

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE MENDOZA and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

*Docket No. 03-1516; Submitted on the Record;
Issued September 10, 2003*

DECISION and ORDER

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

The issue is whether appellant has more than a one percent permanent impairment of his right lower extremity and a five percent permanent impairment of his left lower extremity, for which he received schedule awards.

On July 20, 1999 appellant, then a 52-year-old letter carrier, filed a claim for a traumatic injury occurring on July 19, 1999 in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for a knee, leg and a lumbar sprain and contusions to the face, scalp and neck. He underwent arthroscopic surgery on his left knee with a partial synovectomy and chondroplasty of the femor on June 9, 2000.

By decision dated December 6, 2000, the Office granted appellant a schedule award for a five percent permanent impairment of his left lower extremity. The period of the award ran for 14.40 weeks from June 21 to October 29, 2000.

By letter dated December 19, 2001, the Office informed appellant that it had accepted that he sustained an aggravation of cervical degenerative disc disease as a result of his July 19, 1999 employment injury. The Office further authorized surgery.¹ On January 15, 2002 appellant underwent an anterior cervical discectomy and fusion at C4-5 and C5-6.

In a report dated August 9, 2002, Dr. Charles D. Marable, a neurologist and appellant's attending physician, reviewed appellant's history of injury and listed range-of-motion findings for the cervical and lumbar spine. He found that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) appellant had a 20 percent whole person impairment resulting from his lumbar and cervical spine impairments.

¹ The record indicates that appellant sustained a right toe contusion and an aggravation of lumbar strain due to an injury on January 5, 2002. The Office doubled the case for the January 5, 2002 injury, assigned file number A16-2030962, into his July 19, 1999 injury, assigned file number A16-0338106.

On October 17, 2002 an Office medical adviser reviewed Dr. Marable's report and noted that the regulations did not provide an award for an impairment of the spine. He indicated that Dr. Marable did not provide sufficient information to determine whether appellant had an impairment of the extremities. The Office medical adviser recommended that appellant undergo a second opinion evaluation.

By letter dated November 1, 2002, the Office referred appellant to Dr. John Sklar, a Board-certified physiatrist, for a second opinion evaluation. In a report dated November 22, 2002, he listed detailed findings on physical examination. Dr. Sklar diagnosed "lower back pain and degenerative disease of the lumbar spine without frank lumbar radiculopathy." He stated:

"[Appellant] has good strength in the bilateral lower extremities so there is no evidence of compromise of the motor nerves. In regard to sensation while there is decreased sensation it cannot be related to objectively verifiable pathological findings and it [is] [not] explainable based on the mechanism of injury and thus[,] I cannot assign an impairment in regard to sensory dysfunction. There is actually no objective evidence of impairment at this time. However, I can assign impairment due to [appellant's] reports of lower extremity discomfort which is mild on the right and moderate on the left. The impairment available due to pain then would be [one] percent for the right lower extremity and [two] percent for the left lower extremity.

"To summarize, [appellant] reached MMI [maximum medical improvement] on August 9, 2002. He has a [one] percent lower extremity impairment due to discomfort in the right lower extremity and a [two] percent lower extremity impairment due to discomfort in the left lower extremity."

Dr. Sklar indicated that he had used the fifth edition of the A.M.A., *Guides* in reaching his impairment determination. In an accompanying impairment evaluation form for the lower extremity, he checked that appellant had mild to moderate pain with no weakness or atrophy.

On December 29, 2002 an Office medical adviser reviewed Dr. Sklar's report and concurred with his finding that appellant had a two percent permanent impairment of the left lower extremity and a one percent permanent impairment of the right lower extremity.

By decision dated April 9, 2003, the Office granted appellant a schedule award for a one percent permanent impairment of the right lower extremity. The period of the award ran for 2.88 weeks from August 9 to 29, 2002. The Office noted that appellant was not entitled to an increased award for the left lower extremity as he had already received a schedule award for a five percent impairment of the left lower extremity.

The Board finds that appellant has no more than a one percent permanent impairment of the right lower extremity and a five percent permanent impairment of the left lower extremity for which he received schedule awards.

The schedule award provisions of the Federal Employees' Compensation Act² and its implementing federal regulation,³ 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.⁴ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.⁵

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities. The nerves involved are first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by a determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.⁶

Dr. Marable, appellant's attending physician, evaluated appellant's cervical and lumbar spine and concluded that he had a 20 percent impairment of the whole person. However, 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 Act⁷ or under its implementing federal regulations.⁸ Neither the Act nor its implementing federal regulations provide for a schedule award for impairment to the back or to the body as a whole.⁹ Furthermore, the back is specifically excluded from the definition of "organ" under the Act.¹⁰ As Dr. Marable provided an impairment finding for appellant's whole person rather than his extremities, his opinion cannot be used to determine the degree of appellant's permanent impairment. The Office, therefore, properly referred appellant to Dr. Sklar for a second opinion evaluation.

In a report dated November 22, 2002, Dr. Sklar found that appellant had no objective findings of a lower extremity impairment. Based on appellant's subjective complaints, Dr. Sklar opined that he had a two percent impairment of the left lower extremity due to moderate pain and a one percent impairment of the right lower extremity due to mild pain. He further found that

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ 20 C.F.R. § 10.404(a).

⁵ See FECA Bulletin No. 01-5 (issued January 29, 2001).

⁶ A.M.A., *Guides* at 423.

⁷ 5 U.S.C. § 8107(c).

⁸ 20 C.F.R. § 10.404.

⁹ *Terry E. Mills*, 47 ECAB 309 (1996).

¹⁰ 5 U.S.C. § 8101(19).

appellant had no weakness or atrophy of the lower extremities. Dr. Sklar indicated that he utilized the A.M.A., *Guides* in reaching his determination but did not provide citations to specific tables and pages.

An Office medical adviser reviewed Dr. Sklar's November 22, 2002 report and applied the appropriate tables and pages of the A.M.A., *Guides* to his findings. The Office medical adviser concurred with Dr. Sklar's finding that appellant had a two percent impairment of the left lower extremity and a one percent impairment of the right lower extremity due to pain. He found that, according to Table 17-37 on page 552, the maximum percentage loss of function of the femoral nerve affecting the lower extremity was 7 percent. He graded appellant's complaints of moderate pain of the left lower extremity as 25 percent pursuant to Table 15-15 on page 424 of the A.M.A., *Guides*. The Office medical adviser multiplied the 7 percent impairment of the femoral nerve by the graded 25 percent impairment due to pain which yielded, when rounded, a 2 percent impairment of the left lower extremity.¹¹ For appellant's right side, the Office medical adviser graded appellant's complaints of mild pain as 15 percent.¹² He multiplied 15 percent by 7 percent, the maximum percent impairment due to pain of the femoral nerve, to find that appellant had a 1 percent impairment of the right lower extremity. The Office medical adviser noted that his findings were based on the "same values and methods as awarded by Dr. Sklar."

As the Office medical adviser properly applied the A.M.A., *Guides* to Dr. Sklar's findings, his report constitutes the weight of the medical evidence and establishes that appellant has no more than a one percent impairment of the right lower extremity and a five percent impairment of the left lower extremity.

¹¹ The A.M.A., *Guides* provide that rounding off is to be to the nearest whole number. A.M.A., *Guides* at 9-10, 20.

¹² A.M.A., *Guides* at 424, Table 15.

The decision of the Office of Workers' Compensation Programs dated April 9, 2003 is affirmed.

Dated, Washington, DC
September 10, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member