

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID DIAZ and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, Anthony, NM

*Docket No. 03-571; Submitted on the Record;
Issued July 23, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On May 1, 1990 appellant, then a 42-year-old food service cook foreman, sustained a traumatic injury when, during the course of training for the Special Operations and Response Team, he fell off the rope he was climbing at the obstacle course and landed on his back. The Office of Workers' Compensation Programs accepted the claim for the condition of lumbar strain with radiculopathy.

On April 4, 2001 appellant filed a claim for a schedule award.¹

On October 3, 2001 an Office medical adviser reviewed the medical record and requested that the Office ask Dr. Jeffrey L. Brandon, a Board-certified orthopedic surgeon, to provide a more detailed description of appellant's lower extremities consistent with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition.

By letter dated October 12, 2001, the Office requested that Dr. Brandon clarify his April 26, 2001 report and provided additional findings. Dr. Brandon advised, however, that Dr. Richard S. Westbrook, a Board-certified orthopedic surgeon, would conduct a repeat physical impairment examination of appellant. In a December 5, 2001 report, Dr. Westbrook noted appellant's history of injury and set forth his physical examination findings.

¹ The record reflects that appellant's initial claim for a schedule award, filed on March 4, 1996, was denied in a June 7, 1996 Office decision. In a decision dated October 24, 1997, the Office denied appellant's subsequent request for reconsideration as being untimely filed and lacking clear evidence of error. In a decision dated August 23, 1999, the Board affirmed the Office's October 24, 1997 decision. Docket No. 98-381 (issued August 23, 1999).

In a report dated April 28, 2002, the Office medical adviser reviewed the medical evidence of record. He noted that Dr. Westbrook described calf atrophy on the right side, weakness of plantar flexion, and "slight decreased sensation over the lateral aspect of the leg and into the foot to the lateral toes." The Office medical adviser stated that more medical information was needed as there appeared to be radiculopathy involving the S1 nerve root on the right side.

In an August 28, 2002 report, Dr. Alvaro A. Hernandez, a Board-certified orthopedic surgeon and appellant's new treating physician, noted a history of injury and appellant's symptoms. A diagnosis of lumbar discogenic syndrome with herniated L5-S1 disc with displacement of a right S1 nerve root was provided. In a September 12, 2002 report, Dr. Hernandez noted that appellant's magnetic resonance imaging (MRI) scan showed a large disc herniation at L5-S1 which was impinging on the S1 nerve root. Dr. Hernandez opined that appellant was a surgical candidate as he had weakness of the extensor hallucis longus, an absent reflex and a markedly positive MRI scan and a positive clinical history.

In a September 27, 2002 report, Dr. Gregory R. Misenhimer, a Board-certified orthopedic surgeon, noted the history of injury and provided findings on physical examination. He opined that appellant was suffering from a chronic disc herniation of the L5 level, was functional, and was not a candidate for surgical intervention at the present time.

As appellant's treating physicians failed to rate the extent of physical impairment, the Office referred appellant to a second opinion physician for an impairment rating. In an October 9, 2002 report, Dr. Randy J. Pollet, a Board-certified orthopedic specialist, reviewed the history of injury, objective tests, noted that over the last three to four years appellant had mild pain/sensory disturbances and minimal weakness in the right lower extremity. The symptoms in the right leg were described as being mild/occasional numbness, pain, dyesthesias, occasional weakness/cramps, all of which have been mild. The symptoms of pain were described as being dull, aching, moderate to severe. Dr. Pollet stated that no significant changes were noted in the review of systems and that appellant's history and physical examination correlated with appellant's pain drawing. Findings on examination were presented. Dr. Pollet found the date of maximum medical improvement to be October 9, 2002. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Pollet opined that appellant had a two percent impairment to his right lower extremity, both sensory and motor. Under page 424, Tables 15-15, 15-16, 15-18, appellant had a S1 nerve root sensory loss Grade 4, mild-minimal abnormal sensation forgotten during activity. Under Tables 15-08, impairment due to loss of motor power and motor deficits, appellant had a mild root, Grade 4, minimal loss of strength, which equated to five percent. Sensory loss was mild as active movement against gravity with some resistance, which equated to five percent. Sensory loss 5 times .05 equated to 1 percent. Motor loss of 20 times .05 equated to 1 percent. The sensory loss of one percent plus the motor loss of one percent equated to a physical impairment of the right lower extremity of two percent.

In a report dated October 31, 2002, an Office medical adviser reviewed the October 9, 2002 report of Dr. Pollet for the purpose of recommending maximum medical improvement and permanent partial impairment with regard to determining a schedule award for the lower extremities. Maximum medical improvement was said to have been achieved October 9, 2002.

Utilizing Dr. Pollet's report, the Office medical adviser found that the total impairment, under the Combined Values Chart at page 604, equaled two percent. The Office medical adviser further noted that as Dr. Pollet did not describe abnormalities in the left lower extremity which would support an impairment, a zero impairment value was given.

By decision dated September 2, 2002, the Office issued a schedule award for a two percent impairment of the right lower extremity. The period of the award was from October 9 to November 18, 2002.

The Board finds that appellant has no greater than a two percent permanent impairment of the right lower extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act² and its implementing federal regulation³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members, functions or organs of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ 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.⁵

A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.⁶

In the instant case, the Office referred appellant to Dr. Pollet, a Board-certified orthopedic specialist, for a second opinion examination as his treating physicians failed to rate his impairment. Dr. Pollet indicated that appellant had a two percent impairment to his right lower extremity causally related to his accepted work injury and specifically referenced how he calculated appellant's degree of impairment under the A.M.A., *Guides*. An Office medical adviser reviewed Dr. Pollet's medical findings and applied the proper edition of the A.M.A., *Guides*.⁷ The Office medical adviser determined that appellant had a two percent impairment of

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ 5 U.S.C. § 8107(c)(19).

⁵ See 20 C.F.R. § 10.404 (1999).

⁶ *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215 (1991).

⁷ See generally *Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (when an attending physician's report gives an estimate of permanent impairment but does not indicate that the estimate is based on the application of the A.M.A., *Guides*, the Office may follow the advise of its medical adviser if he or she has properly used the A.M.A., *Guides*).

the right lower extremity based on the fifth edition of the A.M.A., *Guides*. The Office medical adviser referenced page 424, Tables 15-15 through 15-18 stating that appellant was entitled to a two percent impairment of the right lower extremity. Because the Office medical adviser's opinion is based on a proper application of the fifth edition of the A.M.A., *Guides*, and there is no evidence of record to contradict the Office medical adviser's rating, the Board concludes that the Office properly awarded appellant a two percent schedule award for permanent impairment he sustained to his right lower extremity.

The decision of the Office of Workers' Compensation Programs dated December 2, 2002 is hereby affirmed.⁸

Dated, Washington, DC
July 23, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and requesting reconsideration pursuant to 5 U.S.C. § 8128(a).