

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Flemington, NJ, Employer**

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**Docket No. 08-1744
Issued: January 14, 2009**

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 June 3, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated July 26, 2007 and March 7, 2008. 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 impairment of each lower extremity for which he received a schedule award.

FACTUAL HISTORY

On October 2, 2004 appellant, then a 52-year-old distribution-window clerk, injured his lower back while lifting flat mail tubs and bundles of newspapers. He began working restricted duty. The Office accepted that he sustained an employment-related sprain/strain of the lumbar region and lumbar radiculopathy. In a December 23, 2004 report, Dr. Mitchell K. Freedman, a Board-certified osteopath specializing in rehabilitation medicine, noted a past medical history of diabetes. He provided examination findings and diagnosed lumbar disc degeneration, spinal

stenosis with bilateral radiculopathy, peripheral polyneuropathy secondary to diabetes, and right foot deformity, rule out tibialis posterior deformity.

Appellant filed a schedule award claim. In an August 31, 2006 report, Dr. David Weiss, an osteopath, noted appellant's report that he had been diagnosed with Charcot disease of the right foot five years previously. Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain and sprain, bulging lumbar disc at L4-5, aggravation of preexisting quiescent osteoarthritis of the lumbar spine, post-traumatic lumbar facet syndrome, and cumulative and repetitive trauma disorder superimposed upon preexisting Charcot disease of the right foot. He advised that in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),¹ appellant had a 14 percent range of motion deficit of the right ankle and a 3 percent right lower extremity sensory deficit to yield 17 percent right lower extremity impairment and a 4 percent sensory deficit of the left lower extremity. By reports dated January 21 and 22, 2007, Dr. Thomas Duffield, Board-certified in family medicine, noted his agreement with Dr. Weiss that appellant had a 4 percent left lower extremity impairment and a 17 percent right lower extremity impairment. Dr. Duffield advised that appellant's Charcot deformity of the right foot resulted in pain and disability which was exacerbated by long periods of standing at work.

In a November 6, 2006 report, an Office medical adviser reviewed the medical evidence. He advised that it was not appropriate for Dr. Weiss to consider Charcot disease as part of the schedule award as it was totally the result of appellant's diabetes which was unrelated to his employment injury. The Office medical adviser concluded that, as appellant had a Grade 2 sensory loss of each lower extremity, he had a four percent right lower extremity impairment and a four percent left lower extremity impairment.

On January 16, 2007 appellant was granted a schedule award for a four percent impairment of the left lower extremity and a four percent impairment of both the left and right lower extremities, for 23.04 weeks of compensation, to run from August 31, 2006 to January 20, 2007.

On January 22, 2007 appellant, through counsel, requested a hearing. By decision dated April 6, 2007, an Office hearing representative remanded the case to the Office for further development of the medical evidence.

Upon remand, the Office determined that a conflict in medical evidence had been created between the opinions of Dr. Weiss and the Office medical adviser. It referred appellant to Dr. Ronald B. Greene, Board-certified in orthopedic surgery, for an impartial medical evaluation. In a July 10, 2007 report, Dr. Greene noted his review of the medical record and appellant's report that in 2000 he developed a right foot Charcot condition. He provided physical findings and advised that, other than a diagnosis of lumbar sprain and strain, he disagreed with Dr. Weiss' findings and conclusions, noting that his examination did not support findings of L5-S1 radiculopathy and that the electromyography and nerve conduction studies (EMG/NCS) analysis did not rise to the level of diagnostic certainty. Dr. Greene advised that appellant had no symptoms of spinal stenosis and that the Charcot foot was caused by diabetes, as were any lower

¹ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

extremity sensory deficits. He diagnosed a chronic lumbar strain and advised that under the A.M.A., *Guides*, appellant had no impairment as a result of the October 2, 2004 employment injury.

In a July 26, 2007 decision, the Office found that appellant was not entitled to an additional schedule award.

On December 3, 2007 appellant, through counsel, requested reconsideration arguing that appellant's preexisting Charcot deformity should be considered in his impairment rating. On May 10, 2007 Dr. Raul P. Sala, a Board-certified physiatrist, conducted a lower extremity NCS that he interpreted as normal. EMG of the lumbar paraspinals and both lower extremities demonstrated findings consistent with a bilateral L4-L5-S1 lumbar radiculopathy. In a December 28, 2007 report, an Office medical adviser agreed with Dr. Greene's findings and conclusions.

By decision dated March 7, 2008, the Office denied modification of the July 26, 2007 decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act² and section 10.404 of the implementing federal regulation,³ 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*⁴ has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁵

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.⁶ In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ A.M.A., *Guides*, *supra* note 1.

⁵ See *Joseph Lawrence, Jr.*, *supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁶ *Pamela J. Darling*, 49 ECAB 286 (1998).

impairment originated in the spine.⁷ An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.⁸

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.⁹

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹

ANALYSIS

The Board finds that appellant has not established that he has greater than the four percent for each lower extremity previously awarded. In a November 6, 2006 report, an Office medical adviser agreed with Dr. Weiss' finding of four percent impairments due to sensory deficits in both lower extremities, and appellant was then granted a schedule award on that basis.

Office procedures provide that, in evaluating the loss of use of a scheduled member due to an employment injury, the percentage is to include both employment-related impairments and any preexisting impairment of the same member or function.¹² In this case, Dr. Weiss awarded appellant an additional 14 percent impairment of the right lower extremity due to loss of ankle motion caused by a Charcot foot condition, apparently caused by appellant's diabetes. While Dr. Freedman, in his December 2004 report noted a past medical history of diabetes and a right foot condition, and Dr. Weiss and Dr. Greene noted appellant's report of this, there is no contemporaneous medical evidence to show that either of these conditions predated the October 2, 2004 employment injury. Upon submission of appropriate evidence that clearly describes when appellant was diagnosed with diabetes and the Charcot foot condition, appellant could be entitled to an increased schedule award.

⁷ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁸ *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

⁹ A.M.A., *Guides*, *supra* note 1 at 423.

¹⁰ 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

¹¹ *Manuel Gill*, 52 ECAB 282 (2001).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (June 2003); *see Michael C. Milner*, 53 ECAB 446 (2002).

CONCLUSION

The Board finds that appellant did not establish that he is entitled to a schedule award greater than the four percent awarded for each lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 7, 2008 and July 26, 2007 be affirmed.

Issued: January 14, 2009
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