



retired on December 2004. The record reflects that, on April 4, 2005, he filed a claim for a schedule award.

On the first appeal, the Board found that appellant had greater than a one percent permanent impairment to the right lower extremity and the three percent permanent impairment to the left lower extremity.<sup>1</sup> The Board found that the well-reasoned opinion of Dr. Donald J. Viscusi, a Board-certified family practitioner and appellant's attending physician, took precedence over the Office medical adviser. Dr. Viscusi provided a rating of four percent right lower extremity impairment and an eight percent left lower extremity impairment. The facts and history of the case as set forth in the prior decision are hereby incorporated by reference.

In an April 4, 2005 report, Dr. Viscusi noted the history of injury and presented his examination findings, which included normal strength with sensory disturbance with decreased sensation into the right foot and decreased sensation in the left foot and lateral aspect of the left lower extremity. He opined that appellant had a four percent right lower extremity impairment due to sensory deficit/pain and an eight percent left lower extremity impairment due to sensory deficit/pain according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Viscusi found that, as there were no motor deficits in either leg, appellant had a zero percent impairment due to motor deficit of the spinal nerve. He found that appellant had bilateral sensory deficits and provided a rating utilizing Tables 15-15, 15-18 as well as the Combined Values Chart in the A.M.A., *Guides*. For the right lower extremity, Dr. Viscusi found that, under Table 15-15 on page 424, appellant's L5 right sensory disturbance would be classified as a Grade 2 sensory deficit or an 80 percent sensory deficit. As the maximum loss for a sensory deficit or pain for an L5 nerve root equated to a 5 percent loss of function under Table 15-18 on page 424, Dr. Viscusi multiplied that figure by the 80 percent sensory deficit to yield a 4 percent right lower extremity impairment due to sensory deficit or pain. For the left lower extremity, Dr. Viscusi found that appellant's L5 and S1 sensory impairment equated to a Grade 2 or 80 percent sensory deficit for each nerve under Table 15-15 which, when multiplied by the maximum percent loss of function of 5 percent, yielded a 4 percent impairment for both the left L5 and left S1 nerve. He then utilized the Combined Values Chart on page 604 to find that the combined left lower extremity impairment was eight percent.

By decision dated May 8, 2006, the Office granted appellant an additional three percent right leg impairment and an additional five percent left leg impairment (total of four percent right lower leg impairment and eight percent left leg impairment). The schedule award ran for the period April 4 to December 2, 2005 for 34.56 weeks of compensation.

### **LEGAL PRECEDENT**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.<sup>3</sup>

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<sup>1</sup> Docket No. 05-1566 (issued April 5, 2006).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> Gary J. Watling, 52 ECAB 278 (2001).

Under section 8107 of the Act<sup>4</sup> and section 10.404 of the implementing federal regulation,<sup>5</sup> 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*<sup>6</sup> has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>7</sup>

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.<sup>8</sup> As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.<sup>9</sup> The Board notes that section 8109(19) specifically excludes the back from the definition of organ.<sup>10</sup> However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.<sup>11</sup>

### ANALYSIS

In its April 5, 2006 decision, the Board found that the opinion of Dr. Viscusi, appellant's attending physician, established a four percent right lower extremity impairment from the L5 nerve root and an eight percent left lower extremity impairment due to sensory deficit or pain from both the L5 and S1 nerve root. The Board directed the Office to compensate appellant for a four percent right lower extremity impairment and an eight percent left lower extremity impairment as determined by Dr. Viscusi. This decision of the Board became final upon the expiration of 30 days from the date of its filing.<sup>12</sup> On remand, the Office properly awarded an additional three percent right lower extremity impairment and an additional five percent left lower extremity impairment (total of four percent right lower extremity impairment and eight

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

<sup>7</sup> See *Joseph Lawrence, Jr.*, *supra* note 6; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

<sup>8</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>9</sup> 5 U.S.C. § 8107; see also *Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>10</sup> 5 U.S.C. § 8109(c).

<sup>11</sup> *Thomas J. Engelhart*, *supra* note 8.

<sup>12</sup> 20 C.F.R. § 501.6(d).

percent left lower extremity impairment).<sup>13</sup> The Office considered no new evidence or argument in issuing its May 8, 2006 decision, as directed by the Board. The record does not indicate that, prior to issuance of the Office's May 8, 2006 decision, appellant submitted new medical evidence or argument to support a greater degree of permanent impairment than that found by Dr. Viscusi. Thus, the issue adjudicated in the Board's April 5, 2006 decision is *res judicata* and not subject to further consideration by the Board on this appeal.<sup>14</sup> Consequently, there is no basis for finding any greater degree of impairment than that which the Office awarded in its May 8, 2006 decision. The Office's May 8, 2006 decision properly indicated that appellant was entitled to receive a total of 34.56 weeks of compensation for eight percent impairment to the left leg and four percent for the right leg.<sup>15</sup>

### **CONCLUSION**

The Board finds that appellant has no greater than a four percent right lower extremity impairment and an eight percent left lower extremity impairment for which he received a schedule award.

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<sup>13</sup> See *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84, 85 (1949) (the Board's determinations are binding upon the Office and must, of necessity, be so accepted and acted upon by the Director of the Office).

<sup>14</sup> See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998); *Hugo A. Mentink*, 9 ECAB 628 (1958).

<sup>15</sup> The amount of compensation for total loss of use of a lower extremity with 100 percent impairment is 288 weeks. See 5 U.S.C. § 8107. Thus, for 8 percent of the left leg (.08 times 288), appellant is entitled to 23.04 weeks of compensation and for 4 percent impairment of the right leg (.04 time 288), he is entitled to 11.52 weeks of compensation. As appellant was previously paid a schedule award for 4 percent (1 percent for the right leg and 3 percent for the left leg), he is only entitled to an additional 8 percent impairment (3 percent for the right leg and 5 percent for the left leg), or 23.04 weeks of compensation, pursuant to the Office's May 8, 2006 decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated May 8, 2006 is affirmed.

Issued: April 5, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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