

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

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**W.S., Appellant**

**and**

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

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**Docket No. 09-1781  
Issued: March 4, 2010**

*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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On July 8, 2009 appellant timely appealed the April 8, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed an August 4, 2008 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has greater than three percent impairment of both the left and right lower extremity.

**FACTUAL HISTORY**

Appellant, a 62-year-old rural letter carrier, has an accepted occupational disease claim for lumbar sprain and herniated disc at L5-S1, which arose on or about June 2, 2005. On April 24, 2008 he filed a claim for a schedule award. Appellant submitted an October 18, 2007 report from Dr. Nicholas Diamond, a pain management specialist, who diagnosed L5-S1 herniated nucleus pulposus with left S1 nerve root involvement, left S1 radiculitis, per clinical impression, chronic lumbosacral strain and sprain, and chronic myofascial pain syndrome. Dr. Diamond found 24 percent impairment of the left and right lower extremity. Three percent

of the rating was for pain and the other 21 percent was for motor strength deficits involving the L4, L5 and S1 nerve roots. Dr. Diamond evaluated appellant's motor strength deficits pursuant to Table 15-16 and 15-18 at page 424 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He found nine percent impairments of the L4 and L5 nerve roots, as well as a five percent impairment of the left S1 nerve root pursuant to the A.M.A., *Guides*. According to Dr. Diamond, appellant had reached maximum medical improvement.

In a statement dated January 23, 2008, appellant's treating physician, Dr. David J. Miller, stated that he had reviewed Dr. Diamond's report and agreed with his finding of 24 percent bilateral lower extremity impairment.

On May 8, 2008 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and district medical adviser (DMA), reviewed the record, including Dr. Diamond's October 18, 2007 report. He disagreed with Dr. Diamond's finding of motor strength deficits at L4, L5 and S1. Dr. Berman opined that based upon his review of the records he did not believe appellant had any motor strength deficits. Instead, he found three percent impairment based on a Grade 3 sensory deficit involving the S1 nerve root, bilaterally. Dr. Berman also disagreed with Dr. Diamond's additional three percent rating for pain.

By decision dated August 4, 2008, the Office granted a schedule award for three percent impairment of the left and right lower extremities. The award covered a period of 17.28 weeks beginning May 6, 2007. The Branch of Hearings and Review affirmed the schedule award in a decision dated April 8, 2009.<sup>1</sup>

### **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 and organs of the body.<sup>2</sup> 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.<sup>3</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>4</sup>

### **ANALYSIS**

As argued by appellant on appeal, the Board finds that there is an unresolved conflict in medical opinion between the DMA and Dr. Diamond and, therefore, the case shall be set aside and remanded for referral to an impartial medical examiner. The Act provides that if there is

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<sup>1</sup> A hearing was held on December 17, 2008.

<sup>2</sup> For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

<sup>3</sup> 20 C.F.R. § 10.404 (2009).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.<sup>5</sup> Dr. Diamond found 21 percent impairment of the left and right lower extremity for motor strength deficits involving the L4, L5 and S1 nerve roots and 3 percent impairment due to pain, pursuant to Table 15-16 and 15-18 of the A.M.A., *Guides*. Dr. Miller agreed with Dr. Diamond's assessment. Dr. Berman disagreed with Dr. Diamond's finding of motor strength deficits at L4, L5 and S1 and an additional impairment for pain, instead, he found three percent impairment based on a Grade 3 sensory deficit involving the S1 nerve root, bilaterally. Because of the unresolved conflict in medical opinion between Dr. Berman and Dr. Diamond the case will be remanded to the Office for referral to an impartial medical examiner. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

### **CONCLUSION**

The case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2009 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 4, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>5</sup> 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).