

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

S.J., Appellant

and

**DEPARTMENT OF THE ARMY, MATERIAL
COMMAND, Philadelphia, PA, Employer**

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**Docket No. 09-170
Issued: September 4, 2009**

Appearances:
Thomas R. Uliase, 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 October 22, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 5, 2007 and May 20, 2008 merit decisions concerning her entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has more than a seven percent permanent impairment of her right leg and a zero percent permanent impairment of her left leg.

FACTUAL HISTORY

The Office accepted that on January 27, 2000 appellant, then a logistics management specialist, sustained a lumbar sprain and a herniated disc at L4-5 due to a fall at work. It authorized discectomy surgery at L4-5 which was performed on July 28, 2000.

On November 28, 2005 appellant filed claim for a schedule award. In support of the claim, a June 23, 2005 report was received from Dr. Nicholas Diamond, an attending osteopath, who opined that appellant has 22 percent permanent impairment of the right leg comprised of 17 percent impairment for motor strength deficit of the gastrocnemius, 2 percent impairment for motor strength deficit of the extensor hallucis longus and 3 percent impairment for pain.

In a March 15, 2007 report, Dr. Morley Slutsky, a Board-certified orthopedic surgeon serving as an Office medical adviser, reviewed the medical evidence of record. He stated that Dr. Diamond provided a nonspecific rating for muscles that have many lumbar nerve root innervations (not just the L5 nerve root). Dr. Slutsky indicated that the most specific way to rate an L5 motor nerve root impairment was by using the tables found on page 424 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He stated that, using Table 15-16 on page 424, the most appropriate classification was Grade 4 (which corresponded to 25 percent value). Dr. Slutsky indicated that, using Table 15-18 on page 424, the maximum motor deficit for the L5 nerve was 37 percent. He noted that 25 percent times 37 percent equaled 9.25 percent which rounded down to 9 percent impairment of the right leg. Dr. Slutsky concurred with adding 3 percent for pain for a total 12 percent impairment of the right leg.

The Office determined that there was a conflict in medical opinion between Dr. Diamond and Dr. Slutsky regarding appellant's impairment. To resolve the conflict, it referred appellant to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In a July 15, 2007 report, Dr. Fries described his findings on examination and provided an impairment rating of appellant's legs. He stated:

"Referring to the [A.M.A., *Guides,*] [f]ifth [e]dition, Table 15-15, page 424, I assess her sensory loss and associated pain places her in Grade [2], 61 [to] 80 percent sensory deficit. According to Table 15-18, a maximum percentage loss due to an L5 root impairment is five percent. I therefore assess she has a four percent impairment due to her sensory symptoms and pain. [Note this determination includes moderate pain that may prevent some activities, according to Table 15-15.]

"The 4/5 right hip flexion weakness, according to Table 15-16, page 424, equates with a motor deficit of 1 through 25 percent. As hip flexion can be considered L3 function, referring to [Table] 15-18, the maximum loss would be 20 percent. However, as the weakness is mild, I assess 10 percent of 20 ... percent, which is 2 percent.

"In support of my conclusion, there is no muscle weakness in her lower extremities below her hips, and measurements of thigh and calf circumferences are equal bilaterally. I am unable to duplicate Dr. Diamond's muscle weakness findings, and agree with Dr. Slutsky that Dr. Diamond's findings are inconsistent with a single L5-S1 root lesion.

“Electrodiagnostic studies on July 9, 2007 documented right S1 and left L5-S1 radiculopathies. Though such studies are not specifically rated in the [A.M.A., *Guides*], they objectively identify pathology that in my opinion deserves rating. I added one percent for the right extremity based upon electrical evidence. [Appellant] reports no left lower extremity symptoms and there are no clinical findings. Thus, I provided only one percent for the left lower extremity.

“Therefore, the total right lower extremity impairment is four percent plus two percent, plus one percent equaling seven percent. The total left lower extremity impairment is one percent.”

In a report dated July 24, 2007, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, who served as an Office medical adviser, concurred with Dr. Fries’ seven percent impairment rating for the right leg, but noted that his award of one percent impairment of the left leg on the basis of an abnormal electromyogram test was not consistent with the fifth edition of the A.M.A., *Guides* since there was no table or page to justify such award.

In a November 5, 2007 decision, the Office issued appellant a schedule award for seven percent permanent impairment of the right leg. It found that appellant had zero percent impairment of the left leg.

Appellant, through her attorney, disagreed with the decision and requested an oral hearing, which was held on March 25, 2008. At the hearing, she was represented by Carolyn Uliase, attorney at law. Appellant provided testimony regarding her work injury and subsequent surgery. She noted that she currently has pain, numbness and weakness in her right leg. Appellant indicated that she was not presently under active medical treatment but took pain relievers when needed. Ms. Uliase stated that Dr. Fries’ report was deficient because in his description of muscles and strength he gave no exact measurements and he did not perform muscle strength testing. She argued that, in addition to a rating for sensory deficit, there should have been a rating for strength deficit. Ms. Uliase contended that a left leg rating should have been awarded as indicated by Dr. Fries. She concluded that the report of Dr. Fries was not specific enough or sufficiently well reasoned to be afforded special weight and that the claimant should therefore be referred for a new impartial medical specialist.

In a May 20, 2008 decision, the Office hearing representative affirmed the Office’s November 5, 2007 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act¹ and its implementing regulations² 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

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

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 regulations as the appropriate standard for evaluating schedule losses.³

Section 8123(a) of the Act provides in pertinent part: “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.”⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁵ In situations where there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.⁶

ANALYSIS

The Office properly determined that there was a conflict in the medical opinion between Dr. Diamond, an attending osteopath, and Dr. Slutsky, a Board-certified orthopedic surgeon serving as an Office medical adviser, regarding appellant’s leg impairment. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

The Board finds that the well-rationalized report of Dr. Fries represents the weight of the evidence with respect to appellant’s right leg impairment. The opinion of Dr. Berman, a Board-certified orthopedic surgeon serving as an Office medical adviser, represents the weight of the evidence with respect to appellant’s left leg impairment.

The Board finds that the July 15, 2007 report of Dr. Fries is based on an accurate factual background, review of the medical record and physical examination of the claimant. Contrary to appellant’s contentions on appeal, Dr. Fries described in detail his findings on examination and properly applied the findings to specific tables in the A.M.A., *Guides* in determining the extent of permanent impairment. He properly assigned four percent impairment for sensory loss associated with the L5 nerve, two percent impairment for hip flexion weakness and one percent impairment for sensory loss associated with the S1 nerve. Further, Dr. Fries specifically stated that on examination he found no muscle weakness in appellant’s lower extremities below her hips, and measurements of thigh and calf circumferences were equal bilaterally. He stated that he was unable to duplicate Dr. Diamond’s muscle weakness findings, and he agreed with Dr. Slutsky that Dr. Diamond’s findings were inconsistent with a single L5-S1 root lesion.

³ *Id.*

⁴ 5 U.S.C. § 8123(a).

⁵ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

Therefore, the report of Dr. Fries constitutes the weight of the medical evidence in establishing that appellant has seven percent permanent impairment of the right leg.

The report of Dr. Fries resolves the conflict in medical opinion regarding permanent impairment of the right leg. There was no conflict regarding the left lower extremity as neither Dr. Diamond nor any other physician of record indicated that the claimant had a permanent impairment of this extremity. Dr. Fries assigned a one percent impairment of the left leg due based solely on an abnormal test. However, Dr. Fries does not cite any specific page, table or figure in the A.M.A., *Guides* to support this rating, and he indicated that appellant reported no left leg symptoms and there are no clinical findings. Dr. Berman properly stated that the award of one percent impairment of the left leg on the basis of an abnormal electromyogram was not consistent with the A.M.A., *Guides* as there is no standard to justify such an award. Thus, the Office also properly determined that the claimant has a zero percent impairment of the left leg.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than seven percent permanent impairment of her right leg and zero percent permanent impairment of her left leg.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 20, 2008 and November 5, 2007 decisions are affirmed.

Issued: September 4, 2009
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