

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

G.A., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE
FINANCE & ACCOUNTING SERVICE,
Columbus, OH, Employer**)

**Docket No. 07-1228
Issued: September 11, 2007**

Appearances:

*Alan J. Shapiro, 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, Alternate Judge

JURISDICTION

On April 10, 2007 appellant timely appealed the March 2, 2007 merit decision of the Office of Workers' Compensation Programs which affirmed a schedule award for right lower extremity permanent 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 10 percent impairment of the right lower extremity.

FACTUAL HISTORY

Appellant, a 62-year-old accounting technician, has an accepted claim for lumbar sprain, herniated disc at L4-5 and lumbar spinal stenosis which arose on May 30, 2001.¹ On October 26,

¹ Appellant injured his back lifting boxes.

2005 he filed a claim for a schedule award. Dr. Mary Ann Wynd, a Board-certified family practitioner and appellant's treating physician, examined appellant on November 30, 2005 and found that he had a six percent whole person impairment due to sensory deficit involving the sciatic nerve.² On May 17, 2006 the Office medical adviser reviewed the record and advised that he was unable to offer an opinion based on the information provided.

Dr. Timothy Morley examined appellant on May 30, 2006. In his June 1, 2006 report, Dr. Morley found 17 percent impairment of the lower extremity. Although Dr. Morley referenced the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), he did not otherwise explain how he reached his conclusion that appellant had 17 percent permanent lower extremity impairment.³ He also did not specifically indicate which lower extremity was involved nor did he state whether appellant reached maximum medical improvement (MMI).

Dr. James H. Rutherford, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on June 22, 2006 and found 10 percent impairment of the right lower extremity. The rating was based on a combination of motor and sensory deficits involving the L5 nerve root distribution.⁴

In a report dated July 26, 2006, the Office medical adviser concurred with Dr. Rutherford's 10 percent impairment rating of the right lower extremity. He also noted that there was no rating available for the left lower extremity. The Office medical adviser further indicated that appellant reached MMI on June 22, 2006, the date of Dr. Rutherford's examination.

On August 7, 2006 the Office granted a schedule award for 10 percent impairment of the right lower extremity. The award covered 28.8 weeks from June 22, 2006 to January 9, 2007.

Appellant requested an oral hearing which was held on January 23, 2007.⁵ By decision dated March 2, 2007, the Office hearing representative affirmed the August 7, 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 When submitting Dr. Wynd's impairment rating, appellant's counsel acknowledged that it was likely insufficient for purposes of determining the extent of appellant's lower extremity impairment.

³ Dr. Morley cited Figures 17-8 and 17-9 and Table 17-37, A.M.A., *Guides* 551, 552.

⁴ Dr. Rutherford referenced the A.M.A., *Guides* 424, Tables 15-15, 15-16 and 15-18. He rated appellant's motor deficit at 20 percent, which corresponds to a Grade 4 classification under Table 15-16. Appellant's sensory deficit was noted to be 60 percent, which represents a Grade 3 classification pursuant to Table 15-15.

⁵ Appellant did not appear at the hearing. However, his counsel was present and argued in favor of relying on Dr. Morley's 17 percent lower extremity impairment rating. Counsel again acknowledged the deficiencies in Dr. Wynd's six percent whole person impairment rating.

and organs of the body.⁶ 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 A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ Effective February 1, 2001 schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁸

ANALYSIS

Appellant's counsel twice acknowledged that Dr. Wynd's six percent whole person impairment rating was insufficient under the Act.⁹ Counsel is no doubt aware that neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.¹⁰ Consequently, Dr. Wynd's six percent whole person impairment rating is inadequate for purposes of determining appellant's entitlement to a schedule award.

Dr. Morley's June 1, 2006 impairment rating is similarly inadequate, but for different reasons. He found "17 percent permanent lower extremity impairment," but he neglected to identify which extremity was affected. Dr. Morley also neglected to indicate whether appellant reached MMI, but the most significant flaw in his impairment rating is his failure to explain how he applied Table 17-37 and Figures 17-8 and 17-9 in finding there was 17 percent impairment of the lower extremity. Because he did not specifically relate his physical findings to the A.M.A., *Guides*, Dr. Morley's 17 percent impairment rating is not probative.¹¹

In contrast, Dr. Rutherford provided a clear and succinct impairment rating. He also indicated that appellant had reached MMI as of June 22, 2006. The Office properly relied on Dr. Rutherford's findings as a basis for the August 7, 2006 schedule award for 10 percent impairment of the right lower extremity. Both Dr. Rutherford and the Office medical adviser agreed that appellant had 60 percent sensory deficit (Grade 3) in accordance with Table 15-15, A.M.A., *Guides* 424.¹² According to Table 15-18, A.M.A., *Guides* 424, an L5 nerve root impairment represents a maximum five percent loss due to sensory deficit or pain. To determine

⁶ For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2000).

⁷ 20 C.F.R. § 10.404 (2007).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁹ At the January 23, 2007 hearing, counsel characterized Dr. Wynd's impairment rating as "somewhat meaningless."

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

¹¹ *Lela M. Shaw*, 51 ECAB 372, 374-75 (2000).

¹² 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. Table 15-15, A.M.A., *Guides* 424.

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 his right lower extremity with respect to the L5 nerve root. The medical evidence also indicated that appellant had 20 percent motor deficit (Grade 4) in his right lower extremity.¹³ Under Table 15-18, the maximum loss of function due to strength involving the L5 nerve root is 37 percent.¹⁴ Applying the above-mentioned formula, the result is a right lower extremity motor impairment of 7 percent (20 percent x 37 percent). The combined motor (7 percent) and sensory (3 percent) deficits represent a total right lower extremity impairment of 10 percent.¹⁵

The impairment ratings provided by Dr. Rutherford and the Office medical adviser conform to the A.M.A., *Guides* (5th ed. 2001) and their respective findings constitutes the weight of the medical evidence.¹⁶ Appellant has not submitted any credible medical evidence indicating that he has greater than 10 percent impairment of the right lower extremity.

CONCLUSION

The Board finds that appellant has not demonstrated that he has greater than 10 percent impairment of the right lower extremity.

¹³ Under A.M.A., *Guides* 424, Table 15-16, a Grade 4 classification is characterized by “[a]ctive movement against gravity with some resistance” and represents a 1 to 25 percent motor deficit.

¹⁴ A.M.A., *Guides* 424, Table 15-18.

¹⁵ See A.M.A., *Guides* 423, Chapter 15, section 15.12; A.M.A., *Guides* 604, Combined Values Chart.

¹⁶ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 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