

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JASON GROSS and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, Kansas City, KS

*Docket No. 02-164; Submitted on the Record;
Issued August 14, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has more than a one percent permanent impairment of his right lower extremity and no further impairment of his left lower extremity for which he has received schedule awards.

Appellant's claim filed on March 13, 1995 was accepted by the Office of Workers' Compensation Programs for subluxations of the cervical, lumbar and thoracic vertebra (L1 and L3, T4 and T11) after his car collided with another while he and a coworker were on official travel to the federal courthouse.

Appellant's previous claim filed on August 16, 1989 was accepted for paraspinal muscle strain and minimal disc herniation at L5-S1 after he hurt his back lifting heavy boxes at work. Appellant received a schedule award for a six percent permanent impairment of each lower extremity on December 3, 1992. He requested a written review of the record and the hearing representative affirmed the award on April 19, 1993. Following several denials of reconsideration and remand by the Board to conduct a merit review, the Office finally denied reconsideration on May 2, 1997 and appellant did not appeal.

Appellant subsequently filed schedule award claims. Based on the reports and measurements of Dr. Sanjay J. Chauhan, a Board-certified neurologist and appellant's treating physician, the Office medical adviser found a 49 percent impairment of the left upper extremity and an 8 percent impairment of the right upper extremity. The date of maximum medical improvement was February 29, 2000.

On August 25, 2000 the Office issued a schedule award for a 49 percent impairment of the left upper extremity and an 8 percent impairment of the right upper extremity for a total of 177.84 weeks, running from February 29, 2000 to July 27, 2003.¹

¹ Appellant underwent a cervical laminotomy at C5 on May 8, 2001, which the Office authorized.

In a report dated October 10, 2000, Dr. Chauhan diagnosed a six-millimeter disc herniation at L5-S1, pressure at S1-S4 nerve roots with radicular syndrome to the lower extremities, urinary incontinence and painful ejaculation. He noted that appellant sustained new nerve root injuries in the 1995 accident and had reached maximum medical improvement in August 1995. Dr. Chauhan found a total combined impairment due to the work injuries of 76 percent for the right lower extremity, 69 percent for the left lower extremity, 43 percent for the right foot and 28.5 percent for penile/sexual dysfunction.

The Office referred appellant to Drs. Timothy Pietro and Robert Moore for second opinion evaluations.² On August 28, 2001 Dr. Moore's report was reviewed by the Office medical adviser who found a four percent impairment of the left lower extremity and a seven percent impairment of the right lower extremity resulting from the accepted back injuries.

On September 27, 2001 the Office issued a schedule award for an additional one percent impairment of appellant's right lower extremity, noting that the four percent rating for appellant's left lower extremity was less than the six percent rating previously approved and that, therefore, appellant was not entitled to any additional impairment.

The Board finds that this case is not in posture for a decision due to a conflict in the medical opinion evidence.

Section 8107 of the Federal Employees' Compensation Act³ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁴ The Act, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁵ The Act's implementing regulation has adopted the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule award losses.⁶

In this case, the Office medical adviser reviewed Dr. Chauhan's October 10, 2000 report and determined that he had erred in combining values for pain with those for leg length discrepancy, atrophy and muscle weakness and gait derangement. According to Table 17-2 of the fifth edition of the A.M.A., *Guides*, values for gait derangement may not be combined with

² The same set of questions and statement of accepted facts were sent to Drs. Moore and Pietro as specialists in neurology and urology, respectively. Dr. Pietro's April 19, 2001 report recommended further testing and did not address the issue of permanent impairment of appellant's penis or bladder.

³ 5 U.S.C. §§ 8101-8109.

⁴ 5 U.S.C. § 8107.

⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁶ 20 C.F.R. § 10.404 (1999).

values for pain due to peripheral nerve injury and loss due to atrophy or motor weakness.⁷ Dr. Chauhan also used the fourth edition of the A.M.A., *Guides*.

In a report dated May 21, 2001, Dr. Moore, a Board-certified neurologist, examined appellant's spine and noted a 10 degree loss of rotation to the right and a 5 degree loss to the left, with a 20 degree loss of flexion. Lateral flexion was 30 degrees to the left and 20 degrees to the right. Appellant exhibited an abnormal limp in the right leg and there was moderate decrease in muscle bulk in the right calf compared to the left, but no sensory loss was found.

The Office medical adviser relied on Dr. Moore's findings to calculate impairment ratings using the fifth edition of the A.M.A., *Guides*. The Office medical adviser rated appellant's complaints of pain as a maximal Grade II according to Table 15-15, page 424 of the A.M.A., *Guides*, for decreased sensation or moderate pain that would limit some activities. An 80 percent grade of a maximal 5 percent for S1 equated to a 4 percent impairment for each lower extremity, according to Table 15-18, page 424.

Dr. Moore noted no sensory loss or clinical weakness on examination of appellant's lower extremities, but did note a minor decrease in muscle bulk in the right leg. The Office medical adviser rated this at 3 percent impairment, based on Table 17-6, page 530, which assesses a 3 to 8 percent impairment for mild calf atrophy. The Office medical adviser concluded that his ratings of four and seven percent represented the permanent impairment of each lower extremity as a result of the work-accepted back condition. He agreed with Dr. Moore that the date of maximum medical improvement was "no later than previously calculated," December 17, 1991.

On appeal appellant argues that the Office erred in calculating his schedule award based on the effects of the 1989 lifting injury without considering the effects of the 1995 accident.

Dr. Moore found a date of maximum medical improvement as 1991, thus, implying no permanent effects of the accepted injuries resulting from the 1995 accident. Dr. Chauhan stated in his October 10, 2000 report that the date of maximum medical improvement for appellant's lower extremities was that date, thus taking into account the effects of the 1995 accident. He found motor weakness and sensory deficits at L4-S1. Dr. Moore found none and thus the Office medical adviser did not consider any impairment resulting from these conditions.⁸

Inasmuch as there is a conflict in the medical opinion evidence regarding the extent and duration of the permanent impairment of appellant's lower extremities, the Board will remand the case for the Office to resolve the conflict. On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an impartial

⁷ The fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001) provides that any initial schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date.

⁸ According to the fifth edition of the A.M.A., *Guides*, the percentages of impairment due to motor and sensory deficits are calculated under section 17.21, page 550.

medical evaluation regarding the degree of impairment of appellant's lower extremities. After such development of the case as the Office deems necessary, a *de novo* decision shall be issued.

The September 27, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
August 14, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member