

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

TOMMY R. MARTIN, Appellant
and
U.S. POSTAL SERVICE, POST OFFICE,
Little Rock, AR, Employer

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Docket No. 03-1491
Issued: January 21, 2005

Appearances:
Pamela D. Walker, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument January 6, 2005

DECISION AND ORDER

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

JURISDICTION

On June 26, 2001 appellant filed a timely appeal from a March 29, 2001 decision in which a hearing representative of the Office of Workers' Compensation Programs affirmed a February 28, 2000 schedule award granting an eight percent impairment of the right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision in this case.

ISSUE

The issue is whether appellant has more than an eight percent impairment of the right lower extremity for which he received a schedule award. On appeal appellant contends that the Office medical adviser improperly analyzed his impairment in determining the schedule award and that his due process had been violated.

FACTUAL HISTORY

On April 4, 1997 appellant, then a 52-year-old mail processor, sustained an employment-related lumbar strain when he injured his back while lifting a tray of mail. The accepted conditions include a herniated disc at L4-5 with laminectomy performed on April 7, 1997 and tarsal tunnel syndrome, with surgical release done on November 25, 1997.

On June 4, 1999 appellant filed a schedule award claim and submitted medical reports dated August 11 and October 1, 1999 in which Dr. F. Richard Jordan, an attending Board-certified neurosurgeon, generally referenced the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He opined that appellant had a 10 percent right lower extremity motor impairment and a 75 percent right lower extremity impairment for minor causalgia, for a total 13 percent whole body impairment.

The Office thereafter referred appellant to Dr. Julia M. McCoy, Board-certified in neurology and clinical neurophysiology, for a second opinion evaluation. In a report dated February 1, 2000, she diagnosed chronic right L5 radiculopathy and opined that maximum medical improvement had been reached. Dr. McCoy advised that appellant had both sensory and motor impairments at Grade 4 which, under Tables 11 and 12 of Chapter 3 of the A.M.A., *Guides*, indicated that he had an 82 percent right lower extremity impairment.

On February 16, 2000 the Office requested that the Office medical adviser review the statement of accepted facts and medical evidence of record and compute appellant's impairment for schedule award purposes.

In a report dated February 22, 2000, Dr. Ronald H. Blum, an Office consultant Board-certified in orthopedic surgery, advised that maximum medical improvement had been reached on February 1, 2000. He noted that Tables 11 and 12 of Chapter 3 and Tables 20 and 21 of Chapter 4 were essentially identical and advised that, pursuant to the A.M.A., *Guides*, Table 83 of Chapter 3 was to be used in conjunction with these tables. Dr. Blum identified the affected nerve root as L5 and noted that Table 83 provided a maximum of 5 percent for loss of function due to a sensory deficit. He then graded the sensory deficit pursuant to Table 20 as Grade 4 or 80 percent. Multiplying the maximum 5 percent under Table 83 by the 80 percent grade found in Table 20, the Office medical adviser determined that appellant had a 4 percent impairment due to sensory loss. He rated appellant's motor loss, noting that Table 83 provided a maximum of 37 percent for a strength deficit. He then graded appellant's motor weakness pursuant to Table 21 as Grade 4 or 10 percent. Multiplying the maximum 37 percent under Table 21 by the 10 percent grade, Dr. Blum determined that, rounded up, appellant had a 4 percent impairment due to weakness. He utilized the Combined Values Chart of the A.M.A., *Guides* to combine the two impairment values to find that appellant had a total eight percent impairment of the right lower extremity.

By decision dated February 28, 2000, appellant was granted a schedule award for an eight percent impairment of the right lower extremity, for a total of 23.04 weeks of compensation, to run from February 1 to July 12, 2000.

On March 22, 2000 appellant requested a hearing and submitted additional medical evidence including a duplicate of Dr. Jordan's October 1, 1999 report, a functional capacity evaluation dated September 10, 1999 and a February 23, 2000 report in which Dr. Jordan advised that maximum medical improvement had been reached.¹ At the hearing appellant was represented by counsel who argued that the Office medical adviser had incorrectly computed the schedule award. On March 31, 2001 the Office hearing representative referred the medical record with questions to another Office medical adviser, Dr. Neven A. Popovic, an orthopedic surgeon, for review. In a report dated February 6, 2001, Dr. Popovic advised that he concurred with Dr. Blum's impairment rating under the A.M.A., *Guides* and agreed that appellant had an eight percent impairment of the right lower extremity.

By decision dated March 29 and finalized March 30, 2001, the Office hearing representative affirmed the February 28, 2000 schedule award decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act² and section 10.404 of the implementing federal regulations,³ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 A.M.A., *Guides* has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴

The Board notes that, although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.⁵ In 1960, however, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine.⁶

¹ Appellant also submitted a number of Dr. Jordan's treatment notes and reports dated from October 12, 1998 to January 23, 2001, a lumbar spine x-ray report dated December 28, 1998 and a functional capacity evaluation dated September 10, 1999. These reports are not relevant regarding an impairment evaluation under the A.M.A., *Guides*.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ See *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002); *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁶ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.⁷

ANALYSIS

Appellant received a schedule award for an eight percent permanent impairment of the right lower extremity, based on the evaluation of the Office medical adviser, Dr. Blum, who applied the A.M.A., *Guides* to the physical findings of Dr. McCoy, a second opinion examiner. Office procedures directed the use of the fourth edition of the A.M.A., *Guides* from November 1, 1993 to February 1, 2001.⁸

In reports dated August 11 and October 1, 1999, Dr. Jordan generally referred to the A.M.A., *Guides* to advise that appellant had a 10 percent right lower extremity motor impairment and a 75 percent right lower extremity impairment for minor causalgia, for a total of 13 percent whole body impairment. However, Dr. Jordan did not cite to the specific tables or figures he used in rating appellant's impairment. Moreover, he expressed the rating in terms of whole man impairment. Such whole man impairment ratings are not provided for under the Act as section 8107 provides a compensation schedule in terms of specific members of the body.⁹ His opinion is therefore of diminished probative value.¹⁰

The A.M.A., *Guides* provides that lumbar nerve root impairments should be identified under Table 83 which provides maximum impairment values for sensory and motor nerve dysfunction. The sensory and/or motor impairments for the nerve roots identified in Table 83 are then multiplied by the percentage allowed in grading the severity of the deficit as found in Tables 11 and 12. The A.M.A., *Guides* provide that, when there is both sensory and motor impairment of a nerve root, the impairment percentages are to be combined utilizing the Combined Values Chart to determine the total impairment to the extremity.¹¹

The Board finds that Dr. Blum properly rated appellant's right lower extremity impairment in accordance with the A.M.A., *Guides*. He noted that Tables 11 and 12 of Chapter 3 and Tables 20 and 21 of Chapter 4 were essentially identical and advised that, pursuant to the

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

⁸ The Board notes that, at the time of the referral to Dr. Popovic, the Office was using the fourth edition of the A.M.A., *Guides*. See FECA Bulletin No. 94-04. FECA Bulletin No. 01-05 was issued on January 29, 2001, and it provided that the fifth edition of the A.M.A., *Guides* was to be used effective February 1, 2001. Dr. Popovic's report is dated February 3, 2001. However, the corresponding tables in the fourth and fifth editions contain essentially identical numeric values for the impairments rated in this case. Compare Tables 20, 21 and 83 of the fourth edition with Tables 15-18, 16-10 and 16-11 of the fifth edition of the A.M.A., *Guides*.

⁹ See 5 U.S.C. § 8107(c) and 20 C.F.R. § 10.404(a). See also Dennis R. Blackwell, 41 ECAB 98 (1984).

¹⁰ See Lela M. Shaw, 51 ECAB 372 (2000).

¹¹ A.M.A., *Guides* (4th ed. 1993) at 130.

A.M.A., *Guides*, Table 83 of Chapter 3 was to be used in conjunction with these tables. Dr. Blum first identified the affected nerve root as L5 and noted that Table 83 provided a maximum 5 percent for loss of function due to sensory deficit (pain).¹² He graded appellant's sensory deficit pursuant Table 20 as Grade 4 (or 80 percent), and multiplied the two percentages to find a 4 percent right lower extremity impairment due to sensory loss.¹³ Dr. Blum rated appellant's motor loss, noting that Table 83 provides for a maximum of 37 percent impairment.¹⁴ He graded the motor weakness at Table 21 as Grade 4 (or 10 percent) and multiplied the two percentages to find 4 percent impairment due to weakness.¹⁵ As both sensory and motor impairments were found, he utilized the Combined Values Chart to find a total of eight percent impairment to the right lower extremity.¹⁶

The Board finds that Dr. Blum properly applied the A.M.A., *Guides* protocols in reaching his impairment estimate. He relied on the findings of Dr. McCoy and referenced the proper section and tables of the A.M.A., *Guides* which provide for lumbar nerve root impairment affecting the lower extremities. His report establishes that appellant has no more than an eight percent impairment of his right lower extremity.

Lastly, regarding appellant's general contention that his due process had been violated, the record reflects that appellant's claim was properly adjudicated in accordance with Office procedures and he was given the opportunity to provide supportive medical evidence to establish that he had greater impairment than that awarded.¹⁷

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he has more than an eight percent impairment of the right lower extremity.

¹² *Id.*

¹³ *Id.* at 151.

¹⁴ *Id.* at 130.

¹⁵ *Id.* at 151.

¹⁶ *Id.* at 322.

¹⁷ The Board notes that appellant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2001 and finalized March 30, 2001 be affirmed.

Issued: January 21, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member