant's level of function was nearly normal, approximately 4.5 on a scale of 1 to 5.

In a report dated August 7, 1998, the Office medical consultant applied Dr. Wulfsberg's findings to the appropriate sections of the A.M.A., *Guides*. The consultant noted that, pursuant to Table 83, page 130 of the A.M.A., *Guides*, the maximum percentage loss of function due to sensory deficit or pain associated with the S1 nerve root is 5 percent. The consultant further noted that the Class 2 mild sensory deficit described by Dr. Wulfsberg yielded a 25 percent sensory impairment pursuant to Table 20, page 151. Pursuant to Table 20, page 151, he properly multiplied the 5 percent by 25 percent to obtain a 1 percent impairment due to sensory deficit or pain. Using a similar procedure to evaluate appellant's muscle weakness, the Office consultant noted that the Grade 4 mild degree of weakness described by Dr. Wulfsberg yielded a 25 percent sensory impairment pursuant to Table 21, page 151. The Office consultant then stated that the maximum percentage loss of function due to loss of strength associated with the S1 nerve root was 5 percent, which when multiplied by 25 percent pursuant to Table 21, page 151, resulted in a 1 percent impairment due to loss of muscle strength. Finally, the Office consultant used the Combined Values Chart, page 322, to determine that the 1 percent impairment due to sensory loss and the 1 percent impairment due to muscle weakness resulted in a 2 percent impairment to appellant's left lower extremity.

The Board finds that the Office properly found that the weight of the medical evidence rested with the well-rationalized report of Dr. Wulfsberg, the independent medical examiner.⁷ In addition, as he characterized appellant's impairment in terms of a whole person impairment, which is not covered under the Act,⁸ the Office properly correlated his findings with the A.M.A., *Guides*.⁹ The Board notes, however, that pursuant to Table 83, page 130 of the A.M.A., *Guides*, the maximum percentage loss of function due to loss of strength associated with the S1 nerve root is actually 20 percent, not 5 percent as indicated by the Office medical adviser. Multiplying 20 percent by 25 percent pursuant to Table 21, page 151, results in a 5 percent impairment due to loss of muscle strength associated with the S1 nerve root. Combining this five percent with the

⁷ In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Mary A. Moultry*, 48 ECAB 566 (1997).

⁸ 5 U.S.C. § 8107(c).

⁹ The Board has held that if an examining physician does not use the A.M.A., *Guides* to calculate the degree of permanent impairment, it is proper for an Office medical adviser to review the record and apply the A.M.A., *Guides* to the examination findings reported by the examining physician. *Lena P. Huntley*, 46 ECAB 643 (1995).

one percent impairment due to sensory loss, using the Combined Values Chart, results in a six percent impairment of the left lower extremity.

The September 16, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed, as modified, to reflect that appellant has six percent permanent impairment of his left lower extremity.

Dated, Washington, DC
October 26, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member