

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

E.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 10-1792
Issued: April 12, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2010 appellant filed a timely appeal from a December 28, 2009 merit decision of the Office of Workers' Compensation Programs granting her a schedule award. Pursuant to the Federal Employees' Compensation Act¹ and 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 six percent permanent impairment of the left lower extremity or any impairment of the right lower extremity.

FACTUAL HISTORY

On November 15, 1999 appellant, then a 48-year-old rural mail carrier, filed an occupational disease claim alleging that she sustained pain in her back and leg due to factors of her federal employment. She stopped work on November 17, 1999. The Office accepted

¹ 5 U.S.C. § 8101 *et seq.*

appellant's claim for spondylolisthesis and acquired spondylolisthesis. On May 24, 2006 appellant underwent a laminectomy at L4-5.²

In a report dated December 4, 2006, Dr. Mark Nelson, a Board-certified orthopedic surgeon, related that appellant's condition was permanent and stationary. He diagnosed chronic lumbar strain and degenerative spondylolisthesis at L4-5 and spondylolysis at L5-S1. Dr. Nelson discussed appellant's complaints of low back pain radiating into her left buttock and thigh. He measured motor strength of the lower extremity as 5/5 and noted that she complained of decreased sensibilities in the left L5 and S1 distribution. Dr. Nelson found that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), appellant had a 22 percent permanent impairment of the whole person due to an impairment of her lumbar spine.

On June 5, 2007 an Office medical adviser applied the A.M.A., *Guides* to Dr. Nelson's clinical findings. He found that appellant had a Grade 3 or 60 percent, impairment due to pain according to Table 15-15 on page 424 of the fifth edition of the A.M.A., *Guides*. The Office medical adviser then determined that she had the maximum impairment of 5 percent for loss of sensation at both L5 and S1 on the left, which he multiplied by the 60 percent for graded pain to find a 6 percent left lower extremity impairment. He found no impairment of the right lower extremity as appellant had no clinical findings demonstrating an impairment on that side. The Office medical adviser opined that she reached maximum medical improvement on December 4, 2006.

By decision dated March 12, 2009, the Office granted appellant a schedule award for a six percent permanent impairment of the left lower extremity. It further found that she did not have a permanent impairment of the right lower extremity.

On April 8, 2009 appellant requested an oral hearing. On October 13, 2009 she changed her request to a review of the written record.

By letter dated November 16, 2009, appellant requested that the Office consider the October 13, 2009 report from Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, in support of her schedule award claim. Dr. Tauber diagnosed status post lumbar laminectomy and fusion with sciatica. On physical examination, he found decreased sensation in the left foot and 4/5 strength of the gastroc soleus, extensor hallucis longus and left anterior tibialis musculature. Dr. Tauber opined that appellant had a right positive straight leg raise and right calf atrophy consistent with a right nerve root impairment at L4, L5 and S1. He found no motor deficit on the right. On the left side, Dr. Tauber found a sensory and motor deficit at L4, L5 and S1. He asserted that appellant's clinical findings were "significantly worse" than those described by the Office medical adviser. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Tauber determined that she had a 15 percent permanent impairment of the right lower extremity due to sensory deficit at L4, L5 and S1 and a 33 percent impairment of the left lower extremity due to a sensory and motor deficit at L4, L5 and S1.

² By decision dated November 6, 2008, the Office reduced appellant's compensation effective November 23, 2008 based on its finding that she had the capacity to earn wages as a paralegal. Appellant elected to receive retirement benefits effective January 1, 2009.

By decision dated December 28, 2009, an Office hearing representative affirmed the March 12, 2009 decision. He found that Dr. Tauber's report was insufficient to establish a greater impairment as it was based on the fifth rather than the sixth edition of the A.M.A., *Guides*.

On appeal appellant contends that Dr. Tauber used the fifth edition of the A.M.A., *Guides* to rebut the opinion of the Office medical adviser. She argues that the fifth edition of the A.M.A., *Guides* should apply as her claim was adjudicated prior to May 1, 2009.

LEGAL PRECEDENT

The schedule award provision of the Act³ and its implementing federal regulations⁴ 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 As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*. Further, any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*.⁷

After obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.⁸

ANALYSIS

The Office accepted that appellant sustained spondylolysthesis and acquired spondylolysthesis due to factors of her federal employment. Appellant underwent a laminectomy at L4-5 on May 24, 2006. She submitted a December 4, 2006 impairment evaluation from Dr. Nelson, who found that she had a 22 percent whole person impairment due

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *See C.K.*, Docket No. 09-2371 (issued August 18, 2010).

⁸ *Supra* note 6 at Chapter 2.808.6(d) (August 2002); *C.K.*, *id.*

to her lumbar spine condition. The Act, however, does not provide for impairment of the whole person.⁹ On June 5, 2007 an Office medical adviser applied the fifth edition of the A.M.A., *Guides* to Dr. Nelson's findings and concluded that appellant had a six percent permanent impairment of the left lower extremity due to sensory loss at L5 and S1 on the left side. On March 12, 2009 the Office granted appellant a schedule award for a six percent permanent impairment of the left lower extremity based on the Office medical adviser's June 5, 2007 opinion. It further found that she was not entitled to a schedule award for the right lower extremity.

Appellant requested a review of the written record and submitted an October 13, 2009 impairment evaluation from Dr. Tauber, who found loss of sensation in the left foot and a loss of strength of the left leg. On the right side, Dr. Tauber found a positive straight leg raise and atrophy of the right calf corresponding to an L4, L5 and S1 nerve root impairment. He opined that appellant's condition had significantly worsened since the Office's medical adviser rendered his opinion. Dr. Tauber applied the fifth edition of the A.M.A., *Guides* and determined that she had a 33 percent permanent impairment of the left lower extremity and a 15 percent permanent impairment of the right lower extremity. An Office hearing representative determined that his report was insufficient to show that appellant had a greater permanent impairment of the left lower extremity or any permanent impairment of the right lower extremity as he based his opinion on the fifth edition of the A.M.A., *Guides*. The hearing representative did not refer Dr. Tauber's report to an Office medical adviser for review.

While the claimant has the burden of establishing the extent of impairment due to an accepted injury, the Office shares responsibility in the development of the evidence.¹⁰ As noted Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.¹¹ Dr. Tauber provided a detailed report with a current description of decreased strength and sensory deficit sufficient to warrant review by an Office medical adviser.¹² The case will be remanded for the Office to forward Dr. Tauber's report to the Office medical adviser to determine whether it is adequate evidence to support a schedule award under the sixth edition of the A.M.A., *Guides*. Following such further development as the Office deems necessary, it should issue a *de novo* decision.

On appeal, appellant argues that her impairment should be evaluated under the fifth rather than the sixth edition of the A.M.A., *Guides*. The sixth edition of the A.M.A., *Guides*, however, is to be used in rating impairments for schedule award decisions issued after May 1, 2009.¹³

⁹ See *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁰ See *D.N.*, 59 ECAB 576 (2008).

¹¹ *Supra* note 9.

¹² See *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

¹³ See *supra* note 7.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 28, 2009 is set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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