

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

JIMMY L. MILSAP, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charleston, WV, Employer**

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**Docket No. 04-1423
Issued: August 3, 2005**

Appearances:
Richard P. Cohen, Esq., for the appellant
Jim Gordon, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On May 5, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated February 11, 2004. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a three percent permanent impairment to his right lower extremity.

FACTUAL HISTORY

Appellant, a 45-year-old mail handler, injured his lower back while putting a box into a cage on January 22, 2000. He filed a claim for benefits on January 31, 2000, which the Office accepted for lumbosacral sprain. The claim was subsequently expanded to include the condition of aggravation of preexisting herniated disc at L4-5. The Office authorized lumbar surgery on April 26, 2000. He returned to light duty on October 31, 2000.

In a report dated March 21, 2002, Dr. Larry A. Pearce, a Board-certified family practitioner, stated that appellant had severely limiting radicular pain and sensor-motor impairment from lumbosacral disc disease. He also found evidence of a profound sensory loss in lumbar nerve roots based on electrical testing.

In a report dated March 21, 2002, Dr. Prasadarao Mukkamala, Board-certified in physical medicine and rehabilitation, found that appellant had a right lower extremity impairment of one percent. Dr. Mukkamala stated that appellant had a 20 percent impairment from sensory symptoms in the L5 region, which pursuant to Table 83 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) [A.M.A., *Guides*], accounted for a 5 percent lower extremity impairment. He then calculated a 20 percent impairment based on sensory symptoms multiplied by 5 percent totaled a 1 percent lower extremity impairment.

In a report dated April 10, 2002, Dr. George Orphanos, a Board-certified orthopedic surgeon, determined appellant's lumbar range of motion and made impairment findings based on radiculopathy. With regard to radiculopathy, Dr. Orphanos stated:

“Following Table 15-15 on page 424, Grade 3 sensory loss of L5 is found, which I would estimate at 60 percent. This 60 percent multiplied by 5 percent maximum loss of function due to sensory deficit for pain involving L5 would give a 3 percent of impairment....”

In an impairment evaluation dated April 22, 2002, an Office medical adviser found that appellant had a three percent impairment of his right lower extremity based on the fifth edition of the A.M.A., *Guides*. He noted that Dr. Orphanos had calculated a pain/sensory loss at Grade 3 which interfered with activity and created a sensory loss at L5 of five percent. The Office medical adviser multiplied the 60 percent loss rendered by this sensory loss, as estimated by Dr. Orphanos, times a 5 percent maximum loss of function due to sensory deficit for pain involving L5, and arrived at 3 percent of impairment of impairment pursuant to the A.M.A., *Guides*.¹

By letter to the Office dated April 29, 2002, appellant requested a schedule award based on a partial loss of use of his right lower extremity.

On May 10, 2002 the Office granted appellant a schedule award for a three percent permanent impairment of the right lower extremity for the period April 19 to July 28, 1988, for a total of 14.40 weeks of compensation.

By letter dated August 15, 2002, appellant requested reconsideration.

By decision dated September 3, 2002, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

¹ The Office medical adviser noted that Dr. Mukkamala had calculated a one percent lower extremity rating based on a Grade 4 level of pain but credited Dr. Orphanos' Grade 3 impairment because the medical evidence supported the higher rating.

By letter dated June 30, 2003, appellant's attorney requested reconsideration. Appellant submitted a February 26, 2003 report from Dr. Pearce and a June 6, 2003 report from Dr. Joseph A. Snead, a Board-certified orthopedic surgeon. In his report, Dr. Pearce stated that appellant's condition was aggravated by a nonwork-related motor vehicle accident. He advised that appellant's condition has been disabling in that any activity aggravates his pain, with accompanying instability of the legs and gait impairment. Dr. Pearce concluded that appellant had a permanent partial disability which fits the A.M.A., *Guides* criteria for a degenerative disc disease with radiculopathy which entailed a 10 percent permanent impairment rating.

In his June 6, 2003 report, Dr. Snead advised that appellant's lumbar spine range of motion was measured with inclinometers subtracting the sacral movement from the T12 movement. He stated that appellant demonstrated 34 degrees of lumbar flexion, 12 degrees of extension, 12 degrees right lateral flexion and 12 degrees left lateral flexion. Dr. Snead asserted that appellant's sacral movement was compatible with the straight leg raising test, which indicated validity. He stated:

“Using the A.M.A., *Guides* I calculate [appellant] to have a 24 percent whole man impairment. He receives 10 percent from Table 15-7, page 404 under section 2E. This is combined with 16 percent from the Range of Motion Charts, the details of which can be found on my enclosed Figure 79, which is the equivalent of figure 15-10 in the A.M.A., *Guides*. When 10 percent and 16 percent are combined the result is 24 percent whole man impairment using the [C]ombined [V]alues [C]hart.”

In a report dated October 1, 2003, Dr. Pearce opined that appellant's employment injury resulted in muscle atrophy of the right lower extremity and pain, which necessitated continual pain management.

In an impairment evaluation dated February 6, 2004, an Office medical adviser found that appellant was not entitled to an award greater than the three percent rating already granted. He stated that, because Dr. Snead used the tables for the spine in rendering his rating, it must be excluded under the Federal Employees' Compensation Act.

By decision dated February 11, 2004, the Office denied reconsideration.

LEGAL PRECEDENT

The schedule award provision of the Act² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.³ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 5 U.S.C. § 8107(c)(19).

equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.⁴

ANALYSIS

In this case, Dr. Orphanos determined that appellant had a three percent impairment of the right lower extremity based on the A.M.A., *Guides*. The method for deriving an impairment rating based on nerve root or spinal cord impairment is outlined at section 15.12, page 423 of the A.M.A., *Guides*, which states that the extent of any sensory or motor loss due to nerve impairment is determined based on Tables 15-15 and 15-16. After examining appellant and reviewing his medical records, Dr. Orphanos found that appellant had a Grade 3 sensory loss at the L5 region, which he estimated at 60 percent under Table 15-15. Pursuant to the procedure outlined at Table 15-15(b), Dr. Orphanos then multiplied this 60 percent finding times 5 percent, appellant's maximum loss of function due to sensory deficit for pain involving L5, which amounted to a three percent lower extremity impairment. The Office medical adviser adopted Dr. Orphanos' findings and five percent impairment rating.

The Board finds that the Office properly found that appellant had a three percent impairment of the right lower extremity based on the A.M.A., *Guides*. The Office medical adviser acted properly in adopting the rating of Dr. Orphanos, a Board-certified orthopedic surgeon, who based his findings of a three percent impairment of the right lower extremity on the applicable tables and charts of the A.M.A., *Guides*.

Appellant continues to allege that the opinions of Drs. Pearce and Snead supported a greater impairment rating of the right lower extremity. These reports, however did not explain how these physicians correlated any impairment findings with the A.M.A. *Guides*. Dr. Pearce stated in his March 21, 2002 report that appellant had severely limiting radicular pain and sensor-motor impairment from lumbosacral disc disease, and found evidence of a profound sensory loss in lumbar nerve roots based on electrical testing. However, he did not present any impairment rating in accordance with the applicable tables and figures of the A.M.A. *Guides*. In his February 26, 2003 report, Dr. Pearce stated that appellant had instability of the legs and gait impairment and found that appellant had a 10 percent permanent impairment rating for a degenerative disc disease with radiculopathy, pursuant to the A.M.A., *Guides*. He stated in his October 1, 2003 report that appellant's employment injury resulted in muscle atrophy of the right lower extremity and pain, which necessitated continual pain management. Dr. Snead stated in a June 6, 2003 report that appellant had a 24 percent whole man impairment based on Table 15-7, page 404 and Figure 15-10 of the A.M.A., *Guides*. However, none of these reports explained how these physicians correlated any impairment findings with the criteria enunciated in the A.M.A., *Guides*.

Further, none of the reports submitted by Drs. Pearce and Snead are sufficient to establish that appellant is entitled to additional compensation; *i.e.*, an award under the schedule at section 8107,⁵ because they indicate permanent partial impairment based on an injury to appellant's

⁴ 20 C.F.R. § 10.404.

⁵ 5 U.S.C. § 8107.

lumbar spine. The Office medical adviser properly noted that the tables relied on by Dr. Snead in making his impairment rating were not valid in that they pertained to the spine. No schedule award is payable for permanent loss of, or loss of use of, specified anatomical members or functions or organ of the body not specified in the Act or in the implementing regulations.⁶ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole,⁷ no claimant is entitled to such an award.⁸ Therefore, the medical evidence appellant submitted did not establish that appellant is entitled to an additional schedule award. As Drs. Pearce and Snead offered mere conclusions regarding the degree of appellant's impairment, without explaining the basis for each rating factor as outlined in the A.M.A. *Guides*, the Office medical adviser properly advised the Office that appellant was not entitled to more than the three percent impairment already awarded.

The Board therefore affirms the Office's February 11, 2004 decision, which found that appellant was not entitled to an award greater than the three percent impairment to his right lower extremity the Office awarded in its May 10, 2002 decision.

As there is no other probative medical evidence establishing that appellant sustained any additional permanent impairment, the Office properly found that appellant was not entitled to more than a three percent permanent impairment to his right lower extremity.

CONCLUSION

The Board finds that appellant has no more than a three percent permanent impairment to his right lower extremity.

⁶ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies only to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁷ The Act itself specifically excludes the back from the definition of "organ." Section 8101(19); *see also Rozella L. Skinner*, 37 ECAB 398 (1986).

⁸ *George E. Williams*, 44 ECAB 530 (1993).

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2004 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 3, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board