

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY K. LOEB and U.S. POSTAL SERVICE,
POST OFFICE, City of Industry, CA

*Docket No. 02-1772; Submitted on the Record;
Issued March 20, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant is entitled to more than an 11 percent impairment of the right lower extremity and more than a 9 percent impairment of the left lower extremity for which he received a schedule award.

The Board has reviewed the record and finds that appellant has no more than an 11 percent impairment of the right lower extremity and no more than a 9 percent impairment of the left lower extremity.

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing regulation² 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 Office of Workers' Compensation Programs as the implementing regulation as the appropriate standard for evaluating schedule losses. Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is utilized to calculate any awards.³

Appellant, then a 44-year-old letter carrier, filed a notice of occupational disease and claim for compensation asserting that factors of his employment caused or contributed to his

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ FECA Bulletin No. 01-05 (issued January 29, 2001).

lumbar disc disease and nerve damage. The Office accepted the claim for a herniated disc at L3-4 and L5-S1 and authorized surgery which appellant underwent on August 17, 1999. Thereafter, appellant filed a claim for a schedule award.

In a January 24, 2000 report, Dr. Don R. DeFeo, a neurosurgeon, reported that appellant had reached maximum medical improvement and had a permanent impairment to the lower extremity of 80 percent. He indicated that appellant had some residual low backache, no straight leg raising pain and adequate strength in all muscle groups. Dr. DeFeo reported that appellant's reflexes were 2+ and symmetrical, the toes were down going and the sensation was intact. He noted that the degree of permanent impairment of both the right and left lower extremity due to loss of function from sensory deficit, pain or discomfort was 80 percent each. Dr. DeFeo also noted that the degree of permanent impairment of both the right and left lower extremity due to loss of function from decreased strength was 80 percent each. No additional measures were provided.

In a March 30, 2000 report, Dr. Ibrahim Yashruti, a Board-certified orthopedic surgeon and an Office referral physician, performed a second opinion evaluation on appellant. Findings on physical examination were provided, including a detailed description of observations of appellant's lumbar spine range of motion and responses to palpation. Circumferential measurements of the lower extremities, including documentation of his findings after observation of appellant's knees, ankles and feet were provided. Dr. Yashruti reported that appellant walked with a normal gait with no limp and was able to walk on his toes and heels without difficulty, able to squat partially and recover to a standing position without help or support. He, however, did not provide any impairment findings.

On September 21, 2000 an Office medical adviser reviewed the medical record at the request of the Office. Using the measurements provided by the treating physician, Dr. DeFeo, the Office medical examiner concluded that appellant's impairment was six percent for each lower extremity, with a date of maximum medical improvement reached by January 24, 2000. The Office medical examiner noted that Dr. DeFeo's report noted subjective complaints of numbness in appellant's left leg and both feet. Subjective factors were described as frequent, slight to moderate. The Office medical adviser recommended grading the lower extremity subjective complaints as a maximal Grade 3 as per the Grading Scheme (Table 11, p. 48) found in Chapter 3, fourth edition of the A.M.A., *Guides*. This would be pain and/or altered sensation that may interfere with activity or a 60 percent grade of a maximal 5 percent for L3 and 5 percent for L4 on the left (Table 83, p. 130), equivalent thus to a 60 percent impairment of a maximal 10 percent, equaling a 6 percent impairment of the left lower extremity or leg. For the right lower extremity, the identified nerve roots would be L5 and S1, each assessed a maximal five percent impairment as per Table 83. Grade 3 subjective complaints would be assessed a maximal 60 percent grade or thus a 6 percent impairment of the right lower extremity. The Office medical adviser noted that Dr. DeFeo indicated that strength was adequate in all muscle groups and no atrophy was documented. Thus, a zero percent impairment was provided for atrophy/weakness. There was no documentation of loss of range of motion of any of the lower extremity joints, so a zero percent impairment value was provided. Utilizing the Combined Values Chart, the six percent impairment for subjective complaints including pain and numbness, combined with the zero percent impairment for loss of motion, combined with the zero percent impairment for

atrophy/weakness equated to a six percent impairment of each lower extremity or leg. The Office medical adviser noted that Dr. Yashruti's second opinion report documented lower back pain, indicated no loss of range of motion of any of the lower extremity joints and indicated no lower extremity atrophy or weakness. Dr. Yashruti had noted that appellant complained of bilateral foot, right lower extremity numbness and constant aching from the right knee to the right ankle. The Office medical adviser indicated that Dr. Yashruti's March 30, 2000 report would not alter the six percent impairment rating of each lower extremity.

By decision dated October 11, 2000, the Office issued a schedule award for a six percent permanent impairment of the right leg and a six percent permanent impairment of the left leg. The award was based on the Office medical adviser's report of September 21, 2000.

Appellant disagreed with the amount of the award and requested an oral hearing.

In a March 13, 2001 report, Dr. DeFeo expressed his disagreement with the Office's schedule award determination. He indicated that the disability rating should be calculated at 80 percent due to appellant's numbness, back pain, physical limitations and the possibility of additional fusion surgery in the future for any instability which might develop. Dr. DeFeo did not include any objective or clinical measurements to support his opinion.

In an April 12, 2001 report, Dr. Theodore L. Sawyer, a Board-certified neurological surgeon, provided measurements of appellant's back mechanics, findings from his examination of appellant's reflexes, posture, gait, motor functions and reactions to palpation and sensation. He reported that appellant's gait was thought to be normal. Dr. Sawyer noted that appellant was able to squat on both the right and the left leg equally without difficulty and was able to heel walk bilaterally and toe walk normally on the right, with decreased toe walk on the left. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Sawyer used the diagnosis-related estimate, lumbosacral Category III in finding appellant had a 13 percent impairment rating of the whole person. He stated that his impairment rating was supported by the symptoms and clinical and diagnostic findings consistent with a symptomatic herniated disc.

In a report dated May 15, 2001, an Office medical adviser reviewed the medical record at the request of the Office. He indicated that the A.M.A., *Guides*, fifth edition was used to estimate impairment. He noted that the September 21, 2000 report of the previous Office medical adviser established the permanent partial impairment to the lower extremities. The April 12, 2001 report by Dr. Sawyer provided the whole person impairment based on the evaluation of the lumbosacral spine and use of the diagnosis-related estimate (p. 384, Table 15-3, A.M.A., *Guides*, fifth edition. In reviewing the previous Office medical adviser's evaluation, the current Office medical adviser noted that Dr. Sawyer had reported changes in the lower extremities which were not noted in the previous physical evaluation. Dr. Sawyer reported that both lower extremities had signs of muscle weakness, decreased Achilles reflex on the right and decreased ankle plantar/dorsiflexion on the left. Utilizing the A.M.A., *Guides*, fifth edition, page 424, Tables 15-16 and 15-18, the Office medical adviser found that appellant had additional impairments based on decreased lower extremity motor function. Dr. Sawyer had presented an LS impairment, Category III, page 384, Table 15-3. Utilizing Table 15-18, page 424, the Office medical adviser found that the additional impairment for the left lower extremity was 3 percent (20 percent times 13 percent equals 2.6 percent). For the right lower extremity, using the

involvement of L5 (Table 15-18, p. 424), an additional 5 percent impairment was obtained (37 percent times 13 percent equals 4.8 percent). Combining the previously presented values for sensory losses of the lower extremities of the Office medical adviser's report of September 21, 2000 with the current values based on motor loss, the impairment value for the left lower extremity was calculated at 9 percent (6 percent plus 3 percent) and 11 percent for the right lower extremity (6 percent plus 5 percent).

In a decision dated June 26, 2001, an Office hearing representative reversed the previous decision of October 11, 2000 after determining that appellant was entitled to an additional three percent permanent impairment of the left lower extremity and an additional five percent permanent impairment of the right lower extremity. Accordingly, by decision dated July 24, 2001, the Office awarded compensation for an additional three percent permanent impairment of the left lower extremity and an additional five percent permanent impairment of the right lower extremity. Thus, appellant received a total award of a 9 percent permanent impairment of the left lower extremity and an 11 percent permanent impairment of the right lower extremity.

Appellant again disagreed with the amount of the award and requested an oral hearing, which was held on February 27, 2002. Following the hearing, a medical report dated March 5, 2002 from Dr. Sawyer was received. Dr. Sawyer advised, as he did in his previous report of April 12, 2001, that appellant qualified for an impairment rating under diagnosis-related estimate lumbosacral Category III, 13 percent of the whole person. In his report, Dr. Sawyer wrote, in part:

“Based on my neurosurgical experience, I submitted my unbiased, medically reasonable [and] medically appropriate recommendations using the fifth edition A.M.A., *Guides*.... I stated [that] [appellant] qualified for impairment rating as described under [d]iagnosis-[r]elated [l]umbosacral [C]ategory III; 13 percent of the [whole] person. I might add the patient had a documented radiculopathy and that [this] is the appropriate impairment [and] that these progressive radicular L5/S1 deficits originate from the [spine] which is the [whole] person.”

Dr. Sawyer further stated that appellant asked him to review the records reflecting the events which occurred since his April 2001 evaluation, which he did. He wrote that he did “not understand what could possibly be appropriate about not mentioning that [appellant's] injury and impairment is the [lumbar] [spine].” He further reiterated that he attested to his previous evaluation findings and that his impairment rating was in accordance to the A.M.A., *Guides* for a lumbar spine injury, which the parties have failed to discuss for some unknown reason.

By decision dated June 6, 2002, an Office hearing representative affirmed the Office's previous decision of July 24, 2001. It was found that the May 15, 2001 opinion of the Office medical adviser conformed to the A.M.A., *Guides* and established that appellant had no more than a 9 percent permanent impairment of the left lower extremity and no more than an 11 percent permanent impairment of the right lower extremity.

In this case, although the original impairment values pertaining to sensory loss of the lower extremities were derived from the fourth edition of the A.M.A., *Guides*, no change in

values occur through utilization of the appropriate tables in the fifth edition.⁴ Accordingly, the new Office medical adviser appropriately utilized the previously presented values equaling a six percent impairment for sensory losses of each of the lower extremities from the original Office medical adviser's report of September 21, 2000. The Board finds that Dr. DeFeo's March 13, 2001 was properly not considered in calculating appellant's additional impairment values. He indicated that part of appellant's disability rating of 80 percent should be based on the possibility of additional future surgery. With respect to Dr. DeFeo's contention that appellant will need surgery in the future which will create greater impairment, the Board notes that a schedule award cannot be made on the basis of a possibility that the extent of an impairment will increase in the future. If at some later date a medical examination indicates that appellant's condition has worsened, an amended schedule award can then be made to cover any additional impairment.⁵ The new Office medical adviser properly noted that Dr. Sawyer, in his report of April 12, 2001, based his schedule award calculation on appellant's limitation of the spine and lower extremities. Office procedure only allow schedule awards for nerve root impairment associated with the lower extremity. Further, Dr. Sawyer reported a 13 percent impairment of the spine and lower extremities were given as an impairment of the whole person. While the A.M.A., *Guides* provide for both impairment to the individual member and to the whole person, the Act does not provide for permanent impairment for the whole person.⁶ Thus, the Office medical adviser properly used the appropriate tables of the fifth edition of the A.M.A., *Guides* to conclude that appellant had an additional three percent permanent impairment of the left lower extremity and an additional five percent permanent impairment of the right lower extremity.

As Dr. Sawyer did not properly use the A.M.A., *Guides* in determining permanent impairment, it is appropriate for the Office medical adviser to apply the A.M.A., *Guides* to the findings presented by the treating physician.⁷ Moreover, Dr. Sawyer reported an impairment of the spine and lower extremities which was given as an impairment of the whole person.⁸ As the Office medical adviser's report is the only evaluation that conforms to Office procedures and contains specific references to the correct edition of the A.M.A., *Guides*, it constitutes the weight of the medical evidence.

The June 6, 2002 and July 24, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

⁴ *Id.* Awards calculated according to any previous edition should be evaluated according to the edition originally used. Any recalculations of previous awards which result from hearings, reconsideration or appeals should be based on the fifth edition of the A.M.A., *Guides*, effective February 1, 2001. Cf. A.M.A., *Guides*, 4th edition, Table 11, p. 48 and Table 83, p. 130; A.M.A., *Guides*, 5th edition, Tables 15-15 and 15-18, p. 424.

⁵ *Ted R. Soares*, 38 ECAB 480 (1987).

⁶ *John Yera*, 48 ECAB 243 (1996).

⁷ See *Lena P. Huntley*, 46 ECAB 643 (1995).

⁸ The Act specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award. *Francesco C. Veneziani*, 48 ECAB 572 (1997). However, while a schedule award is not payable under the Act for an impairment of the back, a schedule award is payable for a permanent impairment of the legs that is due to a work-related back condition. *Denise D. Cason*, 48 ECAB 530 (1997).

Dated, Washington, DC
March 20, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member