

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ISRAEL H. POVENTUD and U.S. POSTAL SERVICE, NEW JERSEY
INTERNATIONAL & BULK MAIL CENTER, Jersey City, NJ

*Docket No. 02-312; Submitted on the Record;
Issued July 12, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained greater than a seven percent permanent impairment of the right lower extremity, for which he received a schedule award.

The Office of Workers' Compensation Programs accepted that on July 16, 1991 appellant, then a 37-year-old distribution clerk, sustained a lumbosacral sprain and herniated nucleus pulposus at L4-5 requiring a March 31, 1992 L5 laminectomy and L4-5 microdiscectomy,¹ caused by lifting heavy sacks of mail. Appellant resumed work with restrictions and sustained recurrences of total disability from November 20 through December 9, 1991 and from March 30 to June 9, 1992, when he resumed light duty for four hours per day. Appellant resumed full duty on approximately October 12, 1993, but was placed on permanent restrictions in January 1994 due to an exacerbation of his radiculopathy.

On October 29, 2000 appellant claimed a schedule award for permanent impairment of his right lower extremity attributable to neurologic damage related to the accepted lumbar injury. She submitted medical evidence in support of his claim.

In a November 6, 1991 report, Dr. Gregory S. Gallick, an attending Board-certified orthopedic surgeon, provided a history of injury, noted findings on examination indicative of right lumbosacral radiculopathy and diagnosed a right-sided herniated L4-5 intervertebral disc by October 25, 1991 computerized tomography (CT) scan. Dr. Gallick attributed the herniated disc to repetitive heavy lifting at work. Dr. Gallick recommended a trial of physical therapy. He submitted progress notes through January 8, 1992, indicating that conservative measures were not improving appellant's condition.

¹ In a January 20, 1992 note, an Office medical adviser opined that the herniated L4-5 disc was related to appellant's federal employment and that the proposed microdiscectomy was a prudent course of treatment.

A January 2, 1992 lumbar magnetic resonance imaging (MRI) scan showed a “[l]arge right posterior HNP [herniated nucleus pulposus] at L4-5, with compression of the right side of the thecal sac,” with “minimal narrowing of the right L4-5 neuroforamen.”

In a January 13, 1992 report, Dr. Abbott J. Krieger, a Board-certified neurosurgeon of professorial rank, provided a history of injury and treatment. On examination, Dr. Krieger noted a positive straight raising test on the right, “weakness of the hamstrings on the right, weakness of his extensor hallucis longus,” and “hypalgesia in the L5 distribution.” He performed an L5 laminectomy and L4-5 microdiscectomy on March 31, 1992. Dr. Krieger submitted progress notes through May 11, 1992 noting improvement in appellant’s condition.

Dr. Gallick submitted progress notes from May 19 to August 13, 1992, stating that appellant’s condition was improved postsurgically with adjutant physical therapy. In a November 19, 1992 report, he stated that appellant had “some right lower extremity radiculopathy,” and had suffered “permanent damage though his straight leg raise is negative and his strength is normal.” Dr. Gallick recommended permanent work restrictions. As appellant reported on October 12, 1993 that he felt completely recovered, Dr. Gallick released him to full duty.

In a January 3, 1994 report, Dr. Gallick related appellant’s account of increased lumbar and radicular pain into the right calf with “pulling, bending and twisting in certain directions” at work. He again recommended permanent work restrictions with “no prolonged standing, no lifting more than 30 pounds, no pulling, bending or twisting.” Dr. Gallick stated that, if these restrictions were not followed, appellant would sustain additional lumbar damage requiring surgery.

In an August 1, 2000 report, Dr. David Weiss, an attending osteopath and Board-certified orthopedist, family practitioner and specialist in pain management, provided a history of injury and treatment, finding that appellant had reached maximum medical improvement as of his July 26, 2000 examination. Dr. Weiss noted appellant’s report of pain at 0-5/10 into the right lower extremity, with intermittent paresthesias. On examination, he found that motor strength testing of the right lower extremity was 3+/5, with hip flexor strength at 4+/5. Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed., 1993), Dr. Weiss found that the 3+/5 motor strength deficit in the extensor hallucis longus in extension of the great toe equaled a seven percent impairment and that the 4/5 motor strength deficit in the hip flexors equaled a five percent impairment. He then added the two impairments to equal a 12 percent permanent impairment of the right lower extremity. Dr. Weiss opined that these impairments were due to the accepted L4-5 disc herniation.

In a January 11, 2001 letter, an Office medical adviser noted reviewing Dr. Weiss’ August 1, 2000 report. The Office medical adviser agreed with Dr. Weiss’ assessment that appellant had reached maximum medical improvement as of July 26, 2000, and that the 3+/5 motor strength in great toe extension, evaluated at Grade 1 through Grade 3, equaled a seven percent impairment, according to Table 39, page 77 of the A.M.A., *Guides*, entitled “Impairments from Lower Extremity Muscle Weakness.” The Office medical adviser disagreed with Dr. Weiss regarding the hip flexor deficit, finding that including this deficit was in error, as the L4 and L5 nerve roots did not enervate the hip flexors. He therefore found that the “hip

flexor weakness is unrelated to the accepted L4-5 radiculopathy.” The Office medical adviser concluded that appellant therefore had a seven percent permanent impairment of the right lower extremity.

By decision dated January 19, 2001, the Office awarded appellant a schedule award for a seven percent permanent impairment of the right lower extremity. The \$11,592.00 award, equal to 20.16 weeks of compensation, ran from July 26 to December 14, 2000.

Appellant disagreed with this decision and in a January 25, 2001 letter requested an oral hearing before a representative of the Office’s Branch of Hearings and Review, held June 13, 2001. At the hearing, his attorney representative asserted that the recognized strength impairment of the right hip flexors should be included in the percentage of impairment used to determine the schedule award. Appellant’s attorney requested that the Office send appellant for a second opinion evaluation, as under the Office’s Federal (FECA) Procedure Manual, section 2.810.7(g), an Office medical adviser cannot carry the weight of the medical evidence where there is medical evidence supporting a permanent impairment according to the A.M.A., *Guides*.

By decision dated and finalized August 16, 2001, an Office hearing representative affirmed the January 19, 2001 decision, finding that the Office medical adviser’s opinion was entitled to the weight of the medical evidence. The hearing representative found that the Office medical adviser provided sufficient rationale explaining why the hip flexor strength deficit should be excluded from the impairment rating, whereas Dr. Weiss “only indicated that it is a factor of impairment, without rationale.”

The Board finds that appellant has not established that he sustained greater than a seven percent permanent impairment of the right lower extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees’ Compensation Act and its implementing regulations² 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.³ As the Act does not specify how the percentage of loss shall be determined, the method used rests in the Office’s discretion.⁴ To ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*, fourth edition, (1993), as a uniform, appropriate standard for evaluating schedule losses.⁵ The Board has concurred with the adoption of the A.M.A., *Guides*.

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be

² 20 C.F.R. § 10.404.

³ 5 U.S.C. §§ 8107-8109.

⁴ *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁵ FECA Bulletin No. 89-30 (issued September 28, 1990).

itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.⁶ Other factors, such as pain, atrophy and weakness, are also considered.

In support of his schedule award claim, appellant submitted an August 1, 2000 report from Dr. Weiss, an attending osteopath and Board-certified orthopedist, family practitioner and specialist in pain management. Dr. Weiss found that according to the A.M.A., *Guides*, that an observed 3+/5 motor strength deficit in the extensor hallucis longus equaled a seven percent impairment, and that a 4/5 motor strength deficit in the hip flexors equaled a five percent impairment, resulting in a 12 percent impairment of the right lower extremity due to the accepted L4-5 disc herniation.

In a January 11, 2001 letter, an Office medical adviser agreed with the seven percent impairment rating for the 3+/5 motor strength in great toe extension, according to Table 39, page 77 of the A.M.A., *Guides*, entitled "Impairments from Lower Extremity Muscle Weakness." However, the Office medical adviser found that as the hip flexors were not enervated by the L4 or L5 nerve roots, including the deficit of motor strength in the hip flexors was in error. He therefore found that the "hip flexor weakness is unrelated to the accepted L4-5 radiculopathy. Thus, the Office medical adviser concluded that appellant had a seven percent permanent impairment of the right lower extremity. The Office based its January 19, 2001 schedule award for a seven percent permanent impairment of the right lower extremity on the Office medical adviser's interpretation of Dr. Weiss' August 1, 2000 report.

Dr. Weiss did not provide sufficient evidence to support that the 4+/5 strength impairment of the hip flexors was related to the accepted L4-5 herniated disc. He did not name the specific muscles involved, only the flexor group. Additionally, Dr. Weiss did not refer to a specific table or figure in the A.M.A., *Guides* supporting that a hip flexor impairment could be related to an L4-5 disc herniation or L5 nerve root injury.

In contrast, the Office medical adviser referred to a specific table of the A.M.A., *Guides* in calculating the seven percent schedule award and explained why the hip flexor impairment could not be included in the impairment rating as there was no evidence that it was related to the accepted injury. Therefore, the Board finds that the Office medical adviser's report, which is detailed and well rationalized, is sufficient to carry the weight of the medical evidence. Thus, the Office's January 19, 2001 schedule award for a seven percent permanent impairment of the right lower extremity is correct under the law and facts of this case.

⁶ *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

The decisions of the Office of Workers' Compensation Programs dated and finalized August 16 and January 19, 2001 are hereby affirmed.

Dated, Washington, DC
July 12, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member