

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

J.G., Appellant)
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)
and)
)
DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, San Diego, CA, Employer)

**Docket No. 10-1603
Issued: May 4, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 1, 2010 appellant filed a timely appeal of a May 19, 2010 Office of Workers' Compensation Programs' merit decision denying his request for 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 to consider the merits of the case.

ISSUE

The issue is whether appellant sustained ratable impairment to a scheduled member based on his accepted back injury.

FACTUAL HISTORY

This case has previously been before the Board on appeal. On August 14, 2004 appellant, then a 33-year-old transportation security screener, sustained a back injury while

¹ 5 U.S.C. § 8101 *et seq.*

lifting a heavy bag. The Office accepted his claim for thoracic and lumbar strain and sprain. It entered appellant on the periodic rolls. The Office subsequently accepted an L5-S1 disc herniation with radicular symptoms and authorized surgery. Dr. Kamshad Raiszadeh, a Board-certified orthopedic surgeon performed an L5 laminectomy with decompression of the exiting L5 nerve root on August 29, 2005. The Office referred appellant for vocational rehabilitation services.

On June 28, 2006 Dr. Raiszadeh stated that appellant's condition had stabilized. He found limited range of motion of the lumbar spine with normal motor and sensory examination. Dr. Raiszadeh diagnosed L5-S1 disc injury with back and radicular symptoms markedly improved after lumbar interbody fusion with instrumentation. He rated appellant's permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.² Dr. Raiszadeh found 20 percent impairment of the whole person due to radiculopathy and alteration of motion segment integrity. He found no objective evidence of atrophy, weakness or reflex changes.

Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, reviewed appellant's case on behalf of the Office and found that he had pain and decreased sensation along the S1 nerve root that interfered with some activity. He rated three percent impairment to each lower extremity.

By decision dated May 21, 2009, the Office granted appellant schedule awards for three percent impairment of each of his lower extremities. Appellant appealed this decision to the Board. On March 25, 2010 the Board issued an order remanding the case and directed the Office to apply the sixth edition of the A.M.A., *Guides* to calculate appellant's permanent impairment.³ On April 24, 2010 Dr. Harris reviewed appellant's claim and stated, "For purposes of calculating a schedule award for the left lower extremity utilizing the A.M.A., *Guides*, sixth edition, the claimant has two percent impairment of the left lower extremity for residual problems with moderate pain/impaired sensation from lumbar radiculopathy." He found that appellant had no ratable impairment of the right lower extremity.

By decision dated May 19, 2010, the Office denied appellant's request for an additional schedule award finding that appellant had no more than three percent impairment of each of his lower extremities for which he had received schedule awards.

LEGAL PRECEDENT

The schedule award provision of the Act⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method

² A.M.A., *Guides*, 5th ed. (2000).

³ Docket No. 09-1598 (issued March 25, 2010).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition.⁶

The Act does not authorize the payment of schedule awards for the permanent impairment of the whole person.⁷ Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.⁸ Because 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,⁹ no claimant is entitled to such an award.¹⁰

Amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹¹

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition, Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹²

ANALYSIS

The Office accepted that appellant sustained thoracic and lumbar sprains and strains and an L5-S1 disc herniation with radicular symptoms due to his August 14, 2004 employment injury. Appellant requested a schedule award and submitted a report from Dr. Raiszadeh who

⁶ *Id.* For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

⁷ *Ernest P. Govednick*, 27 ECAB 77 (1975); *W.D.*, Docket No. 10-274 (issued September 3, 2010).

⁸ *William Edwin Muir*, 27 ECAB 579 (1976); *W.D.*, *supra* note 7.

⁹ The Act itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹⁰ *Timothy J. McGuire*, 34 ECAB 189 (1982); *W.D.*, *supra* note 7.

¹¹ *Rozella L. Skinner*, 37 ECAB 398 (1986); *W.D.*, *supra* note 7.

¹² A.M.A., *Guides* 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

rated impairment under the fifth edition of the A.M.A., *Guides* and finding 20 percent impairment of the whole person. This rating is of diminished probative value. Dr. Raiszadeh did not provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. Moreover, he expressed his impairment rating in terms of the whole person. It is well established that a schedule award is not payable for impairment of the back or spine¹³ nor does the Act or implementing regulations provide a schedule award for the body as a whole.¹⁴

On April 24, 2010 Dr. Harris, the Office medical consultant, concluded that appellant had two percent impairment of his left lower extremity and no ratable impairment of his right lower extremity. He did not, however, explain how he applied the sixth edition of the A.M.A., *Guides* in reaching his determination. The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as 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.¹⁵ The Office has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹⁶ The Board will remand the case for proper application of the A.M.A., *Guides* and further medical opinion to determine the extent of permanent impairment to appellant's lower extremities.

CONCLUSION

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

¹³ See *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁴ See *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹⁵ Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, the A.M.A., *Guides* Newsletter (A.M.A., *Guides* Chicago, IL), July/August 2009.

¹⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibit 1, 4). *G.N.*, Docket No. 10-850 (issued November 12, 2010).

ORDER

IT IS HEREBY ORDERED THAT that the May 19, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceeding consistent with this opinion of the Board.

Issued: May 4, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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