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

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| **J.T., Appellant** | ) | |
| **and** | ) | **Docket No. 07-589** |
| | ) | **Issued: June 19, 2007** |
| **DEPARTMENT OF THE ARMY, ROCK ISLAND ARSENAL, Rock Island, IL, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On December 27, 2006 appellant timely appealed the October 27, 2006 merit decision of the Office of Workers' Compensation Programs, which affirmed a schedule award for bilateral lower extremity impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

### ***ISSUE***

The issue is whether appellant has more than six percent bilateral impairment of the lower extremities.

### ***FACTUAL HISTORY***

Appellant, a 57-year-old former meat cutter, has an accepted claim for lumbar sprain and herniated disc at L5-S1, which arose on July 16, 1986.[1] On July 23, 1996 the Office granted a schedule award for two percent impairment of both lower extremities. On June 11, 2004

[1] Appellant retired effective September 30, 1995.

appellant underwent a lumbar laminectomy at L4. The Office issued an additional schedule award on April 22, 2005 for three percent bilateral lower extremity impairment.[2] On June 15, 2005 appellant had a second lumbar laminectomy, but this time at the L5 level. He filed a claim for an additional schedule award on October 24, 2005. Appellant also requested reconsideration of the April 22, 2005 schedule award, noting that he had undergone additional surgery in June 2005.

The Office received additional medical records regarding appellant's June 15, 2005 surgery, as well as postoperative radiology reports and treatment notes dated July 27, 2005 from Dr. Gregory W. Albert, an attending physician. Appellant reported lower extremity weakness and worsening numbness in his legs and feet. A recent magnetic resonance imaging scan revealed central disc bulging at L4-5 and L5-S1 and significant scar tissue at the site of the prior surgeries. Dr. Albert indicated that the scar tissue was likely contributing to appellant's symptoms, and it was not amenable to surgery.

In a report dated January 30, 2006, the Office medical adviser found that appellant had six percent impairment to both lower extremities. This rating included the three percent impairment previously awarded on April 22, 2005, plus an additional three percent for pain and dyesthesias in the distribution of the S1 nerve root bilaterally. The Office medical adviser found that appellant reached maximum medical improvement six months following his June 15, 2005 surgery.

On March 1, 2006 the Office awarded an additional one percent for the left and right lower extremities. The Office noted that appellant had a six percent total impairment of each lower extremity and that he had already received schedule awards for five percent for both lower extremities. The March 2, 2006 additional award of one percent covered 5.76 weeks from December 15, 2005 to January 24, 2006.

Appellant requested an oral hearing, which was held on July 25, 2006. Following the hearing, he submitted an October 4, 2006 impairment rating from Dr. Xerxes R. Colah, a Board-certified orthopedic surgeon, who rated a 20 percent impairment of the whole person. Dr. Colah applied the diagnosis related-estimate (DRE) method in rating appellant's impairment of the spine. He characterized appellant's condition as DRE lumbar Category IV.

By decision dated October 27, 2006, the Office hearing representative affirmed the March 2, 2006 schedule award.

## ***LEGAL PRECEDENT***

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions

[2] The Office medical adviser subsequently advised the claims examiner that the 2005 schedule award for three percent bilateral impairment partially duplicated the 1996 award for two percent impairment. Therefore, appellant should have been paid only an additional one percent impairment of both lower extremities, rather than the combined five percent he received.

and organs of the body.[3] 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[4] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[5]

## ***ANALYSIS***

Appellant contends on appeal that he is entitled to an additional schedule award based upon Dr. Colah's October 4, 2006 impairment rating. As noted, Dr. Colah found 20 percent impairment of the whole person by applying the DRE method of rating impairment due to lumbar spine injury.[6] He did not separately assess appellant's impairment of the lower extremities. Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the spine or the body as a whole.[7] Consequently, Dr. Colah's October 4, 2006 impairment rating does not conform to the Office's established protocols.

The Office medical adviser found that appellant's current lower extremity impairment was six percent of each leg. He explained that three percent was due to residual leg pain in the distribution of the L5 nerve root, which was identical to the award appellant received on April 22, 2005.[8] The medical adviser further explained that the only additional lower extremity impairment was for residual pain and dyesthesias in the distribution of the S1 nerve root bilaterally. He found a Grade 3 (60 percent) sensory deficit in accordance with Table 15-15, A.M.A., *Guides* 424.[9] According to the A.M.A., *Guides* 424, Table 15-18, a S1 nerve root impairment affecting the lower extremity represents a maximum five percent loss due to sensory deficit or pain. To determine the lower extremity impairment one multiplies appellant's Grade 3 classification (60 percent) by the maximum percentage loss due to sensory deficit or pain (5 percent). Applying this formula, appellant had 3 percent impairment for sensory deficit (60 percent x 5 percent) in each lower extremity with respect to the S1 nerve root. When properly

[3] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2000).

[4] 20 C.F.R. § 10.404 (2006).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[6] *See* A.M.A., *Guides* 384, Table 15-3.

[7] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[8] *See* A.M.A., *Guides* 424, Tables 15-15, 15-18.

[9] With respect to sensory loss, a Grade 3 classification is characterized by "[d]istorted superficial tactile sensibility (diminished light touch and two-point discrimination), with some abnormal sensations or slight pain, that interferes with some activities. This classification represents a 26 to 60 percent sensory deficit. A.M.A., *Guides* 424, Table 15-15.

combined with the three percent bilateral impairment involving the L5 nerve root, appellant's total bilateral lower extremity impairment is six percent.[10]

The January 30, 2006 impairment rating provided by the Office medical adviser conforms to the A.M.A., *Guides* (5th ed. 2001), and his finding constitutes the weight of the medical evidence.[11] Appellant has not submitted probative medical evidence to establish that he has greater than six percent impairment of the left and right lower extremities. Furthermore, the Office properly reduced the current six percent award by five percent in light of appellant's two prior schedule awards for impairment of his lower extremities.[12]

## ***CONCLUSION***

Appellant has not demonstrated that he has greater than six percent impairment of the lower extremities.

[10] *See* Combined Values Chart, A.M.A., *Guides* 604.

[11] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[12] Any previous impairment to the schedule member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (November 1998).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 27, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 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