

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

A.A., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
AIRCRAFT UNIT, TINKER AIR FORCE BASE,)
OK, Employer)

**Docket No. 07-939
Issued: August 8, 2007**

Appearances:
Appellant, pro se
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, Alternate Judge

JURISDICTION

On February 21, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 7 and December 14, 2006 merit decisions concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a four percent permanent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

On September 6, 2001 appellant, then a 45-year-old aircraft mechanic, filed an occupational disease claim alleging that he sustained injury due to the physical requirements of his job which often required working in small spaces. The Office accepted that he sustained a lumbosacral strain, displaced lumbar disc at L5-S1, degeneration of the lumbar spine and viral

pneumonia. It authorized the performance of an L5-S1 laminectomy and microdiscectomy on December 9, 2003 and a repeat L4-5 laminectomy and fusion on August 10, 2004 by Dr. Edward A. Shadid, an attending Board-certified orthopedic surgeon.

On September 29, 2004 Dr. Shadid indicated that appellant reported having numbness from the middle of his buttocks to the small toe of his right leg and a “subjective sense of weakness in the right leg.” On March 23, 2005 he indicated that on examination appellant exhibited diminished sensation in the posterolateral aspect of the right calf, that he displayed no weakness of the legs upon strength testing and that straight leg testing was negative at 90 degrees in the seating position. Dr. Shadid stated that appellant had a 23 percent impairment of the whole person due to his employment-related injuries.

On July 12, 2005 appellant filed a claim for a schedule award due to his accepted employment injuries. On July 13, 2005 appellant submitted an undated report in which Dr. Shadid stated that appellant had a six percent impairment of the whole person comprised of the following impairments due to limited motion: two percent for flexion of the right leg, three percent for extension of the right leg and one percent for right lateral bending of the back. He indicated that according to diagnosis-related estimates appellant was in lumbar Category IV and he would rate him as having a 23 percent impairment of the whole person “due to loss of the motion segment integrity due to his successful arthrodesis.” Dr. Shadid noted that the permanent neuropathic pain in appellant’s lower extremity placed him the higher end of lumbar Category IV and stated, “Thus, I would rate [appellant] as having a total of 29 percent impairment of the whole person.”

On September 23, 2005 Dr. Henry Mobley, a district medical adviser and Board-certified internist, recommended that Dr. Shadid be provided an opportunity to give an impairment rating of the lower extremities under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). In an undated report received by the Office on November 11, 2005, Dr. Shadid stated that appellant had a 27 percent impairment of the whole person based on diagnosis-related estimate of lumbar impairment, a 6 percent impairment of the whole person based on limited range of motion and a total whole person impairment of 33 percent.

On February 24, 2005 Dr. Mobley concluded that appellant had a four percent permanent impairment of the right leg based on sensory loss associated with the right S1 nerve distribution. He indicated that the reports of Dr. Shadid showed that appellant had a Grade 2 (or 80 percent) sensory loss and indicated that multiplying this value times the maximum value of 5 percent for sensory loss associated with the S1 nerve distribution yielded the 4 percent value. Dr. Mobley stated that Dr. Shadid’s impairment ratings were not valid because they were based on whole person impairment.

In an April 7, 2006 decision, the Office granted appellant a schedule award for a four percent permanent impairment of his right leg. At an October 17, 2006 hearing before an Office hearing representative, appellant argued that he had more than a four percent impairment of his right leg and that Dr. Mobley did not provide a comprehensive evaluation of his impairment. In

a decision dated December 14, 2006, an Office hearing representative affirmed the Office's April 7, 2006 decision.¹

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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.⁴

A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.⁵

ANALYSIS

The Office accepted that appellant sustained a lumbosacral strain, displaced lumbar disc at L5-S1, degeneration of the lumbar spine and viral pneumonia. The Office granted appellant a schedule award for a four percent permanent impairment of his right leg due to these injuries.

The Board finds that on February 24, 2005 Dr. Mobley, a district medical adviser and Board-certified internist, properly concluded that appellant had a four percent permanent impairment of the right leg based on sensory loss associated with the right S1 nerve distribution. He correctly indicated that the reports of Dr. Shadid, an attending Board-certified orthopedic surgeon, showed that appellant had a Grade 2 (or 80 percent) sensory loss and multiplied this value times the maximum value of 5 percent for sensory loss associated with the S1 nerve distribution to yield the 4 percent impairment rating.⁶ The Board further notes that the medical reports of record do not show that appellant had limited motion or decreased strength of the right leg which would justify an additional impairment rating.

¹ Appellant submitted additional evidence after the Office's December 14, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *Id.*

⁵ *James E. Mills*, 43 ECAB 215, 219 (1991); *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

⁶ A.M.A., *Guides* 424, Tables 15-15, 15-18.

Dr. Shadid variously provided impairment ratings for the whole person of 23, 29 and 33 percent. These ratings also incorporated impairments for the back itself. The Board notes that these ratings are of limited probative value because the Act does not provide for schedule award compensation for impairment of the back or whole person.⁷ The impairment ratings of Dr. Shadid are of limited probative value in that Dr. Shadid failed to provide an explanation of how his assessments of permanent impairment were derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.⁸ As the report of Dr. Mobley provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.⁹

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a four percent permanent impairment of his right leg, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 14 and April 7, 2006 decisions are affirmed.

Issued: August 8, 2007
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

⁷ See *supra* note 5 and accompanying text.

⁸ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

⁹ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).