

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

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**E.R., Appellant**

**and**

**U.S. POSTAL SERVICE, MAIN POST OFFICE,  
Oakland, CA, Employer**

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**Docket No. 10-234  
Issued: October 8, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 3, 2009 appellant filed a timely appeal from an August 4, 2009 decision of the Office of Workers' Compensation Programs concerning a schedule award. 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 has more than three percent permanent impairment of her left leg, for which she received a schedule award.

**FACTUAL HISTORY**

On February 19, 2002 appellant, then a 42-year-old distribution clerk, filed a traumatic injury claim alleging that on October 2, 2001 she injured her lower back while lifting a heavy package. The Office accepted the claim for lumbar strain and lumbosacral radiculitis.

On October 23, 2008 Dr. Fulton S. Chen, appellant's attending Board-certified physiatrist with a subspecialty in pain medicine, diagnosed chronic low back pain with left sciatica, L5-S1 lumbar disc degeneration and probable left lumbar radiculopathy. He noted appellant

complained of low back pain going into her left leg. A physical examination revealed tenderness at the left L5-S1, intact sensation on light touch on the left leg and positive left straight leg testing and 60 degrees flexing.

On March 13, 2009 the Office referred the claim to the Office medical adviser for a schedule award determination. In a March 21, 2009 report, Dr. Arthur S. Harris, an Office medical adviser, reviewed the medical evidence and determined appellant had three percent left lower permanent extremity impairment based on the 5<sup>th</sup> edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001). Dr. Harris stated that appellant had Grade 3 pain/decreased sensation that interfered with some activity of the left L5 nerve root and referenced Table 16-10, page 482 and Table 15-18, page 424 in finding a three percent left lower extremity impairment.

In a March 27, 2009 decision, the Office granted appellant a schedule award for three percent permanent impairment of her left leg. The award ran for 8.64 weeks from October 23 to December 22, 2008.

In an April 15, 2009 report, Dr. Chen concluded that appellant had eight percent whole person permanent impairment due to radicular pain based on Table 15-3, page 384 of the A.M.A., *Guides* (5<sup>th</sup> ed.).

On April 20, 2009 appellant requested a review of the written record by an Office hearing representative. In an attached letter dated April 19, 2009, she contended she was entitled to at least eight percent left lower extremity impairment as found by Dr. Chen. Appellant also contended the period of the award was incorrect, as she explained it should include the time when her injury first occurred.

In an August 4, 2009 decision, the Office hearing representative affirmed the March 27, 2009 schedule award decision.<sup>1</sup>

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulations<sup>3</sup> 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

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<sup>1</sup> The Board notes that, following the August 4, 2009 decision, the Office received additional evidence. Appellant also submitted new evidence with her appeal to the Board. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *M.B.*, 60 ECAB \_\_\_\_ (Docket No. 09-176, issued September 23, 2009); *J.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

the body.<sup>4</sup> 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 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.<sup>5</sup>

A schedule award is not payable for a member, function, or organ of the body not specified in the Act or in the implementing regulations.<sup>6</sup> As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.<sup>7</sup> However, as the Act makes provision for the lower extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.<sup>8</sup>

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes a method to be used for evaluation of impairment due to sensory loss of the extremities. The nerves involved are to be first identified. Under Table 15-15, the extent of any sensory loss due to nerve impairment is to be determined, to be followed by determination of the maximum impairment due to nerve dysfunction applying Table 15-18 for the lower extremity. The severity of the sensory deficit is to be multiplied by the maximum value of the relevant nerve.<sup>9</sup>

### ANALYSIS

On appeal appellant generally contends that she has more than three percent permanent impairment of the left lower extremity. The Office accepted appellant's claim for lumbar strain and lumbosacral radiculitis. In a March 27, 2009 decision, it granted appellant a schedule award for three percent permanent impairment of her left leg. The award was based on calculations of Dr. Harris, a Board-certified orthopedic surgeon serving as an Office medical adviser, who reviewed the medical evidence of record, including the reports of Dr. Chen, an attending Board-certified physiatrist.

On March 13, 2009 Dr. Harris stated that the medical evidence revealed that appellant had decreased sensation of the L5 nerve root. He cited Table 16-10, page 482 and Table 15-18, page 424, to find three percent left lower extremity impairment. The Board notes that Table 16-

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<sup>4</sup> See *Carol A. Smart*, 57 ECAB 340 (2006). (Section 8107 of the Act authorizes the payment of schedule awards for the loss or loss of use, of specified members or functions of the body. Such loss or loss of use is known as permanent impairment).

<sup>5</sup> See *id.*; *P.C.*, 58 ECAB \_\_\_\_ (Docket No. 07-410, issued May 31, 2007); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>6</sup> *W.C.*, 59 ECAB \_\_\_\_ (Docket No. 07-2257, issued March 5, 2008); *Anna V. Burke*, 57 ECAB 521 (2006).

<sup>7</sup> *D.N.*, 59 ECAB \_\_\_\_ (Docket No. 07-1940, issued June 17, 2008).

<sup>8</sup> *J.Q.*, 59 ECAB \_\_\_\_ (Docket No. 06-2152, issued March 5, 2008).

<sup>9</sup> A.M.A., *Guides* 423.

10, page 482, is used in calculating upper extremity impairment due to spinal nerve root impairment and that Table 15-15, page 424, is to be used in calculating lower extremity impairment due to spinal nerve root impairment. The Office medical adviser's use of Table 16-10 instead of Table 15-15 is harmless, as the grading classification, however, is the same.<sup>10</sup> Both Table 15-15 and Table 16-10 provide a classification system for impairments due to sensory deficits. The classifications range from Grade 0 to 5. This classification system is used in conjunction with Table 15-18 to determine the lower extremity impairment due to sensory loss. Dr. Harris identified the grade for appellant's sensory loss as Grade 3, for which he allowed 60 percent.<sup>11</sup> According to Table 15-18, the maximum percentage loss of function due to sensory deficit or pain is five percent.<sup>12</sup> As set forth in the procedure for Table 15-15, the severity of the sensory deficit multiplied by the maximum impairment value of the L5 nerve root (60 percent times 5 percent) results in an impairment of 3 percent for sensory loss, as was found by Dr. Harris.

The Board finds that Dr. Harris' opinion is entitled to the weight of the evidence as his report is sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his report in finding that appellant was entitled to an impairment of three percent to the left lower extremity. There is no probative medical evidence of record to establish that appellant has more than three percent impairment to the left lower extremity.

On appeal appellant contends that Dr. Chen's report showed that she had eight percent impairment of her left leg. On April 15, 2009 Dr. Chen indicated that under Table 15-3 of the A.M.A., *Guides* appellant had an eight percent impairment of her whole person due to persistent symptoms related to her lumbar radiculopathy. However, Table 15-3 concerns diagnosis-related estimates for impairments related to lumbar spine injuries and provides impairment values for the whole person.<sup>13</sup> Dr. Chen's evaluation in this regard is of limited probative value because the Act does not provide for a schedule award for impairment to the back or to the body as a whole.<sup>14</sup> Moreover, he failed to provide a full explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board for evaluating schedule losses.<sup>15</sup>

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<sup>10</sup> See *id.* at 423, 480-481. See Table 15-15, page 424, Table 16-10, page 482.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 424.

<sup>13</sup> *Id.* at 384, Table 15-3.

<sup>14</sup> See *A.L.*, 60 ECAB \_\_\_\_ (Docket No. 08-1730, issued March 16, 2009); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

<sup>15</sup> See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989)(finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she sustained more than a three percent impairment of the left lower extremity for which she received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 8, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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