

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HECTOR CHAIDEZ and DEPARTMENT OF THE TREASURY,
CUSTOMS INSPECTION, San Diego, CA

*Docket No. 02-1367; Submitted on the Record;
Issued November 5, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On September 8, 1998 appellant, then a 30-year-old customs agent, filed a claim alleging he injured his back while lifting and inspecting luggage. The Office of Workers' Compensation Programs accepted the claim for lumbar disc displacement and authorized disc excise and destruct surgery. Appellant stopped work on August 24, 1998 and returned in September 1998 to a light-duty position where he worked until April 1999 when he underwent surgery. He returned to light duty in July 1999 and regular duty on August 19, 1999. Appropriate benefits were paid.¹

In support of his claim, appellant submitted several reports from Dr. Roger P. Thorne, a Board-certified orthopedist, magnetic resonance imaging (MRI) scans dated September 24, 1998 and March 15, 1999; and an operative report dated April 8, 1999. Dr. Thorne's reports note a history of appellant's injury. He diagnosed appellant with lumbar radiculopathy and status post laminectomy/discectomy L4-5 bilaterally for cauda equina syndrome. The MRI scan dated September 24, 1998 revealed a suspected disc protrusion right side L5-S1. The March 15, 1999 MRI scan revealed a right-sided herniated nucleus pulposus L5-S1 causing right S1 root and dural sac deformity; status post right L5 laminotomy; and a very small central disc protrusion at L3-4. The operative report dated April 8, 1999 noted that Dr. Thorne performed a simple discectomy at L5-S1. He diagnosed appellant with disc herniation at L5-S1.

On January 19, 2000 appellant filed a claim for a schedule award. He submitted reports from Dr. Thorne dated October 20, 1999 and July 20, 2000. Dr. Thorne's reports noted findings upon physical examination of pain with intermittent radiation into the leg; absent ankle reflex on

¹ The record reflects that appellant has filed two other claims for compensation: claim No. A13-1175890 for an injury sustained April 17, 1997; and claim No. A13-1036339 for an injury sustained December 22, 1993.

the right; hypesthesia on the lateral four toes; marked weakness of gastrosoleus strength on the right; and negative straight leg raises. The form report also submitted noted involvement of the S1 nerve root on the right with pain described as intermittent and moderate; there was weakness of the gastrosoleus on the right with repetitive toe raises; and atrophy of the right calf of 14-3/4 inches compared with 15-1/8 inches on the left side for a difference of 3/8 an inch maximal circumference. He noted that appellant was permanent and stationary at this time and reached maximum medical improvement on July 12, 2000.

The Office referred appellant's case record and Dr. Thorne's reports to an Office medical adviser who determined, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1993), that appellant sustained an eight percent impairment of the right lower extremity.

In a decision dated September 28, 2000, the Office granted appellant a schedule award for an eight percent permanent impairment of the right lower extremity.

In a letter dated October 22, 2000, appellant requested a hearing before an Office hearing representative. The hearing was held on June 20, 2001. Appellant submitted reports from Dr. Isaac Bakst, a Board-certified neurologist, dated January 5, 2001 and Dr. Thomas W. Harris, a Board-certified orthopedist, dated January 12, 2001. Dr. Bakst's report provided a detailed history of appellant's injury and subsequent treatment by Dr. Thorne. He noted that the electromyogram studies revealed chronic right S1 radiculopathy; mild right L5 and left L5-S1 radiculopathy, chronic. Dr. Thorne diagnosed appellant with right S1 radiculopathy; status post lumbar laminectomy and discectomy for disc herniation, L5-S1, right June 1999; status post lumbar laminectomy and discectomy, L4-5, bilaterally, June 1997; and chronic radiculopathy, L5 right and left and left S1. He did not provide any impairment estimate referencing the A.M.A., *Guides*. The report from Dr. Harris dated January 12, 2001 indicated that he evaluated appellant in accordance with the A.M.A., *Guides*. He noted physical findings of slight weakness of the right gastrocnemius on strength testing; numbness of the right calf; positive straight leg raise for the right leg pain; and reduced reflexes of the right ankle and knee. Dr. Harris diagnosed appellant with status post lumbar laminectomy and discectomy at L5-S1, June 1997 and June 1999; chronic right S1 radiculopathy; and mild right L5 and left L5-S1 radiculopathy, chronic. Dr. Harris noted appellant's present medical condition was ratable using the A.M.A., *Guides* (4th ed. 1993), page 76, paragraph 3.2d, Table 39; page 89 for a combined ratable impairment for the right lower extremity of 28 percent.

In a decision dated August 24, 2001, the hearing representative affirmed the decision of the Office dated September 28, 2000.

The Board finds that appellant has no more than an eight percent impairment of the right lower extremity.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation payable to employees

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

On appeal appellant contends he is entitled to a schedule award of 28 percent impairment of the right lower extremity based on Dr. Harris' report of January 12, 2001.

The Board has carefully reviewed Dr. Harris' report and finds that Dr. Harris did not adequately explain how his determination was reached in accordance with the relevant sections of the A.M.A., *Guides*.⁴ Dr. Harris noted physical findings of slight weakness of the right gastrocnemius on strength testing; numbness of the right calf; positive straight leg raise for the right leg pain; and reduced reflexes of the right ankle and knee. He noted that appellant reached maximum medical improvement and provided a rating of 28 percent impairment stating he applied the A.M.A., *Guides* (4th ed. 1993), page 76, paragraph 3.2d and Table 39; page 89. However, Dr. Harris did not adequately explain how his determination was reached in accordance with the relevant tables of the A.M.A., *Guides*.⁵ Although he stated appellant sustained a 28 percent permanent impairment of his right lower extremity, he did not provide how he derived any impairment rating for lower extremity muscle weakness. Table 39 is located at page 77 of the A.M.A., *Guides* and his reference to an unnumbered table at page 89 is vague and not well explained. The Board has determined that a medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value.⁶

The Office medical adviser identified the affected nerve root as S1 and noted Table 83 at page 130 provides a maximum of 5 percent loss of function due to sensory deficit or pain. He then graded the pain at Table 11, page 48 as Class 3 or 60 percent, to find 3 percent impairment due to pain. The Office medical adviser next rated loss of function due to weakness; noting Table 83, at page 130, provided maximum of 20 percent. He then graded the muscle weakness at Table 12, page 49, as grade IV or 25 percent, to find a 5 percent impairment due to weakness. The medical adviser properly utilized the Combined Values Chart, of the A.M.A., *Guides* to determine the total impairment of the right lower extremity of eight percent by combining the three percent for pain with five percent for motor deficit. The Board finds that the medical adviser properly followed the procedures as set forth in the A.M.A., *Guides*.

In a reports dated October 20, 1999 and July 20, 2000, Dr. Thorne provided the following physical findings: he noted involvement of the S1 nerve root on the right with pain described as intermittent and moderate; there was weakness of the gastrosoleus on the right with repetitive toe raises and atrophy of the right calf of 14-3/4 inch compared with the left calf measuring 15-1/8

⁴ See *Tonya R. Bell*, 43 ECAB 845, 849 (1992).

⁵ *Id.*

⁶ See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (an attending physician's report is of little probative value where the A.M.A., *Guides* were not properly followed). *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

inch for a difference of 3/8 an inch maximal circumference. He noted that appellant reached maximum medical improvement on July 12, 2000. Dr. Thorne neither referenced the A.M.A., *Guides* nor did he cite to tables or charts for an impairment rating determination. Thus it was proper for the Office to refer the matter to its medical adviser.⁷

The Board notes that the Office medical adviser properly calculated appellant's schedule award utilizing the A.M.A., *Guides*. The fifth edition of the A.M.A., *Guides*⁸ became effective February 1, 2001. Upon review of both the fourth and fifth editions of the A.M.A., *Guides*, the Board notes that there is no difference in the impairment rating in appellant's case.

The Board therefore finds that the weight of the evidence rests with the calculations of the Office medical adviser. Appellant is therefore entitled to a schedule award for no more than eight percent impairment of the right lower extremity.

The decision of the Office of Workers' Compensation Programs dated August 24, 2001 is hereby affirmed.

Dated, Washington, DC
November 5, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ It is well settled that when an attending physician's report does not give an estimate of permanent impairment based on the application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*. Board cases are clear that if an attending physician does not utilize the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. *Paul R. Evans, Jr., supra* note 6.

⁸ See FECA Bulletin 01-05 (issued January 31, 2001).