

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

J.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Nashville, TN, Employer**

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**Docket No. 06-788
Issued: September 28, 2006**

Appearances:

E. Guy Holliman, Esq., for the appellant
Office of Solicitor, for the Director,

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES GROOM, Alternate Judge

JURISDICTION

On February 16, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative decision dated November 22, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.¹

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he is entitled to a schedule award for scarring and disfigurement of his legs.

FACTUAL HISTORY

On May 26, 2004 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim alleging that he was attacked and bitten on both legs by a dog in the performance of duty.

¹ The Board notes that appellant's representative has indicated that the only issue being appealed is whether appellant was entitled to an award for scarring and disfigurement to his legs.

On June 25, 2004 the Office accepted appellant's claim for dog bite of both lower legs. On July 28, 2004 the Office expanded his claim to include bilateral dog bites of the lower extremities, left rotator cuff tear and right tibia neuropathy. Appellant received appropriate compensation benefits.

In an October 28, 2004 report, Dr. Jeffrey Hazelwood, Board-certified in physical medicine and rehabilitation, conducted an examination. With regard to appellant's lower extremities, he noted that he had right lower extremity tightness secondary to his injury. Dr. Hazelwood also indicated that appellant had "chow tooth marks" which were still seen on the calf, but which were "well healed, but scars present and they fall right on top of where the tibial nerve most likely runs." In a disability certificate also dated October 28, 2004, Dr. Hazelwood opined that appellant reached maximum medical improvement.

In an October 31, 2004 report, Dr. Hazelwood utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) and noted that it was "possible that the tibial neuropathy seen by electrodiagnostic testing [was] related to the dog bite/injury." He explained that, because of appellant's discomfort, he deserved some impairment. Dr. Hazelwood referred Table 17-37, page 552 and indicated "the specific tibial nerve is not listed, but explained that an analogous type nerve would be the common peroneal nerve. He opined that, given the "common peroneal sensory full involvement," appellant would be entitled to a five percent lower extremity impairment and that it would be "reasonable to give [appellant] a three [percent] lower extremity impairment regarding his possible tibial injury."

In a December 10, 2004 report, the Office medical adviser indicated that appellant did not have any joint laxity or tenderness in the extremities. He opined that he did not have any permanent impairment.

By letter dated January 14, 2005, the Office requested that appellant's treating physician, Dr. Hazelwood, provide his opinion with respect to whether appellant was entitled to a schedule award.

In a January 29, 2005 response, Dr. Hazlewood advised that he disagreed that appellant did not have any impairment. He explained that he would qualify for a three percent lower extremity impairment, because appellant continued to have discomfort related to his injury. Dr. Hazelwood advised that he had some component of tibial neuropathy related to an objective nerve injury.

In a March 1, 2005 report, the Office medical adviser noted that an electromyography (EMG) scan showed decreased amplitude of the right tibial nerve "with continued discomfort, tightness and pulling in [right] leg." He referred to Table 17-37, at page 552 of the A.M.A., *Guide* and noted that dysesthesia for common peroneal nerve equaled a five percent impairment of the right lower extremity. The medical adviser noted that, when combined with Table 15-5, at

page 424 of the A.M.A., *Guides*, was equal to a grade of three for dysesthesia, which equated to a three percent impairment of the right lower extremity.²

On March 7, 2005 the Office granted appellant a schedule award for three percent impairment of the right lower extremity. The award covered a period of 8.6 weeks from October 28 to December 27, 2004.

By letter dated April 1, 2005, appellant's representative requested a hearing, which was held on October 24, 2005.

In an April 13, 2005 report, Dr. Walter Wheelhouse, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He conducted an examination and noted that appellant had scars from the dog bite on both legs. Dr. Wheelhouse concluded that he was entitled to a 21 percent left upper extremity impairment based on loss of motion and strength. He also referred to Table 17-37 at page 552 of the A.M.A., *Guides* and determined that appellant was entitled to a "5 [percent] impairment of the right lower extremity due to common peroneal sensory deficit." In his June 21, 2005 report, Dr. Wheelhouse provided an additional impairment rating for the scarring to appellant's lower extremities. He referred to Table 8-2 at page 178 of the A.M.A., *Guides* and explained that regarding the criteria for rating permanent impairment due to skin disorders and determined that appellant "fit into a Class 2 with a 0 to 8 [percent] impairment of the whole person." Dr. Wheelhouse opined that appellant had an "additional eight [percent] whole person impairment for his scarring of both lower extremities due to the dog bites with skin disorder signs and symptoms present and no or few limitations in performance of activities of daily living and requires no or intermittent treatment."

By decision dated November 22, 2005, the Office denied appellant's claim for a schedule award for scarring to his legs.³

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁴ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁵ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of

² The Office medical adviser multiplied 60 percent (a percentage allowed within Grade 3) by 5 percent to equal 3 percent.

³ The decision also denied appellant's claim for a greater impairment than three percent to the right lower extremity and remanded the claim on the issue of the inclusion of overtime in his pay rate for compensation purposes. As noted in footnote one, on appeal, appellant only disputes the Office's finding that he was not entitled a schedule award for impairment due to scarring and disfigurement of his legs.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8107.

uniform standards applicable to all claimants.⁶ The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁷

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁸ The Act identifies members such as the arm, leg, hand, foot, thumb and finger; functions such as loss of hearing and loss of vision; and organs to include the eye. Section 8107(c)(22) of the Act provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.⁹ The Secretary of Labor has made such a determination, and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.¹⁰

ANALYSIS

The evidence of record is insufficient to establish that appellant is entitled to a schedule award for disfigurement or scarring to his legs in accordance with the fifth edition of the A.M.A., *Guides*.

As noted, no schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.¹¹ If there is permanent disability involving the loss or loss of use, of a member or function of the body so specified or involving disfigurement, the employee is entitled to basic compensation for the disability.¹² The Board notes that section 8107(c)(21) of the Act provides that compensation shall be awarded for serious disfigurement of the face, head or neck of a character likely to handicap an individual in securing or maintaining employment, not to exceed \$3,500.00, in addition to any other compensation payable under the schedule.¹³

Appellant's claim was accepted for bilateral dog bites of the lower extremities, left rotator cuff tear and right tibia neuropathy. Dr. Wheelhouse, in his June 21, 2005 report, opined that appellant was entitled to whole person impairment due to skin disorders.¹⁴ However, he

⁶ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁷ 20 C.F.R. § 10.404.

⁸ *George E. Williams*, 44 ECAB 530, 533 (1993); *William Edwin Muir*, 27 ECAB 579, 581 (1976).

⁹ 5 U.S.C. § 8107(c)(22)

¹⁰ 20 C.F.R. § 10.404; *Henry B. Floyd, III*, 52 ECAB 220 (2001).

¹¹ *George E. Williams*, *supra* note 8; *William Edwin Muir*, *supra* note 8.

¹² 5 U.S.C. § 8107(a).

¹³ 5 U.S.C. § 8107(c)(21).

¹⁴ The Board also notes that, while the A.M.A., *Guides*, provides for impairment to the individual member and to the whole person, the Act does not provide for permanent impairment for the whole person. *Janae J. Triplette*, 54 ECAB 792, 796 (2003).

made no mention of any facial disfigurement caused by the employment injury and appellant has not claimed or shown entitlement to an award for facial disfigurement. Therefore, section 8107(c)(21) is inapplicable to this case. Although Dr. Wheelhouse opined that appellant was entitled to an additional award of eight percent for his lower extremities due to scarring on both legs, he did not explain how any such impairment was derived in accordance with the A.M.A., *Guides* with regard to a schedule member of the body. He referenced a provision in the A.M.A., *Guides* for rating skin disorders.¹⁵ However, disfigurement of the skin, except for disfigurement covered under 5 U.S.C. § 8107(c)(21), is not ratable. The Board has specifically held that permanent impairment for loss or loss of use, of the skin is not covered under the schedule award provisions of the Act.¹⁶ Dr. Wheelhouse did not otherwise explain how appellant was entitled to greater impairment under a provision of the A.M.A., *Guides* which rates a schedule member of the body.

As noted above, the Office evaluates schedule award claims pursuant to the standards set forth in the A.M.A., *Guides*. Appellant has the burden of proof to submit medical evidence supporting that he has impairment of a schedule member of the body.¹⁷ As such evidence has not been submitted, he has not established entitlement to a schedule award for scarring of disfigurement to his legs.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award for scarring or disfigurement to his legs.

¹⁵ A.M.A., *Guides*, Table 8-2, at 178 (5th ed. 2001). Table 8-2 appears in the chapter 8, entitled, "The Skin."

¹⁶ *Ann L. Tague*, 49 ECAB 453 (1998).

¹⁷ *See Annette M. Dent*, 44 ECAB 403 (1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 22, 2005 is affirmed.

Issued: September 28, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board