

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

_____)
T.T., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
JESSE BROWN VETERANS ADMINISTRATION)
MEDICAL CENTER, Chicago, IL, Employer)
_____)

Docket No. 10-880
Issued: November 9, 2010

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 17, 2010 appellant filed a timely appeal from a December 8, 2009 merit decision of the Office of Workers' Compensation Programs granting him an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a three percent permanent impairment of the left leg and a five percent permanent impairment of the right leg, or three percent of the right arm for which he received schedule awards.

FACTUAL HISTORY

On December 31, 2008 appellant, then a 52-year-old health technician, filed a claim alleging that on November 24, 2008 he injured his back, right shoulder and arms helping to move a patient. The Office accepted the claim, assigned file number xxxxxx265, for a sprain of the

right acromioclavicular joint of the shoulder, a clavicle sprain, an upper back sprain and an aggravation of a disc bulge at L3-4 and L5-6. Appellant stopped work on November 24, 2008 and received compensation for disability beginning February 1, 2009. He returned to modified employment on March 9, 2009.¹

On July 26, 2009 appellant filed a claim for a schedule award. In a September 2, 2009 impairment evaluation, Dr. Robert Fink, a Board-certified orthopedic surgeon, discussed his symptoms of pain and weakness in the legs, greater on the right. On examination he found pain with right leg extension, right shoulder motion and motion of the lower extremities. Citing to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008) (A.M.A., *Guides*), Dr. Fink found that appellant had a 12 percent permanent impairment of each lower extremity due to loss of extension. He referenced Table 17-8 on page 578 of the Spine and Pelvis chapter of the A.M.A., *Guides*, which describes common radicular syndromes from lumbar and cervical discs. Dr. Fink further determined that he had a 10 percent permanent impairment of the right upper extremity due to loss of flexion and extension.

On November 9, 2009 an Office medical adviser opined that, according to Table 16-12 on page 535 of the A.M.A., *Guides*, appellant had five percent impairment of the right lower extremity and a three percent impairment of the left lower extremity due to disc herniations with radicular symptoms in an L3-5 distribution, right more than left. He further found that appellant had one percent impairment due to tendinopathy of the right shoulder and two percent impairment due to degeneration of the acromioclavicular joint pursuant to Table 15-5 on page 403 of the A.M.A., *Guides*.

On November 19, 2009 the Office noted that it previously granted appellant a schedule award under file number xxxxxx464 for two percent permanent impairment of each lower extremity.² It requested that the Office medical adviser again review the evidence and explain whether the lower extremities impairments he rated on November 9, 2009 were in addition to or included in the previously awarded two percent impairments of each leg under file number xxxxxx464. On December 3, 2009 the Office medical adviser asserted that the impairment percentages represented appellant's total impairment and included the conditions from file number xxxxxx464.

By decision dated December 8, 2009, the Office granted appellant a schedule award for an additional one percent impairment of the left lower extremity, an additional three percent

¹ By decision dated May 20, 2009, the Office reduced appellant's compensation to zero after finding that his actual earnings as a modified health technician effective March 9, 2009 fairly and reasonably represented his wage-earning capacity.

² The Office accepted that appellant sustained a displacement of lumbar discs under file number xxxxxx464. On June 20, 2008 an Office medical adviser determined that he had a two percent permanent impairment of each lower extremity due to pain in the L5 nerve root. By decision dated August 15, 2008, the Office granted appellant a schedule award for a two percent permanent impairment of the right and of the left lower extremity under file number xxxxxx464.

impairment of the right lower extremity and a three percent impairment of the right upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,³ and its implementing federal regulations,⁴ 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides*⁶ as the appropriate edition for all awards issued after that date.⁷

The sixth edition of the A.M.A., *Guides* provides a diagnosis based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).⁸ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).⁹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS

The Office accepted that appellant sustained a sprain of the right acromioclavicular joint of the shoulder, a clavicle sprain, a sprain of the upper back and an aggravation of a disc bulge at L3-4 and L4-5 due to a November 24, 2008 employment injury. On July 26, 2009 appellant filed a claim for a schedule award.

In an impairment evaluation dated September 2, 2009, Dr. Fink found pain in the lower extremities, worse on the right and pain with shoulder motion. He determined that appellant had 12 percent permanent impairment of each lower extremity using Table 17-8 of the sixth edition of the A.M.A., *Guides*. Table 17-8, however, is relevant to determining impairments of the spine

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ A.M.A., *Guides* (6th ed. 2008).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁸ A.M.A., *Guides* (6th ed., 2008), page 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

⁹ A.M.A., *Guides* (6th ed. 2008), pp. 405-12, 515-24.

and pelvis. The Act specifically excludes the back as an organ; therefore, the back or spine does not come under the provisions for payment of a schedule award.¹⁰

Dr. Fink further determined that appellant had a 10 percent permanent impairment of the right upper extremity due to loss of flexion and extension. He cited Table 16-40, however, such a table does not appear in the sixth edition of the A.M.A., *Guides*. As Dr. Fink's opinion does not conform to the provisions of the A.M.A., *Guides*, it is of diminished probative value.¹¹

An Office medical adviser reviewed Dr. Fink's opinion and determined that appellant had a five percent impairment of the right lower extremity and a three percent impairment of the left lower extremity under Table 16-2 of the A.M.A., *Guides* as a result of radiculopathy at L3-5. He did not, however, sufficiently explain how he applied the sixth edition of the A.M.A., *Guides* in reaching his conclusion. The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as an extremity impairment. Recognizing that certain jurisdictions, such as under the Act, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹² The Office has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹³ The Office medical adviser did not apply this method in reaching his determination of the extent of appellant's impairment from his spinal injury. The Board will remand the case for proper application of the A.M.A., *Guides* and further development of the evidence to determine whether appellant is entitled to a schedule award for a permanent impairment of the lower extremities.

The Office medical adviser further determined that, for the right upper extremity, appellant had a one percent impairment due to tendinopathy of the right shoulder cuff and a two percent impairment for degeneration of the acromioclavicular joint, for a total of three percent impairment under Table 15-5. He failed, however, to explain how he reached his conclusion. The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation. It requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).¹⁴ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX). The Office medical adviser identified only the table used without providing any explanation of the diagnosis category, class rating or evaluation of the grade modifiers. As discussed, grade modifiers should be considered for functional history, physical examination and clinical studies and these grade modifiers can change the extent of a given impairment rating.¹⁵

¹⁰ *Patricia J. Horney*, 56 ECAB 256 (2005); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹¹ *Mary L. Henninger*, 52 ECAB 408 (2001).

¹² Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, *The Guides Newsletter* (A.M.A., Chicago, IL), July/August 2009.

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700 (January 2010) (Exhibit 1, 5).

¹⁴ *Id.* at 405-12.

¹⁵ *Id.*

Consequently, the Board finds that the opinion of the Office medical adviser requires further clarification on the issue of appellant's right upper extremity impairment. The case is remanded for proper application of the A.M.A., *Guides* and, if necessary, further development of the evidence to determine whether appellant is entitled to a schedule award for a permanent impairment of the lower extremities and right upper extremities. Following such further development as the Office deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

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

Issued: November 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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