

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

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**ANDREA BAKER, Appellant**

**and**

**U.S. POSTAL SERVICE, MAIN POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 04-1612  
Issued: November 29, 2004**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On June 7, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 28, 2004, which denied modification of a December 22, 2000 schedule award for a 14 percent permanent impairment of the left lower extremity and a 4 percent permanent impairment of the right lower extremity. 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 met her burden of proof to establish that she has greater than a 14 percent permanent impairment of the left lower extremity and a 4 percent permanent impairment of the right lower extremity for which she received a schedule award.

**FACTUAL HISTORY**

On June 4, 1997 appellant, then a 42-year-old clerk, filed a Form CA-1, traumatic injury claim alleging that on that day she hurt her back. On August 13, 1997 the Office accepted that

she sustained an employment-related lumbosacral strain and disc herniation at L4.<sup>1</sup> In a decision dated December 22, 2000, appellant was granted a schedule award for a 14 percent impairment of the left lower extremity and a 4 percent impairment of the right lower extremity for a total of 51.84 weeks of compensation to run from November 30, 2000 to November 27, 2001.

On May 11, 2002 appellant filed an additional schedule award claim. In a May 3, 2002 report, Dr. Patrick G. Bray, an attending physician Board-certified in occupational medicine, noted that on examination straight leg raising was negative on the right and positive on the left. He advised that pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>2</sup> under Table 15-3, she met the requirements of category 3, which was equal to a 13 percent whole person impairment. In an undated report, an Office medical adviser reviewed Dr. Bray's report and determined that appellant had a zero percent lower extremity impairment.

By report dated June 27, 2002, Dr. Joseph C. Eshelman, also Board-certified in occupational medicine and an associate of Dr. Bray,<sup>3</sup> diagnosed left L5 radiculopathy and provided findings under Chapter 15 of the A.M.A., *Guides*, finding that under Table 15-5 appellant had a Grade 2 sensory deficit of the left L5 nerve root and under Table 15-6, a Grade 3 motor deficit of the L5 nerve root. He determined that under Table 15-8, appellant had a 4 percent sensory loss and a 19 percent strength loss of the left lower extremity which equated to a 14 percent whole person impairment. In a report dated July 15, 2002, an Office medical adviser, Dr. Andrea Young, a surgeon, reviewed Dr. Eshelman's report and the medical record and advised that appellant had no lower extremity impairment.

Finding a conflict between the opinions of Dr. Eshelman and Dr. Young, the Office medical adviser, on October 29, 2002 the Office referred appellant to Dr. Bernard N. Stulberg, Board-certified in orthopedic surgery, for an impartial impairment evaluation. In a November 7, 2002 report, she advised that appellant had been evaluated under the fifth edition of the A.M.A., *Guides*.<sup>4</sup> Dr. Stulberg concluded that appellant had a 10 percent permanent impairment with an additional 3 percent for pain.

In a report dated December 5, 2002, Dr. Nabil F. Angley, an Office medical consultant, Board-certified in orthopedic surgery, advised that he was unable to provide an impairment rating after review of Dr. Stulberg's report, as he provided a rating for the spine and not for the lower extremities. Dr. Angley suggested that a supplementary report be obtained from Dr. Stulberg. In a supplemental report dated February 10, 2003, Dr. Stulberg advised that as

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<sup>1</sup> The record also indicates that appellant filed a claim for a recurrence of disability beginning April 14, 1998. By decision dated May 28, 1998, the Office denied the claim. Following an appeal, by decision dated March 29, 2000 Docket No. 98-2548, the Board remanded the case to the Office for further development. On June 9, 2000 the Office accepted that the recurrence of disability was causally related to the employment injury. Appellant also has a claim for a stress-related condition.

<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> Dr. Eshelman had provided the impairment rating used in determining appellant's December 22, 2000 schedule award.

<sup>4</sup> A.M.A., *Guides supra* note 2.

appellant's impairment related to the spine, he could not provide a lower extremity impairment rating. On February 27, 2003 Dr. Angley advised that the Office should obtain another impartial evaluation.

On April 30, 2003 the Office referred appellant to Dr. Robert C. Corn, a Board-certified orthopedic surgeon, for an impartial examination and impairment rating. In a report dated May 24, 2003, he advised that, under the fifth edition of the A.M.A., *Guides* and appellant's range of motion of the lumbar spine, she had a 16 percent whole person impairment with an additional 2 percent sensory impairment and a 5 percent loss of strength impairment, to total a 23 percent whole person impairment. In a June 25, 2003 report, Dr. Angley advised that a supplementary report was needed from Dr. Corn. On July 29, 2003 Dr. Corn stated that he utilized the fourth edition of the A.M.A., *Guides* and determined that appellant had 2.5 centimeter of atrophy of the left calf and thigh when compared to the right which, under Table 37, would indicate a 10 percent permanent impairment of the whole person. Dr. Corn further advised that appellant had Grade 4 ankle weakness and that under Table 39, diminished dorsiflexion, plantar flexion, inversion and eversion totaled a 16 percent lower extremity impairment. He concluded that appellant had a 26 percent permanent impairment of the left lower extremity.

In a September 29, 2003 report, Dr. Corn utilized the fifth edition of the A.M.A., *Guides*, and advised that maximum medical improvement had been reached on December 30, 2000. He stated that under Table 15-18, appellant had a 4 percent sensory impairment and a 25 percent motor impairment on the left, to equal a 29 percent permanent impairment of the whole person. He further advised that according to Table 17-6, appellant had a 3 percent whole person impairment for left thigh atrophy and a 3 percent impairment for left calf atrophy. Dr. Corn further found that under Table 17-8, she had a 16 percent impairment due to muscle weakness in all directions and that under Tables 17-11 and 17-12, there was a 3 percent impairment for diminished dorsiflexion, 1 percent for plantar flexion, 2 percent for inversion and 1 percent for eversion, to total 7 percent for decreased range of motion on the left.

In an October 26, 2003 report, an Office medical adviser, Dr. Young, noted deficiencies in Dr. Corn's report, specifically advising that sensory and motor deficits should be graded per Tables 16-10 and 16-11, respectively and should provide specific measurements for loss of range of motion. Following a request by the Office, in a November 25, 2003 report, Dr. Corn again described his findings and conclusions, advising that appellant had a Grade 5 sensory deficit. In a December 29, 2003 report, the Office medical consultant, Dr. Angley, stated that he could not determine a permanent partial impairment based on his review of Dr. Corn's November 25, 2003 report.

The Office then submitted a set of questions to Dr. Anthony M. Harris, a Board-certified surgeon and Office medical adviser. In a report dated March 3, 2004, he reviewed the medical reports and noted that the fifth edition of the A.M.A., *Guides* outlined a method for calculation of sensory and motor deficits of the lower extremity. Dr. Harris advised that Dr. Corn had not used this format, but that based on his analysis of Dr. Corn's findings, appellant had an eight percent impairment of the left lower extremity. Dr. Harris stated that under Table 17-37, a maximum sciatic nerve sensory impairment was 5 percent which when multiplied by the 25 percent Grade 4 sensory deficit found in Table 16-10 equaled a 1.25 percent sensory impairment and a 30

percent motor deficit multiplied by the 25 percent Grade 4 deficit found in Table 16-11 equaled a 7.5 percent motor impairment. He concluded that under the Combined Values Chart appellant had an eight percent left lower extremity impairment.

By decision dated April 28, 2004, the Office found that there was no medical evidence of record to indicate that appellant had greater impairment of the right lower extremity and was not entitled to an additional award. The Office also found that the medical evidence did not establish greater than the 14 percent previously awarded. As such, she was not entitled to an increased schedule award.

### **LEGAL PRECEDENT**

Under section 8107 of the Federal Employees' Compensation Act<sup>5</sup> and section 10.404 of the implementing federal regulation,<sup>6</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*<sup>7</sup> has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>8</sup>

The Act, at 5 U.S.C. § 8123(a), provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

### **ANALYSIS**

The Board finds that appellant has not established that she is entitled to more than the four percent impairment of the right lower extremity for which she received a schedule award. There is no medical evidence of record to indicate that she has greater right lower extremity impairment. The Board, however, finds that this case is not in posture for a decision regarding whether appellant is entitled to an increased schedule award for her left lower extremity. On December 22, 2000 she was awarded a 14 percent impairment of the left lower extremity. On April 28, 2004 the Office found that the medical evidence did not establish more than the 14 percent previously awarded.

After Dr. Stulberg was unable to resolve the medical conflict, between Dr. Eshelman for appellant and an Office medical adviser for the Office regarding permanent impairment, the

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> A.M.A., *Guides*, *supra* note 2.

<sup>8</sup> See *Joseph Lawrence, Jr.*, 53 ECAB \_\_\_\_ (Docket No. 01-1361, issued February 4, 2002); *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

Office referred appellant to Dr. Corn.<sup>9</sup> He examined appellant on May 19, 2003 and provided reports dated May 24, July 29, September 29 and November 25, 2003, in which he attempted to explain his impairment rating for her left lower extremity. As noted by a number of Office medical advisers, Dr. Corn initially provided ratings under Chapter 15, which provides guidelines for estimating impairment due to disorders of the spine. A schedule award, however, is not payable under the Act for injury to the spine.<sup>10</sup> In 1960, amendments to the Act 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. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>11</sup> Dr. Corn then provided analysis under the fourth edition of the A.M.A., *Guides*. Office procedures, however, direct the use of the fifth edition of the A.M.A., *Guides* for schedule awards determined on and after February 1, 2001.<sup>12</sup> Dr. Corn's reports contain further deficiencies, because he stated that appellant had a Grade 5 sensory deficit which he equated to 25 percent. Table 16-10 of the A.M.A., *Guides* states that a Grade 5 impairment is equal to a 0 percent impairment.<sup>13</sup> The Board, therefore, finds Dr. Corn's reports insufficient to establish the degree of appellant's left lower extremity impairment.

Section 17.21 of the A.M.A., *Guides* describes the procedure to be followed in determining peripheral nerve injuries<sup>14</sup> and Table 17-37 provides impairment ratings based on motor and sensory deficits and dysesthesias of specific nerves.<sup>15</sup> Under Table 17-37 the maximum allowed for the sciatic nerve sensory deficits is a 17 percent lower extremity impairment; the maximum motor deficit is 75 percent and the maximum for dysesthesia is 12 percent.<sup>16</sup> In a March 3, 2004 report, Dr. Harris, an Office medical adviser, related Dr. Corn's findings to a whole person impairment under Tables 17-37, 16-10 and 16-11, as he found a 30 percent motor impairment and a 5 percent sensory impairment,<sup>17</sup> which under Table 17-37, relate

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<sup>9</sup> When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report. *April Ann Erickson*, 28 ECAB 336, 341-42 (1977). However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue. *Harold Travis*, 30 ECAB 1071, 1078 (1979).

<sup>10</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>11</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>12</sup> *Joseph Lawrence, Jr.*, *supra* note 8.

<sup>13</sup> A.M.A., *Guides*, *supra* note 2 at 482.

<sup>14</sup> *Id.* at 550-52.

<sup>15</sup> *Id.* at 552.

<sup>16</sup> *Id.*

<sup>17</sup> The Board notes that the latter refers to the whole person impairment for dysesthesia of the sciatic nerve. *Id.*

to a whole person impairment.<sup>18</sup> A schedule award is not payable for an impairment of the whole person.<sup>19</sup> The Board, therefore, finds that as both Dr. Corn's and Dr. Harris' reports are not fully rationalized, the case must be remanded to the Office. The Office should refer the case to another impartial examiner<sup>20</sup> to make findings under the guidelines found under section 17.21 of the fifth edition of the A.M.A., *Guides* for peripheral nerve injuries to be followed by an appropriate decision.

### CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she is entitled to greater than the four percent impairment she was previously awarded for her right lower extremity. The Board further finds that this case is not in posture for a decision regarding whether appellant is entitled to a schedule award greater than the 14 percent previously awarded for her left lower extremity.

### ORDER

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 28, 2004 be affirmed in part, concerning the four percent impairment of the right lower extremity and vacated in part and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: November 29, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>18</sup> A.M.A., *Guides*, *supra* note 2 at 552.

<sup>19</sup> *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

<sup>20</sup> *See supra* note 9.