

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**THOMAS J. FRAGALE, Appellant**

**and**

**U.S. POSAL SERVICE, POST OFFICE,  
Plymouth Meeting, PA, Employer**

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**Docket No. 04-835  
Issued: July 8, 2004**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant  
Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On February 10, 2004 appellant filed an application for review of an Office of Workers' Compensation Programs' decision dated October 14, 2003, finding a four percent impairment to each lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the schedule award issue.

**ISSUE**

The issue is whether appellant has more than a four percent permanent impairment to each lower extremity, for which she received schedule awards.

**FACTUAL HISTORY**

The case was before the Board on a prior appeal. In a decision dated February 1, 2002, the Board found that a conflict of medical opinion existed as to whether appellant had any employment-related permanent impairment to a specified member of the body under the Federal Employees' Compensation Act.<sup>1</sup> The Board remanded the case for referral to an impartial

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<sup>1</sup> Docket No. 01-1260 (issued February 1, 2002).

medical specialist to resolve the conflict. The history of the case is provided in the Board's February 1, 2002 decision and is incorporated herein by reference.

On return of the case record, the Office referred appellant, together with medical records and a May 8, 1996 statement of accepted facts to Dr. H. William Schaaf, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated July 11, 2002, Dr. Schaaf provided a history and results on examination. He noted bilateral lower extremity pain and weakness and opined that "the claimant's permanent impairment of the legs is not causally related to his thoracic strain/sprain."

By letter dated August 12, 2002, the Office advised Dr. Schaaf that he was sent the wrong statement of accepted facts. The Office indicated that a January 10, 2000 statement of accepted facts noted the acceptance of a lumbar strain with intermittent radiculopathy as employment related, in addition to thoracic strain/sprain. Dr. Schaaf was asked to review a January 10, 2002 statement of accepted facts and submit a supplemental report as to any employment-related impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001).

In a report dated September 26, 2002, Dr. Schaaf noted that he had received the Office's August 12, 2002 letter, although he had not seen the statement of accepted facts.<sup>2</sup> Dr. Schaaf stated that, based on the acceptance of lumbar strain with radiculopathy, he felt that appellant's "disability is causally related to the work injury of July 1994. This ongoing disability related to the lower extremity dysfunction and pain is clearly related to a degree to this injury. I would pick somewhere around 50 percent as my degree of causality based on a prior history of radiculopathy and neuropathy of diabetes noted before the accident of July 1994."

The Office asked an Office medical adviser to provide an opinion as to the percentage of permanent impairment. In a report dated October 30, 2002, an Office medical adviser reviewed Dr. Schaaf's findings and opined that, under the A.M.A., *Guides*, appellant had a four percent impairment to each leg based on radicular pain.

By decision dated November 8, 2002, the Office issued a schedule award for a four percent permanent impairment to each lower extremity. In a decision dated October 14, 2003, an Office hearing representative affirmed the prior decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Act<sup>3</sup> and its implementing regulation<sup>4</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

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<sup>2</sup> The record transmitted to the Board does not contain a January 10, 2000 statement of accepted facts.

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404 (2002).

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. As of February 1, 2001, the fifth edition of the A.M.A., *Guides* was to be used to calculate schedule awards.<sup>5</sup>

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>6</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>7</sup>

### ANALYSIS

In its prior decision, the Board found that a conflict existed in the medical evidence with respect to whether appellant was entitled to a schedule award. A conflict existed as to whether there was an employment-related permanent impairment, and if so, the degree of impairment under the A.M.A., *Guides*. The Office requested that the physician selected as an impartial medical specialist, Dr. Schaaf, provide an opinion as to a permanent impairment under the A.M.A., *Guides*.<sup>8</sup> The Board notes that the Office initially sent Dr. Schaaf an inaccurate statement of accepted facts and according to Dr. Schaaf he did not receive a copy of the amended statement of accepted facts. He submitted reports dated July 11 and September 26, 2002, but neither report offers an opinion as to the percentage of a permanent impairment. In the September 26, 2002 report, Dr. Schaaf reported “50 percent as my degree of causality,” which appeared to refer to causal relationship and did not represent an opinion as to the degree of permanent impairment.

The Office referred the case to an Office medical adviser for an opinion on the percentage of permanent impairment. The Office’s procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.<sup>9</sup> In the instant case, there was a conflict under section 8123(a) that must

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<sup>5</sup> FECA Bulletin No. 01-05 (issued January 29, 2001).

<sup>6</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>7</sup> *William C. Bush*, 40 ECAB 1064 (1989).

<sup>8</sup> The record does not contain the actual questions posed to Dr. Schaaf; his July 11, 2002 report, however, stated that the Office had requested an opinion as to a permanent impairment and Dr. Schaaf reported that he reviewed the A.M.A., *Guides*. The Board notes that, on appeal appellant alleges that the Office bypassed two physicians, without explanation, before selecting Dr. Schaaf. The record indicates, however, that the physicians initially identified did not treat back conditions and therefore were not selected as impartial medical specialists.

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002). The hearing representative refers to FECA Bulletin No. 96-17 (issued September 20, 1996), which was issued pursuant to the fourth edition of the A.M.A., *Guides* and indicates that an Office medical adviser should compute the percentage of the schedule award. It does not discuss the opinions of physicians selected as impartial medical specialists.

be resolved by the impartial medical specialist. In order to properly resolve the conflict it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An Office medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.<sup>10</sup> Although Dr. Schaaf indicated that he reviewed the A.M.A., *Guides*, he did not provide an opinion as to the percentage of permanent impairment in this case. Accordingly, the case will be remanded to the Office to properly resolve the conflict.

### CONCLUSION

The Board finds that the reports of Dr. Schaaf are not sufficient to resolve the conflict in the medical evidence with respect to the percentage of permanent impairment to the legs. The case will be remanded to secure an appropriate report from an impartial medical specialist.

### ORDER

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 14, 2003 be set aside and the case remanded for action consistent with this decision of the Board.

Issued: July 8, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>10</sup> See, e.g., *Willie C. Howard*, 55 ECAB \_\_\_\_ (Docket Nos. 04-342, 04-464, issued May 27, 2004) (where the Office medical adviser concurred that the impartial medical specialist's impairment rating was appropriate under the fifth edition of the A.M.A., *Guides*).