

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL S. MARZIGLIANO and DEPARTMENT OF THE TREASURY,
CUSTOMS SERVICE, Terminal Island, CA

*Docket No. 02-973; Submitted on the Record;
Issued November 14, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has more than a nine percent permanent impairment of the right lower extremity for which he received a schedule award.

On August 6, 1997 appellant, then a 39-year-old special agent, sustained a gunshot wound to the right leg and buttock in the performance of duty during an undercover operation.

In a report dated January 30, 2001, Dr. Jacob E. Tauber, appellant's attending orthopedic surgeon, provided findings on examination and stated that appellant had pain in the right lower extremity attributable to the L4, L5, and S1 nerve roots and decreased rotation of his hip. He stated:

“Using the [American Medical Association, *Guide to the Evaluation of Permanent Impairment*, (Fourth Edition), it should be noted that there does not seem to be a provision made for an impairment due to loss of hip rotation. However, [appellant] has findings consistent with sensory deficits and pain in the L4, L5 and S1 distributions. He does have decreased sensation to pinprick in his right great toe and, in addition, he is fatigued due to pain and thus, does not have normal strength in his right lower extremity.

“Using Table 83 of Chapter III, unilateral spinal nerve root impairment affecting the lower extremity would yield a 15 [percent] impairment due to the sensory deficit or pain alone. However, [appellant] also has a loss of function due to a strength deficit in that he does not have normal strength in the distributions of these same roots. Thus, in apportioning this properly using the same table, [appellant] has a 35 [percent] impairment.”

In a memorandum dated March 12, 2001, an Office medical consultant, Dr. Arthur S. Harris, stated that appellant had a nine percent permanent impairment of the right lower extremity based on the A.M.A., *Guides*, Fifth Edition.¹ He stated:

“For the purposes of Schedule Award, [appellant does have Grade 3 pain/decreased sensation that interferes with some activity (60%) (Table 16-10/Page 482) of the L4 nerve root [5] (Table 15-18/Page 424), resulting in a 3 [percent] impairment for pain/decreased sensation which interferes with some activity of his L4 nerve root.

“[Appellant] has Grade 3 pain/decreased sensation that interferes with some activity (60%) (Table 16-10/Page 482) of the L5 nerve root [5] (Table 15-18/Page 424), resulting in 3 [percent] impairment for pain/decreased sensation which interferes with some activity of his S1 nerve root.

“[Appellant] also has Grade 3 pain/decreased sensation that interferes with some activity (60%) (Table 16-10/Page 482) of the S1 nerve root [5] (Table 15-18/Page 424), resulting in 3 [percent] impairment for pain/decreased sensation which interferes with some activity of his S1 nerve root.

“Utilizing combined values for 3 [percent] impairment for pain/decreased sensation that interferes with some activity from his L4, L5, S1 nerve roots, this results in 9 [percent] impairment of his right lower extremity.

“Although [appellant] does have some loss of terminal rotation of his hip, this is not a ratable impairment based on [the A.M.A., *Guides*] (Table 17-9/Page 537).

“As such, [appellant] has 9 [percent] impairment of the right lower extremity. The 9 [percent] impairment of the right lower extremity is the sole impairment of the right lower extremity resulting from the accepted work injury of August 6, 1997. The date of maximum medical improvement is January 30, 2001, when [appellant] was seen for evaluation by Dr. Tauber.” (Emphasis in the original.)

By decision dated May 10, 2001, the Office granted appellant a schedule award for 25.92 weeks based on a nine percent permanent impairment of the right lower extremity.

By letter dated July 24, 2001, appellant requested reconsideration and submitted additional evidence.

In a letter dated July 5, 2001, Dr. Tauber stated that he had reviewed the March 12, 2001 report of Dr. Harris. In response to Dr. Harris’ comment that he did not document any decreased muscle strength, he noted that on page three of his January 30, 2001 report he indicated that appellant “also has lost function due to his strength deficit in that he does not have normal

¹ Effective February 1, 2001 the Fifth Edition of the A.M.A., *Guides* is to be used in calculating schedule awards. FECA Bulletin No. 01-05 (issued January 29, 2001).

strength in the distributions of these same roots.” Dr. Tauber also noted that on page three of his report he indicated that appellant “does have decreased sensation to pinprick in his right great toe, and he has fatigue due to pain, and thus, does not have normal strength in his right lower extremity.” He stated his opinion that Dr. Harris had underestimated the extent of appellant’s pain and decreased sensation and failed to consider his fatigue. Dr. Tauber stated that Dr. Harris’ determination that appellant had a nine percent permanent impairment did not correlate with the findings and asked the Office to reevaluate his January 30, 2001 report because it more accurately represented appellant’s impairment.

By decision dated, January 3, 2002, the Office denied modification of its May 10, 2001 schedule award decision on the grounds that the evidence submitted in support of appellant’s request for reconsideration was repetitive and did not warrant modification.

The Board finds that this case is not in posture for a decision.

The schedule award provisions of the Federal Employees’ Compensation Act² and its implementing regulation³ 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 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*, has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In a report dated January 30, 2001, Dr. Tauber, appellant’s attending orthopedic surgeon, provided findings on examination and stated that appellant had pain in the right lower extremity attributable to the L4, L5 and S1 nerve roots. He determined that appellant had a 15 percent permanent impairment for pain or sensory deficit related to the L4, L5 and S1 nerve roots according to Table 83 at page 130 of the fourth edition of the A.M.A., *Guides* (a 5 percent impairment for each nerve). However, he did not properly apply the A.M.A., *Guides*. The A.M.A., *Guides* provides, at page 130 in the section titled “Lumbar Nerve Root Impairment,” that the percentages in Table 83 are to be multiplied by the applicable percentages in Table 11 at page 48. Dr. Tauber did not complete the calculation as specified in the A.M.A., *Guides*. Dr. Tauber also stated that appellant had a 35 percent permanent impairment of the right lower extremity for loss of function due to a strength deficit based on Table 83. However, the percentages for loss of function due to strength deficit in Table 83 are 34 percent, 37 percent and 20 percent, respectively, for the L4, L5 and S1 nerves. Dr. Tauber did not explain how he arrived at his 35 percent figure for loss of function due to decreased strength. Thus, Dr. Tauber’s determination of appellant’s permanent impairment of the right lower extremity is not based on correct application of the A.M.A., *Guides*.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

In a memorandum dated March 12, 2001, an Office medical consultant, Dr. Harris, properly determined that appellant had a nine percent permanent impairment of the right lower extremity for pain or decreased sensation based on the A.M.A., *Guides*, fifth edition. He stated:

“[Appellant] does have Grade 3 pain/decreased sensation that interferes with some activity (60%) (Table 16-10/Page 482) of the L4 nerve root [5] (Table 15-18/Page 424), resulting in a 3 [percent] impairment for pain/decreased sensation which interferes with some activity of his L4 nerve root.

“[Appellant] has Grade 3 pain/decreased sensation that interferes with some activity (60 percent) (Table 16-10/Page 482) of the L5 nerve root [5] (Table 15-18/Page 424), resulting in 3 [percent] impairment for pain/decreased sensation which interferes with some activity of his S1 nerve root.

“[Appellant] also has Grade 3 pain/decreased sensation that interferes with some activity (60%) (Table 16-10[page 482) of the S1 nerve root [5] (Table 15-18/Page 424), resulting in 3 [percent] impairment for pain/decreased sensation which interferes with some activity of his S1 nerve root.

“Utilizing combined values for 3 [percent] impairment for pain/decreased sensation that interferes with some activity from his L4, L5, S1 nerve roots, this results in 9 [percent] impairment of his right lower extremity.”

However, Dr. Harris did not include in the impairment rating any consideration of appellant’s loss of function due to decreased strength in his right lower extremity. Dr. Tauber noted in his January 30, 2001 report, that appellant had a loss of function due to a strength deficit in that he did not have normal strength in the distributions of the L4, L5 and S1 nerve roots. On remand, the Office should determine whether appellant has any permanent impairment of the right lower extremity attributable to loss of function due to decreased strength⁴ and, if so, issue a corrected schedule award decision.

⁴ See Table 15-18 at page 424 of the fifth edition of the A.M.A., *Guides*.

The decisions of the Office of Workers' Compensation Programs dated January 3, 2002 and May 10, 2001 are set aside and the cases is remanded for further action consistent with this decision.

Dated, Washington, DC
November 14, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member