

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

R.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 07-20
Issued: May 11, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 4, 2006 appellant filed a timely appeal from a September 20, 2006 Office of Workers' Compensation Programs' merit decision which granted a schedule award for a three percent permanent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issue of the case.

ISSUE

The issue on appeal is whether appellant has more than a three percent permanent impairment of the left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On April 16, 2004 appellant, then a 43-year-old mail handler filed a traumatic injury claim alleging that on April 9, 2004 he was sweeping mail when he felt tingling in his left hip and leg. He stopped work on April 11, 2004 and returned April 12, 2004. On May 29, 2004 appellant stopped work. The Office accepted left lumbar radiculopathy, disc herniation and authorized an L4-5 microdiscectomy which was performed on July 6, 2004.

Appellant came under the treatment of Dr. Lawrence R. Schacht, a Board-certified internist, on April 19, 2004. Dr. Schacht noted that appellant sustained a left hip and leg strain while at work. He indicated that appellant presented with severe pain on the left L5-S1 nerve root or sciatica. Dr. Schacht opined that appellant was totally disabled. An April 20, 2004 lumbar spine x-ray revealed mild degenerative arthritis of the vertebral bodies. A May 7, 2004 magnetic resonance imaging (MRI) scan of the lumbar spine revealed disc herniation on the left at L4-5 with significant encroachment upon the thecal sac and neural foramen and possible scoliosis. A myelogram dated June 26, 2004 revealed a herniated disc at L4-5 on the left.

Appellant was also treated by Dr. Randall J. Rogalsky, a Board-certified orthopedic surgeon, from June 23 to December 29, 2004. Dr. Rogalsky diagnosed left lumbar radiculopathy secondary to L4-5 herniated nucleus pulposus. He recommended a microdiscectomy at L4-5. Appellant submitted treatment notes from Dr. Wynndel Buenger, a Board-certified anesthesiologist, on November 10, 2004. Dr. Buenger reviewed the history of injury and subsequent treatment. He noted that the motor examination revealed 5/5 in the bilateral lower extremities, light touch was intact, straight leg raises were positive on the left, reflexes were symmetric, the motor groups were within normal limits and there was significant tenderness in the paraspinal muscles at L4-5 and L5-S1 on the right and left. Dr. Buenger diagnosed left L4 radiculopathy and recommended a left L4 transforaminal injection.

On February 23, 2005 the Office referred appellant for a second opinion to Dr. Donald H. Brancato, a Board-certified orthopedic surgeon, to determine if appellant had reached maximum medical improvement and whether he was capable of returning to work. In a report dated March 21, 2005, Dr. Brancato noted significant atrophy of the left lower extremity, positive left leg raises, pain which radiated into buttock and left thigh, reflexes which were equal and symmetrical and pin prick was within normal limits. He opined that appellant had not reached maximum medical improvement and his findings suggested unrelieved nerve root compression. Dr. Brancato indicated that appellant was not able to return to work at this time. In a supplemental report dated April 12, 2005, he diagnosed unrelieved nerve root compression which was directly related to the work injury of April 16, 2004. Dr. Brancato noted that objective findings were consistent with appellant's subjective complaints of pain and burning into his lower back into the left lower extremity.

On April 4, 2005 appellant filed a claim for a schedule award.

Appellant submitted reports from Dr. Buenger dated November 24 to December 22, 2004. Dr. Buenger noted that appellant underwent several L4-5 transforaminal injections which provided some pain relief. Subsequent reports noted that appellant experienced a recurrent L4-5 disc protrusion after returning to work for a three-week period. Dr. Buenger advised that appellant was not a good surgical candidate but recommended a spinal cord stimulator for pain control. In an operative report dated September 12, 2005, he performed a placement of trial right and left spinal cord stimulation leads and diagnosed lumbar radiculitis. On September 22, 2005 Dr. Buenger noted that the trial spinal cord stimulator provided good coverage of appellant's pain and recommended implanting a permanent stimulator. He noted that appellant's pain was a level three on the pain scale. Dr. Buenger noted on January 30, 2006 that appellant could return to work for four hours per day subject to permanent restrictions on lifting. In a work capacity form dated February 7, 2006, Dr. Buenger advised that appellant

could return to work two hours per day and lift up to 20 pounds intermittently. An MRI scan of the lumbar spine dated May 20, 2005 revealed prior surgery at the L4-5 level with minimal scar formation, focal disc protrusion on the left with desiccation, posterior bulging of the L4-5 disc and mild degenerative spurring.

In a letter dated July 6, 2006, the Office advised appellant that to establish entitlement to a schedule award he must submit medical evidence demonstrating permanent loss or loss of use of a member or function of body listed in 5 U.S.C. § 8107 or 20 C.F.R. § 10.404. The Office further indicated that the medical evidence was to establish that the residuals of the injury reached maximum medical improvement. The Office stated that the evidence did not demonstrate that appellant had reached maximum medical improvement and, therefore, a schedule award could not be granted.

On July 26, 2006 appellant filed a claim for a schedule award. He submitted a July 26, 2006 statement from Dr. Buenger who noted that appellant had reached maximum medical improvement. In a July 27, 2006 report, Dr. Buenger noted that appellant was not getting the recuperative sleep that he required and recommended that he work the day shift.

On August 4, 2006 the Office referred Dr. Buenger's reports and the case record to an Office medical adviser. In a report dated August 11, 2006, the Office medical adviser noted that maximum medical improvement occurred on July 26, 2006. He reviewed the reports of Drs. Buenger, Brancato and Rogalsky. Appellant reported moderate pain in the back and left lower extremity which was made worse with strenuous activity. The Office medical adviser noted that physical examination demonstrated 5/5 muscle strength in the bilateral lower extremity, range of motion of all joints was normal, sensation in the lower extremities was normal and reflexes were symmetrical bilaterally. He opined that appellant had a three percent permanent impairment of the left leg for sensory deficit or pain in the distribution of the L4 nerve root under Table 16-10 and 16-15, page 482 and 492,¹ in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² (A.M.A., *Guides*). This sensory loss was calculated by multiplying the 60 percent grade with the 5 percent maximum allowed for the L4 nerve.

In a decision dated September 20, 2006, appellant was granted a schedule award for a three percent permanent impairment of the left lower extremity.

¹ The Office medical adviser cited to Table 16-10 and 16-15 of the A.M.A., *Guides*; however, this section applies to the impairment due to sensory loss for the upper extremities. This appears to be a typographical error as the calculations correspond to Table 15-15 and 15-18, page 424 A.M.A., *Guides* for determining impairment due to sensory loss for the lower extremities.

² A.M.A., *Guides* (5th ed. 2001).

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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.⁵

ANALYSIS

The Office accepted appellant's claim for left lumbar radiculopathy and disc herniation and authorized an L4-5 microdiscectomy.

Appellant submitted a report from dated November 10, 2004. Dr. Buenger noted that appellant's motor examination was 5/5 in the bilateral lower extremities, light touch was intact, straight leg raises were positive on the left, reflexes were symmetric, the motor groups were within normal limits and there was significant tenderness in the paraspinal muscles at L4-5 and L5-S1 on the right and left. Dr. Buenger diagnosed left L4 radiculopathy and recommended a left L4 transforaminal. In reports dated November 24 to August 10, 2005, he noted that appellant underwent several L4-5 transforaminal injections which provided pain relief; however, appellant experienced a recurrent L4-5 disc protrusion after returning to work for a three-week period. Dr. Buenger recommended a spinal cord stimulator for pain control which was inserted on September 12, 2005. On September 22, 2005 he noted that the trial spinal cord stimulator provided good coverage of appellant's pain level and noted that his pain level was at a level three on the pain scale. Dr. Buenger noted that appellant reached maximum medical improvement on July 26, 2006. Although, his reports provided findings upon physical examination, Dr. Buenger did not provide an impairment rating in accordance with the A.M.A. *Guides*.

The Office medical adviser properly utilized the findings in Dr. Buenger's reports to determine under the A.M.A., *Guides* (5th ed.) an impairment rating for sensory loss to appellant's left lower extremity. He calculated that appellant had a three percent impairment of the left leg for sensory deficit or pain in the distribution of the L4 nerve root under Table 15-18 of the A.M.A., *Guides*.⁶ This table provides a maximum of five percent impairment for pain. The Office medical adviser noted that appellant had Grade 3 pain of the left lower extremity under Table 15-15⁷ which provides for 26 to 60 percent sensory deficit of the involved nerve. Under

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ A.M.A., *Guides* 424, Table 15-18 (5th ed. 2001).

⁷ *Id.* at 424, Table 15-15 (5th ed. 2001).

the procedure set forth in Table 15-15, the Office medical adviser multiplied the 60 percent grade with the 5 percent maximum allowed for the L4 nerve, to arrive at a total 3 percent impairment of the left leg. The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Buenger's reports.

On appeal, appellant contends that the award is insufficient as it does not take into account his inability to run and play sports as he did prior to his employment injury. In evaluating schedule impairment, the Office has adopted the A.M.A., *Guides*, as a uniform standard to allow for consistent results and to ensure equal justice under the law to all claimants. The Board has held that factors such as inability to exercise or play sports do not enter into the calculation of impairment for schedule award purposes.⁸

CONCLUSION

The Board finds that the Office properly determined that appellant had no more than a three percent permanent impairment of the left lower extremity for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED that the September 20, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2007
Washington, DC

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

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

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

⁸ *Ted R. Soares*, 38 ECAB 480 (1987).