

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH DAY and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Trenton, NJ

*Docket No. 03-265; Submitted on the Record;  
Issued March 27, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has more than a 10 percent permanent impairment of his left lower extremity, for which he received a schedule award.

Appellant's claim filed on October 26, 1990 was initially accepted for left carpal tunnel syndrome. On May 28, 1991 the Office of Workers' Compensation Programs informed appellant that his back condition had been aggravated by work factors and accepted his diagnosed left cervical and sciatic radiculopathies.

The Office paid appropriate disability compensation and on June 10, 1992 appellant underwent a cervical discectomy and fusion at C5-6. Appellant returned to limited duty on May 14, 1994. Appellant requested a schedule award (claim number A02-0624457) and submitted an October 10, 1994 report from Dr. David Weiss, an osteopathic practitioner. After examining appellant, Dr. Weiss found a 50 percent permanent impairment of the left upper extremity and a 25 percent permanent impairment of the left lower extremity.

An Office medical adviser reviewed Dr. Weiss' findings and determined that appellant had a 20 percent impairment of his left upper extremity. On September 22, 1995 the Office issued a 20 percent schedule award for appellant's left upper extremity, running from October 10, 1994 to December 20, 1995 at the rate of \$1,980.00 every four weeks.

Appellant requested a hearing, which was held on June 17, 1996. The hearing representative affirmed the 20 percent schedule award, finding that the Office medical adviser's opinion represented the weight of the medical evidence because he had pointed out the problems with Dr. Weiss' calculations and considered the report of appellant's treating physician, Dr. Luis A. Cervantes, Board-certified in neurological surgery.<sup>1</sup> The hearing representative

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<sup>1</sup> The Board affirmed the Office's decision. Docket No. 97-818 (issued January 5, 1999).

instructed the Office to consider appellant's request for a schedule award for his left lower extremity.

On remand, the Office referred appellant to Dr. Stephen G. Pappas, Board-certified in neurology, who stated in an April 27, 2000 report that appellant had a 10 percent whole person impairment, due to radiculopathy, based on the diagnostic-related estimate (DRE), lumbosacral Category III, at page 102 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Office sought clarification, but based on Dr. Pappas' clinical findings, the Office medical adviser calculated a 10 percent impairment of appellant's left lower extremity.

On December 26, 2000 the Office issued a 10 percent schedule award for appellant's left lower extremity. The \$15,984.00 award ran from April 27 to November 14, 2000.

Appellant requested a hearing, which was held on June 12, 2001. On August 23, 2001 the hearing representative remanded the case for the Office to obtain a clarifying report from Dr. Pappas, noting that he had failed to explain his reasoning or provide an impairment rating for appellant's left lower extremity.

On remand, the Office asked Dr. Pappas to render an impairment rating according to the fourth edition of the A.M.A., *Guides* and provide the charts and tables used in his calculations. On October 4, 2001 Dr. Pappas stated that appellant suffered from L5 and S1 lumbar radiculopathies, which would be equivalent to a 10 percent impairment of the left lower extremity, using Table 83 on page 130 of the fourth edition.<sup>2</sup> Dr. Pappas reiterated his conclusion in a report dated November 26, 2001.

Based on his conclusion, the Office again issued a 10 percent impairment rating on December 19, 2001. Following appellant's request for a hearing, the hearing representative affirmed the schedule award on August 5, 2002.

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

Section 8107 of the Federal Employees' Compensation Act<sup>3</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>4</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined.

To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>5</sup> The

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<sup>2</sup> The letter noted page 103, a typographical error.

<sup>3</sup> 5 U.S.C. §§ 8101-8109.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

Act's implementing regulation has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule award losses.<sup>6</sup>

The fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001) provides that any initial schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date. Any schedule award decision on or after February 1, 2001, resulting from a reconsideration or a hearing requested prior to that date, in which additional medical evidence is submitted, will be recalculated using the fifth edition.

In this case, Dr. Weiss found a 25 percent impairment of the left lower extremity in October 1994. He noted an electromyography, which showed L5-S1 radiculopathy and a myelogram, which showed herniated nucleus pulposus (HNP) at L5-S1. Using the fourth edition of the A.M.A., *Guides*, he calculated a five percent impairment for radiculopathy, Table 68, page 89; a nine percent impairment for a surgically-treated disc lesion, Table 75, page 113; a seven percent impairment for an unoperated on HNP with radiculopathy, Table 75, page 113; and a four percent impairment for unoperated on disc lesion with pain and rigidity, Table 75, page 113, using Table 16, page 57.

Subsequently, the Office medical adviser considered Dr. Pappas' DRE rating based on clinical findings and calculated a 10 percent impairment on December 21, 2000, using Table 83 on page 130 of the fourth edition. Following the hearing representative's remand on August 23, 2001 for the Office to obtain further medical rationale from Dr. Pappas, the Office should have asked him to calculate his rating based on the fifth edition of the A.M.A., *Guides*, which became effective on February 1, 2001.

Although both editions of the A.M.A., *Guides* provide for a DRE rating of the lumbar spine in several categories, the fifth edition offers a range of 10 to 13 percent in Category III, while the fourth edition offers a maximum of 10 percent.<sup>7</sup> Because the Office erroneously relied on the earlier edition of the A.M.A., *Guides*, appellant may be entitled to more than the 10 percent schedule award he received. Therefore, the Board will remand the case for the Office to apply the correct edition of the A.M.A., *Guides*.

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<sup>6</sup> 20 C.F.R. § 10.404 (1999).

<sup>7</sup> Compare, DRE Lumbar Category III, Chapter 15, page 384 of the fifth edition, with DRE Category III: Radiculopathy, Chapter 3, page 102 of the fourth edition.

The August 5, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC  
March 27, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member