

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD F. LaFOUNTAIN and U.S. POSTAL SERVICE,  
HARTFORD GENERAL MAIL FACILITY, Hartford, CT

*Docket No. 03-298; Submitted on the Record;  
Issued April 21, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant has more than a three percent impairment of the right leg, for which he received a schedule award.

The case has been on appeal previously.<sup>1</sup> In a September 19, 2001 decision, the Board noted that appellant's claim was accepted for a back strain and a herniated L4-5 disc. The Office of Workers' Compensation Programs issued a schedule award for a one percent permanent impairment of the right leg. The Board found that there existed a conflict in the medical evidence between Dr. W. Jay Krompinger, a treating Board-certified orthopedic surgeon, who stated that the employment injury affected appellant's strength and caused pain in the right leg and an Office medical adviser, who stated that the permanent impairment only affected the peroneal nerve. The Board remanded the case for referral of appellant to an impartial medical specialist.

In a September 21, 2001 letter, appellant's attorney requested a copy of the statement of accepted facts, the questions to be asked the impartial specialist, and the letter of referral of appellant to the impartial specialist. He repeated his request in an October 30, 2001 letter. In an October 25, 2001 letter, the Office informed the attorney that the Office was proceeding to schedule the impartial medical specialist examination and promised to provide further details once the appointment for examination had been made. In an October 26, 2001 letter, the Office referred appellant to Dr. Carl Bomar, a Board-certified orthopedic surgeon, for an examination on November 19, 2001 to resolve the conflict in the medical evidence. A copy of the referral was sent to the address of appellant's attorney.

In a November 19, 2001 report, Dr. Bomar stated that appellant had a normal gait with no limp. He noted straight leg raising was negative at 90 degrees bilaterally. Dr. Bomar found no weakness or muscle atrophy in the legs. He found venous stasis changes in both legs.

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<sup>1</sup> Docket No. 01-347 (issued September 19, 2001).

Dr. Bomar indicated that appellant had decreased sensation in various areas of the left foot and lower leg. He noted trace reflexes at both knees and both ankles. Dr. Bomar concluded that appellant had residual symptoms from his accepted disc herniation. He estimated that appellant had a 10 percent permanent impairment of the lumbar spine based on the diagnosed-related estimate for a lumbar spine impairment of category three for a patient with a herniated disc who had surgery but no radiculopathy.<sup>2</sup> Dr. Bomer stated that there was no logical reason to assign a permanent impairment to appellant's leg because he did not have any gross weakness or atrophy.<sup>3</sup> He indicated that appellant had minimal sensory changes which, by themselves, did not amount to a permanent impairment. Dr. Bomer noted that under the A.M.A., *Guides*, a 10 percent permanent impairment of the whole person was equivalent of a 24 percent permanent impairment of the leg.

In a December 11, 2001 memorandum, a new Office medical adviser noted that Dr. Bomar reported no weakness or atrophy of the right leg with minimal sensory changes. He indicated that no permanent impairment was found for the right leg but that Dr. Bomar addressed only the lumbar spine, diagnosing a disc herniation at L4-5, status post laminectomy, with residual L5 radiculopathy. The Office medical adviser noted that the Act and federal regulations did not provide for impairment of the lumbar spine except when the extremities were involved. Based on Table 15-18, the medical adviser noted that the maximum permanent impairment due to sensory deficit or pain to the lower extremity involving the L5 nerve root was five percent.<sup>4</sup> Dr. Bomar applied Table 16-10 of the A.M.A., *Guides* to grade the impairment as Grade 3, allowing up to 60 percent for pain which may interfere with activities.<sup>5</sup> The Office medical adviser therefore multiplied 60 percent by 5 percent to determine that appellant had a 3 percent impairment of the right leg.

In a January 4, 2002 decision, the Office issued a schedule award for an additional two percent in appellant's schedule award for the right leg.

Appellant's attorney requested a hearing before an Office hearing representative. He contended that the Office failed to inform him of the name of the physician selected as the impartial medical specialist or with an opportunity to object to the physician prior to the examination. Appellant requested that the case be remanded for a new referral. He subsequently amended his request to a review of the written record. Appellant stated that, while the Office indicated that he had received a copy of the letter referring appellant to Dr. Bomar, he did not receive such a letter.

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*, page 384, Table 15-3 (5<sup>th</sup> ed. 2001).

<sup>3</sup> No schedule award is payable for an anatomical member, function or organ of the body not specified in the Federal Employees' Compensation Act or implementing regulations. Neither the Act nor the federal regulations provide for the payment of a schedule award for loss of use of the back, spine or body as a whole. See *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>4</sup> *Id.* at page 424, Table 15-18

<sup>5</sup> *Id.* at page 482, Table 16-10.

In a September 23, 2002 decision, the Office hearing representative affirmed the January 9, 2002 schedule award. He stated that the attorney had not asserted a right to participate in the selection of an impartial specialist and had not provided a valid reason for such participation.

The Board finds that appellant has no more than a three percent permanent impairment of the right leg.

The schedule award provisions of the Act<sup>6</sup> and its implementing regulation<sup>7</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 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.

Dr. Bomar, in his report, concluded that appellant did not have a significant permanent impairment of the right leg and concluded that he had a 10 percent permanent impairment of the lumbar spine. The Act, however, does not allow a schedule award for the back.<sup>8</sup> When the medical evaluator improperly uses the A.M.A., *Guides*, the Office may follow the advice of the Office medical adviser if he or she has properly used the A.M.A., *Guides*.<sup>9</sup> In this case, the Office medical adviser, based on the physical findings made by Dr. Bomar, found that appellant's sensory loss or pain to the right lower extremity involved the L5 nerve root and calculated that appellant had a three percent permanent impairment of the right leg. As noted above, the Office medical adviser properly applied the A.M.A., *Guides* in determining the extent of appellant's permanent impairment.

Appellant's attorney claimed that he was not sent a copy of the letter in which appellant was referred to Dr. Bomar. He stated that he was deprived of an opportunity to object to Dr. Bomar. The Office has the burden of proving that it mailed to a claimant notice of the scheduled hearing. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.<sup>10</sup> In this case, the record shows that a copy of the Office's October 26, 2001 letter was sent to appellant's representative. It is presumed in the ordinary course of

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404 (1999).

<sup>8</sup> 5 U.S.C. §§ 8101(20); 8107(c)(22).

<sup>9</sup> See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (where an attending physician has given a permanent impairment estimate but did not indicate he used the A.M.A., *Guides*, the Office may follow the advice of the Office medical adviser if he or she has properly used the A.M.A., *Guides*).

<sup>10</sup> *Samuel Smith*, 41 ECAB 226 (1989).

business that the representative received the letter. He has not submitted sufficient evidence to rebut the presumption that the letter was received in the ordinary course of business.

In addition, appellant's attorney only requested that he be informed of whom was selected as the impartial medical specialist. He made no request to participate in the selection of the impartial medical specialist following the Board's September 19, 2001 decision. Appellant's attorney did make a request for the information prior to the selection of the impartial medical specialist. However, even if appellant's attorney asks to participate in the selection of an impartial medical specialist or objects to the physician selected as the impartial medical specialist, he must present a valid reason.<sup>11</sup> Counsel did not present a valid reason for a need to participate in the selection of the impartial medical specialist and did not present any valid objection to the appointment of Dr. Bomar as the impartial medical specialist, either before or after the November 19, 2001 examination. The procedural objections to Dr. Bomar's selection as the impartial medical specialist in this case are without merit.

The decisions of the Office of Workers' Compensation Programs dated September 23 and January 4, 2002 are hereby affirmed.

Dated, Washington, DC  
April 21, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (October 1990); see *David Alan Patrick*, 46 ECAB 1020 (1995).