

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LARRY G. ROWLAND and U.S. POSTAL SERVICE,  
POST OFFICE, Nashville, TN

*Docket No. 01-1894; Submitted on the Record;  
Issued June 13, 2002*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than a 13 percent permanent impairment of his left lower extremity; (2) whether the Office of Workers' Compensation Programs properly calculated his schedule award based on his date-of-injury pay; and (3) whether the Office properly denied appellant's request for reconsideration.

The Office accepted that on September 24, 1999 appellant, then a 45-year-old distribution clerk, sustained an aggravation of a herniated nucleus pulposus at L5-S1 during the performance of his duties. On November 2, 1999 appellant underwent a left L5-S1 subtotal hemilaminectomy with a micro discectomy without noted problems.

On December 15, 1999 appellant accepted a modified mailhandler position and returned to light-duty work.

On February 2, 2000 Dr. Michael F. Moran, a Board-certified neurosurgeon, opined that appellant had a 10 percent whole person impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition, as a result of his employment injury. He noted the date of maximum medical improvement as February 2, 2000. Dr. Moran reiterated this opinion in a narrative report of the same date and he stated that he obtain the 10 percent impairment rating using Table 75, page 113 of the A.M.A., *Guides*.<sup>1</sup>

By letter dated February 15, 2000, the Office requested that Dr. Moran provide an impairment rating in accordance with the A.M.A., *Guides* that included the identification of the nerve root and branch[es] involved, the degree of lower extremity impairment due to sensory deficit, pain or discomfort, and the degree of lower extremity impairment due to decreased strength.

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<sup>1</sup> This Table is entitled "Whole-Person Impairment Percents Due to Specific Spine Disorders."

On March 27, 2000 Dr. Moran restated the date of maximum medical improvement as February 2, 2000 and reiterating that appellant had a 10 percent whole person impairment according to Table 75, page 113 of the A.M.A., *Guides*.

By letter dated April 4, 2000, the Office again requested that Dr. Moran provide a rating that was specific as to degree and specificity of impairment.

In a report dated May 1, 2000, Dr. Moran opined that appellant had a 15 percent permanent impairment of the left lower extremity secondary to pain/sensory deficits, in accordance with Table 83 and Table 11, part B of the A.M.A., *Guides*, fourth edition.<sup>2</sup>

On June 14, 2000 an Office medical adviser reviewed the medical evidence and opined that Dr. Moran had not provided the basic physical findings necessary for the application of Table 11 regarding pain/sensory deficits. The Office medical adviser also noted that Dr. Moran did not provide medical findings to show which spinal nerve root is affected in Table 83 and noted that the October 11, 1999 magnetic resonance imaging (MRI) scan demonstrated impingement of the left S1 nerve root. He further noted that, per Table 83, the maximum impairment for pain/sensory for the S1 root was 5 percent of the lower extremity.

The employing establishment referred appellant for further evaluation to Dr. M. Robert Weiss, a Board-certified neurosurgeon. In a report dated August 1, 2000, Dr. Weiss reviewed appellant's history, imaging studies and postoperative activity limitations, reported physical examination results and opined that appellant had reached maximum medical improvement. He opined that appellant had a 10 percent permanent impairment of the body as a whole in accordance with the A.M.A., *Guides*, Table 75, page 113.

In response to a September 5, 2000 letter from the Office, Dr. Moran reiterated that appellant had a 10 percent whole person impairment according to Table 75, page 113 of the A.M.A., *Guides*.

On January 4, 2001 the Office referred appellant, with a statement of accepted facts and questions to be resolved, for a second opinion impairment rating to Dr. John W. Lamb, a Board-certified orthopedic surgeon.

By report dated January 19, 2001, Dr. Lamb reviewed appellant's history and imaging studies, provided physical examination results and responded to the Office's questions. He opined that appellant's date of maximum medical improvement was February 15, 2000, the date he was discharged by Dr. Moran, that the nerve root involved was the first sacral nerve root on the left, which was part of the sciatic nerve and that appellant's mild persistent symptoms and the apparent mild weakness, the slight decrease in size of the calf and the slight decrease in ankle

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<sup>2</sup> Table 11, part b is entitled "Determining Impairment of the Upper Extremity Due to Pain or Sensory Deficit Resulting from Peripheral Nerve Disorders," and Table 83 is entitled "Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity."

jerk indicated a persistent neurologic deficit as a result of nerve root compression. Dr. Lamb noted:

“Using Table 83 for a single nerve root, S1, impairment in a single extremity the appropriate rating for loss of function due to sensory deficit or pain and due to strength deficit is 13 percent. Using Table 11 on page 48, the sensory deficit would be in the [G]rade 3 level or 60 percent. Applying Table 83 the impairment due to sensory deficit is three percent. Using Table 12 on page 49, [appellant] is within the [G]rade 3 level or 50 percent motor deficit. Applying Table 83 the impairment rating due to motor deficit is 10 percent. Using the [C]ombined [V]alues [C]hart the impairment rating to the left lower extremity is equal to 13 percent.”

Dr. Lamb continued, however, that he believed the most accurate was of assigning an impairment to a patient with radiculopathy is by using the diagnosis-related estimate (DRE) Lumbosacral Category 3 which gives an impairment of 10 percent whole person impairment which fits this person’s condition.

Dr. Lamb also completed the Office’s rating form indicating the date of maximum medical improvement as January 6, 2000, the nerve root origin as “S1 left,” the permanent impairment due to sensory deficit, pain or discomfort as 3 percent, and the permanent impairment due to decreased strength as 10 percent. He reiterated, however, on the bottom of the form that the more appropriate rating was DRE Lumbosacral Category 3 which was rated at 10 percent whole body impairment.

On February 13, 2001 an Office medical adviser, Dr. Phillip W. Horn, reviewed Dr. Lamb’s findings and applied them to the A.M.A., *Guides*, fifth edition, Table 15-15,<sup>3</sup> page 424, Table 15-16,<sup>4</sup> and Table 15-18.<sup>5</sup> Dr. Horn noted that in accordance with Table 15-15 appellant had a Grade 3 sensory deficit which consisted of “[d]istorted superficial tactile sensibility with some abnormal sensation or slight pain that interferes with some activities.” He rated appellant’s sensory deficit (pain) at 60 percent. Dr. Horn then noted that in accordance with Table 15-16 appellant had a Grade 3 impairment due to loss of motor function, which included active movement against gravity only, without resistance. He rated appellant’s motor deficit (weakness) at 50 percent. Dr. Horn noted that in accordance with Table 15-18, for the S1 nerve, the maximum percentage loss of function due to sensory deficit or pain was 5 percent and the maximum percentage loss of function due to strength was 20 percent. He then multiplied appellant’s 60 percent pain rating (Table 15-15) times the 5 percent (Table 15-18) allowable for the S1 nerve impairment due to pain which resulted in a 3 percent permanent impairment due to pain. Thereafter he multiplied appellant’s 50 percent weakness rating (Table 15-16) times the 20 percent (Table 15-18) allowable for the S1 nerve impairment due to weakness which resulted in a 10 percent permanent impairment due to weakness. Using the Combined Values Chart

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<sup>3</sup> This Table is entitled “Determining Impairment Due to Sensory Loss.”

<sup>4</sup> This Table is entitled “Determining Impairment Due to Loss of Power and Motor Deficits.”

<sup>5</sup> This Table is entitled “Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity.”

Dr. Horn combined the 3 percent impairment due to pain and the 10 percent impairment due to weakness and arrived at a total of 13 percent permanent impairment of appellant's left lower extremity. The date of maximum medical improvement was determined to be January 6, 2000.

On March 2, 2001 the Office granted appellant a schedule award for a 13 percent permanent loss of use of his left leg for the period January 6 to September 24, 2000 for a total of 37.44 weeks of compensation. The Office calculated the award using appellant's date-of-injury rate of pay rather than his present rate of pay.

By letter dated April 1, 2001, appellant requested reconsideration of the schedule award alleging that he was due a greater impairment rating at a higher rate of pay. He claimed that he was due another five percent disability for left lower extremity pain and sensory deficits<sup>6</sup> and that his schedule award should have been calculated based upon his rate of pay for the period of the schedule award.

By decision dated April 13, 2001, the Office declined to reopen appellant's case for further review on its merits, finding that his letter neither raised substantive legal questions nor included new and relevant evidence not previously considered, and that therefore it was insufficient to warrant reopening appellant's case for further review on its merits. The Office noted that both Drs. Moran and Lamb considered pain and sensory deficits in arriving at their impairment ratings and that the Federal Employees' Compensation Act required that a schedule award be based on a claimant's date-of-injury pay.

The Board finds that appellant has no greater than a 13 percent permanent impairment of his left lower extremity, for which he has received a schedule award

The Act<sup>7</sup> provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.<sup>8</sup> In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.<sup>9</sup>

The schedule award provision of the Act<sup>10</sup> and its implementing regulation<sup>11</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not

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<sup>6</sup> Appellant claimed that neither Dr. Moran nor Dr. Lamb checked for any left leg decreased strength, mobility, nerve damage, sensory deficits, pain or discomfort.

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

<sup>9</sup> See *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404 (1999).

specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>12</sup>

The A.M.A., *Guides* standards for evaluating the impairment of extremities are based primarily on loss of range of motion.<sup>13</sup> However, all factors that prevent a limb from functioning normally, including pain or discomfort, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.<sup>14</sup> The A.M.A., *Guides* provides grading schemes and procedures for determining the impairment of a specifically affected body part, in this case the left S1 nerve root, due to pain, discomfort or loss of sensation as well as weakness and loss of motion.<sup>15</sup>

The Act<sup>16</sup> and its implementing federal regulations<sup>17</sup> provide for payment of compensation for the permanent loss or loss of use of specified members, functions, and organs of the body. However, no schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.<sup>18</sup> Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,<sup>19</sup> no claimant is entitled to such an award.<sup>20</sup> Although the medical evidence in this case supports appellant's claim that he sustained an injury to his lumbar spine and had residuals post hemilaminectomy and micro discectomy, no evidence can establish entitlement to an award not authorized under the Act. However, 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 the cause of the impairment originated in a scheduled or nonscheduled member.<sup>21</sup> As the schedule award provisions of the Act include the

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<sup>12</sup> *Id.*

<sup>13</sup> See *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

<sup>14</sup> See *Paul A. Toms*, 28 ECAB 403 (1987).

<sup>15</sup> A.M.A., *Guides*, (5<sup>th</sup> ed. 2001) Chapter 15, section 15.12, Tables 15-15, 15-16 and 15-18.

<sup>16</sup> 5 U.S.C. § 8107(a).

<sup>17</sup> 20 C.F.R. § 10.404.

<sup>18</sup> *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); see also *Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

<sup>19</sup> The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); see also *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>20</sup> E.g., *Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>21</sup> See *Thomas J. Engelhart*, 50 ECAB 319 (1999); *Rozella L. Skinner*, 37 ECAB 398 (1986).

extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originated in the spine.<sup>22</sup>

With respect to appellant's left lower extremity, Dr. Moran initially did not offer any opinion regarding an impairment rating for appellant's left lower extremity. He only offered a whole person impairment rating. The Board has frequently explained that the Act does not provide for permanent impairment for the whole person.<sup>23</sup> Consequently, none of the ratings appellant was given in terms of whole body impairment are compensable under the Act.

Finally, on May 1, 2000 Dr. Moran opined that appellant had a 15 percent permanent impairment of his left lower extremity, but he failed to explain how he arrived at this rating in terms of the A.M.A., *Guides*. He merely cited to two Tables from the A.M.A., *Guides*, one of which pertained to upper extremity impairment, without explaining how he applied them to the specific physical evidence he found upon examination. As no rationale was provided in support of this determination, this impairment rating opinion is of diminished probative value, and is insufficient to support a schedule award.

On August 1, 2000 Dr. Weiss provided an opinion on appellant's impairment rating, but he also provided the rating in terms of the whole body. As noted above, the Act does not provide for a whole body impairment, and therefore Dr. Weiss's opinion is not probative on the issue of appellant's permanent impairment rating.

On January 19, 2001 Dr. Lamb provided a thorough and well rationalized medical report, based upon the fourth edition of the A.M.A., *Guides*, which determined that appellant had an S1 nerve root impairment due to pain of 3 percent and an S1 nerve root impairment due to weakness of 10 percent, which, when combined, resulted in a total left lower extremity impairment rating of 13 percent. As this opinion was well rationalized and was properly based upon the physical evidence noted upon examination and was consistent with the A.M.A., *Guides*, fourth edition, it is of great probative value in establishing appellant's permanent impairment rating. Dr. Lamb opined, following his determination of appellant's left lower extremity impairment, that appellant's condition would more appropriately be based on the DRE Lumbosacral Category 3 rating of 10 percent of the whole body. The Board notes, however, that the DRE rating is given in terms of the whole body. Therefore, as noted above, the results in terms of a whole body impairment are not compensable under the Act.

However, on February 13, 2001 the Office medical adviser, Dr. Horn, reviewed the medical evidence of record and properly applied the fifth edition of the A.M.A., *Guides*,<sup>24</sup> Dr. Horn clearly explained which Tables he applied, based upon physical examination results as detailed by Dr. Lamb, and why, with the result being an overall permanent impairment rating of

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<sup>22</sup> *Id.*

<sup>23</sup> See *John Yera*, 48 ECAB 243 (1996); *Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>24</sup> The fifth edition of the A.M.A., *Guides* became effective February 1, 2001 as per FECA Bulletin No. 01-05 which indicates that permanent impairment ratings calculated after that date should be based upon that edition. The Board notes that there appears to be no difference in results whether calculating appellant's left lower extremity impairment under the fourth edition versus under the fifth edition of the A.M.A., *Guides*.

13 percent permanent impairment of appellant's left lower extremity, which was in agreement with the rating of Dr. Lamb. As Dr. Horn used the correct edition of the A.M.A., *Guides* which was in force at the time of his disability determination, as he explained how he arrived at his results, and as the rating agreed with the rating given appellant by Dr. Lamb prior to February 1, 2001 using the fourth edition of the A.M.A., *Guides*, the Board finds that this rating is of great probative value and establishes that appellant had no greater than a 13 percent permanent impairment of his left lower extremity, causally related to his L5-S1 herniated disc injury and surgery. Moreover, appellant has submitted no probative medical evidence to establish that he has any greater than a 13 percent permanent impairment of his left lower extremity.

The Board also finds that the Office properly calculated the amount of appellant's schedule award entitlement based on his date-of-injury pay rate.

Under the Act, compensation is based on an employee's monthly pay, which is defined under 5 U.S.C. § 8101(4) as the rate of pay at the time of injury, or the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if it recurs more than six months after an employee resumes full-time employment with the United States, whichever is the greatest. The word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury."<sup>25</sup> This meaning, for brevity, is expressed as "disability for work." Regarding section 8101(4), the section at issue in this case, the Board finds that the context and legislative history clearly show that the term "disability" was intended to have the general meaning which it has in the Act, namely "disability for work."<sup>26</sup>

Appellant contends upon appeal that his rate of compensation should be based on his actual wages for the time period of the schedule award, rather than on his date-of-injury pay rate. The Board notes that compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins, or the rate at the time of recurrence of disability of the type described in section 8101(4), whichever is greater. This holding is in accord with the prior decisions of the Board involving this issue.<sup>27</sup>

Appellant's injury occurred on September 24, 1999 and his disability for work began when he underwent spinal surgery on November 2, 1999, his pay rate at the time disability began would be the rate upon which his schedule award was calculated. There is no support in the Act, its implementing regulations or in case law, to base appellant's pay rate at the time of his application for a schedule award or at the time of the schedule award calculation.

The Board further finds that the Office did not abuse its discretion by denying appellant's request for further review on its merits under 5 U.S.C. § 8128(a).

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<sup>25</sup> *Franklin L. Armfield*, 28 ECAB 445 (1977); *Elden H. Tietze*, 2 ECAB 38 (1948).

<sup>26</sup> Prior to the 1960 amendments to the Act, "monthly pay" for compensation purposes was based in all cases on the rate of pay at the time of injury.

<sup>27</sup> *Henry F. McGinnis*, 24 ECAB 25 (1973); *Evlyn M. Egan*, 23 ECAB 20 (1971).

To require the Office to reopen a case for reconsideration under 5 U.S.C. § 8128(a), section 10.606(b)(1), (2) of the Office’s implementing regulations requires as follows:

“(b) The application for reconsideration, including all supporting documents, must:

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either:
  - (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
  - (ii) Advances a relevant legal argument not previously considered by [the Office]; or
  - (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”<sup>28</sup>

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>29</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>30</sup> When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>31</sup>

In support of his reconsideration request, appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office, and was not accompanied by relevant and pertinent new evidence not previously considered. The Office reviewed appellant’s arguments regarding percentage of schedule award and rate of pay and found that they had no merit and were, therefore, insufficient to warrant reopening appellant’s case for further review on its merits under 5 U.S.C. § 8128(a). The Board finds, therefore, that the Office properly denied further merit review.

In the present case, appellant has not established that the Office abused its discretion by denying his request for review of its March 2, 2001 decision.

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<sup>28</sup> 20 C.F.R. § 10.606 (b)(1), (2).

<sup>29</sup> 20 C.F.R. § 10.607(a).

<sup>30</sup> *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>31</sup> *See Mohamed Yunis*, *supra* note 5; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 13 and March 2, 2001 are hereby affirmed.

Dated, Washington, DC  
June 13, 2002

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member