

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

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RONALD J. VAN WYNSBERG, Appellant)	
)	
and)	Docket No. 05-1607
)	Issued: November 2, 2005
U.S. POSTAL SERVICE, POST OFFICE,)	
Cherry Hill, NJ, Employer)	
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Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 25, 2005 appellant filed a timely appeal of October 14, 2004 and March 4, 2005 merit decisions of the Office of Workers' Compensation Programs that found he had a 14 percent impairment of the left leg. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the Office's schedule award decision.

ISSUE

The issue is whether appellant has greater than a 14 percent impairment of the left leg.

FACTUAL HISTORY

On November 20, 2002 appellant, then a 37-year-old sales and service associate, filed a claim for compensation for an occupational disease of discogenic low back pain. The Office accepted that he sustained a herniated disc, and approved the decompression and fusion at L4-5 and L5-S1 done on December 26, 2002.

On November 10, 2003 appellant filed a claim for a schedule award. He submitted an August 27, 2003 report from Dr. David Weiss, an osteopath, whose examination of appellant

revealed a perceived sensory deficit over the L4 and L5 dermatomes of the left lower extremity, gastrocnemius circumference of 41.5 centimeters on the right versus 40 on the left, and, on manual muscle testing, grades of 5/5 for the hip flexors and gastrocnemius muscles, and 4+/5 for the quadriceps muscles. Dr. Weiss rated appellant's permanent impairment using the 5th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as follows: 12 percent for motor strength deficit of the left quadriceps,¹ and 8 percent for sensory deficit involving the L4 and L5 nerve roots (4 percent each), for a combined total of 19 percent permanent impairment of the left lower extremity.

An Office medical adviser reviewed Dr. Weiss's report on January 5, 2004 and stated that since 4+ weakness was almost normal, he prorated the 12 percent for 4/5 weakness and assigned 6 percent for the 4+/5 weakness,² also noting that L4-5 and L5-S1 disc problems usually do not affect the quadriceps muscles, which are more commonly affected by L3-4 disc problems. The medical adviser agreed with Dr. Weiss's assignment of 8 percent impairment for decreased sensation,³ and combining this with the 6 percent for quadriceps weakness, concluded that appellant had a 14 percent permanent impairment of the left lower extremity.

On January 8, 2004 the Office issued appellant a schedule award for a 14 percent permanent impairment of the left leg.

Appellant requested a hearing, which was held on August 10, 2004. His attorney contended that the Office paid the schedule award at an incorrect rate of pay based on appellant's pay on the date of injury rather than on the date of his recurrence of disability. By decision dated October 14, 2004, an Office hearing representative found that the Office medical adviser properly applied the A.M.A., *Guides* in concluding that appellant had a 14 percent permanent impairment of the left leg. The hearing representative also found that appellant's pay rate needed to be adjusted to the rate being paid at the time of his recurrence of disability on December 23, 2002.

In an October 20, 2004 report, Dr. Alexander R. Vaccaro, the Board-certified orthopedic surgeon who performed appellant's December 26, 2002 back surgery, stated that overall he was doing extremely well, with occasional discomfort in his left thigh when undergoing strenuous activity, with no evidence of a motor deficit on motor testing, and a symmetrical sensory examination. On March 4, 2005 the Office issued an amended schedule award for 14 percent permanent impairment of the left leg, reflecting the increase in the rate of pay.

¹ Dr. Weiss indicated that he used Table 17-8 to rate this impairment.

² The medical adviser indicated that he used Table 17-8 to rate this impairment.

³ Dr. Weiss and the Office medical adviser both used Tables 15-15 and 15-18 to rate the impairment in sensation.

LEGAL PRECEDENT

The schedule award provision of the Act⁴ and its implementing regulation⁵ 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 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.

ANALYSIS

Dr. Weiss, an osteopath, who examined appellant on August 27, 2003 to rate his permanent impairment related to his accepted herniated discs at L4-5 and L5-S1, and an Office medical adviser who reviewed Dr. Weiss's report agreed that appellant had an 8 percent impairment due to sensory deficits using Tables 15-15 and 15-18 from the A.M.A., *Guides*, the tables for unilateral spinal nerve root impairment affecting the lower extremity. Table 15-18, when used with Table 15-16, can also be used to rate an impairment of the lower extremity due to loss of strength from a unilateral spinal nerve root impairment, which is the only accepted condition. Yet Dr. Weiss and the Office medical adviser chose to use Table 17-8 to rate appellant's loss of strength. The narrative in the A.M.A., *Guides* addressing the use of Table 17-8 states that in general, this method is best used for pathology that does not have a primary neurologic basis.⁶

The A.M.A., *Guides* also states that it is the responsibility of the evaluating physician to explain in writing why a particular method to assign the impairment rating was chosen.⁷ The case will therefore be remanded to the Office to obtain a supplemental report from Dr. Weiss addressing why appellant's loss of strength of the left leg should not be rated using Tables 15-16 and 15-18, the tables for loss of strength due to a unilateral spinal nerve impairment, or Table 17-6, the table for impairment due to unilateral leg muscle atrophy. If Dr. Weiss can explain why Table 17-8 was the appropriate table to rate appellant's loss of leg strength, he should address the Office medical adviser's opinion that a Grade 4+ constitutes a 6 percent impairment, where a grade of 4 is a 12 percent impairment and a Grade 5 is a 0 percent impairment.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ Section 17.2e, p. 531.

⁷ Section 17.2, p. 526.

CONCLUSION

Further development of the medical evidence is needed to determine the extent of permanent impairment of appellant's left leg related to his accepted herniated discs at L4-5 and L5-S1.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2005 and October 14, 2004 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for action consistent with this decision of the Board, to be followed by an appropriate decision.

Issued: November 2, 2005
Washington, DC

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

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board