

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

D.D., Appellant)

and)

GENERAL SERVICES ADMINISTRATION,)
Philadelphia, PA, Employer)

Docket No. 08-255
Issued: August 20, 2008

Appearances:

Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 2, 2007 appellant, through counsel, filed a timely appeal from the October 19, 2007 merit decision of the Office of Workers' Compensation Programs, finding 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant has more than 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On April 11, 2000 appellant, then a 53-year-old maintenance mechanic, sustained a traumatic injury to his back and shoulder while removing and replacing manhole covers. He tried to prevent one from falling into an opening. The Office accepted the claim for thoracic and

lumbar sprains, aggravation of cervical and lumbar degenerative disc disease, left elbow ulnar neuropathy, a single episode of major depression and post-traumatic stress disorder.

On April 13, 2003 appellant requested a schedule award. He submitted a February 5, 2003 medical report from Dr. George L. Rodriguez, an attending Board-certified physiatrist, who found that appellant sustained 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

On April 25, 2003 an Office medical adviser reviewed Dr. Rodriguez's report and agreed with his finding that appellant sustained 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity. The medical adviser opined that appellant reached maximum medical improvement on February 5, 2003.

By decision dated June 25, 2003, the Office granted appellant schedule awards for 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity.

On June 26, 2007 appellant requested an additional schedule award. In an April 17, 2007 report, Dr. Rodriguez provided his findings of limited range of motion of the back and lower extremities on physical examination. He reported decreased sensation of the cervical spine and upper extremities on neurological examination. Dr. Rodriguez stated that appellant sustained cervical herniated nucleus pulposus at C4-5, C5-6 and C6-7, bulging discs at C2-3, C3-4, C7-T1, L3-4, L4-5 and L5-S1, lumbar radiculopathy, neuritis of the left elbow ulnar nerve, gait abnormality, bowel and bladder dysfunction, depression and post-traumatic stress disorder. He opined that the diagnosed conditions were caused by the April 11, 2000 employment injury. Appellant reached maximum medical improvement on March 31, 2007.

Dr. Rodriguez noted a Grade 3 sensory loss (60 percent) associated with the ulnar nerve distribution above the mid forearm for the left arm which, when multiplied by the 7 percent maximum value for ulnar nerve loss, yielded 4 percent impairment of the left upper extremity (A.M.A., *Guides* 482, 492, Tables 16-10, 16-15). Regarding the right upper extremity, Dr. Rodriguez multiplied 60 percent of 8 percent for the maximum sensory loss for C6 which represented 5 percent. He stated that, for the C7 nerve roots, appellant had a sensory deficit of 5 percent and multiplied this by the 50 percent of Grade 3 sensory loss for the nerve root at C7 and determined that this resulted in 3 percent. (A.M.A., *Guides* 482, 489, Tables 16-10 and 16-13). Dr. Rodriguez combined the five percent of nerve root C6 with the three percent for nerve root C7, resulting eight percent. He classified appellant's sensory nerve loss to the left lower sciatic nerve as Grade 3, which he stated corresponded to 50 percent sensory deficit. The maximum sensory impairment of the sciatic nerve was 17 percent, resulting in 9 percent impairment (A.M.A., *Guides* 482, 552, Tables 16-10 and 17-37). Dr. Rodriguez further addressed the motor deficit of appellant's left lower extremity. He found 37 percent for a Grade 3 motor strength deficit of the gluteus max extensor muscle, 12 percent for a Grade 4 motor strength deficit of the quad extensor, 17 percent for a Grade 3 motor strength deficit of the biceps femoris flexor, 25 percent for a Grade 3 motor strength deficit of the gastrocnemius flexor, 12 percent for a Grade 4 motor strength deficit of the anterior tibial extensor and 2 percent for a Grade 4 motor strength deficit of the hallucis longus extensor, resulting in 71 percent impairment (A.M.A., *Guides* 484,

532, Tables 16-11 and 17-8). Dr. Rodriguez combined the maximum sensory deficit of 9 percent with the 71 percent maximum motor deficit to find that appellant sustained 74 percent impairment of the left lower extremity.

By letter dated September 11, 2007, the Office referred appellant, together with a statement of accepted facts, the case record and a list questions to be addressed, to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a September 26, 2007 report, Dr. Hanley reviewed a history of the April 11, 2000 employment injury and appellant's medical records. On physical examination, he found no motor deficit of the left lower extremity. Dr. Hanley reported paresthesias in the distribution of the L5 and S1 dermatomes on sensory examination. He rated a Grade 3 sensory loss at the 25 percent sensory level (A.M.A., *Guides* 484, Table 16-11). Dr. Hanley stated that appellant had distorted superficial tactile sensibility, diminished light touch and two-point with some abnormal sensations or slight pain. He opined that the sensory deficit was anywhere between 26 and 60 and estimated 50 percent sensory deficit. Dr. Hanley stated that appellant sustained chronic degenerative disc disease spinal axis with left-sided radicular symptomatology. He opined that appellant continued to experience residuals of the accepted employment injury. Dr. Hanley stated that the diagnosed contusion had stabilized and was not progressive. He found no nonindustrial or preexisting disabilities. Dr. Hanley found that appellant was unfit for his prior occupation but he could perform light-duty work with a permanent limitation of lifting no more than 10 pounds. He determined that 50 percent sensory loss of L5 and S1 represented 3 percent impairment of each nerve (A.M.A., *Guides* 424, Table 15-18). Dr. Hanley added the three percent impairments to calculate a six percent impairment of the left lower extremity (A.M.A., *Guides* 4, Table 16-11). He stated that none of the additional impairments outlined by Dr. Rodriguez had any credence. Dr. Hanley's findings were inaccurate and unrelated to the April 11, 2000 employment injury. He concluded that appellant did not sustain any additional impairment to the left lower extremity.

On October 13, 2007 Dr. Arnold T. Berman, an Office medical adviser, reviewed the reports of Dr. Rodriguez and Dr. Hanley. He stated that Dr. Hanley correctly noted that Dr. Rodriguez had not properly utilized the A.M.A., *Guides* because he attributed appellant's impairment to peripheral nerve injuries rather than nerve roots of the lumbar spine secondary to disc abnormalities. Dr. Berman stated that it was clear that appellant did not have peripheral nerve injuries and it was not appropriate for Dr. Rodriguez to utilize sciatic nerve weakness and sensory loss as the sciatic nerve was not involved. He stated that Dr. Rodriguez's impairment rating for loss of strength based on specific muscle groups was not appropriate based on section 16.8a on page 508 of the A.M.A., *Guides* which provided that decreased strength cannot be rated in the presence of painful conditions and impairment ratings should be based on objective anatomic findings to take precedence. Dr. Berman related that Dr. Rodriguez should not have used Table 16-11 on page 484 of the A.M.A., *Guides* combined with Table 17-8 on page 532 of the A.M.A., *Guides*. He stated that appellant had left-sided radicular surgery which should be related to L5 and S1 nerve roots. Dr. Berman determined that the maximum impairment for sensory deficit or pain for these nerve roots was five percent each (A.M.A., *Guides* 424, Table 15-18). He then determined that 50 percent sensory loss of L5 and S1 represented a 2.5 or 3 percent impairment for each nerve. Dr. Berman added these impairment ratings to calculate a six percent impairment of the left lower extremity (A.M.A., *Guides* 484, Table 16-11). He opined

that appellant was not entitled to an additional schedule award for the left lower extremity. Dr. Berman further opined that appellant was not entitled to an additional schedule award for the left upper extremity based on Dr. Hanley's report. He concluded that appellant reached maximum medical improvement on September 26, 2007.

By decision dated October 19, 2007, the Office found that appellant was not entitled to an additional schedule award for his left upper and lower extremities based on Dr. Hanley's September 26, 2007 and Dr. Berman's October 13, 2007 opinions.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.³ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.⁵ Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.⁶

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the protocols of the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. In such cases, the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.⁷

¹ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.404.

³ 5 U.S.C. § 8107(c)(19).

⁴ 20 C.F.R. § 10.404.

⁵ *See Paul A. Toms*, 28 ECAB 403 (1987).

⁶ A.M.A., *Guides*, Chapter 16, The Upper Extremities, pp. 433-521 (5th ed. 2001).

⁷ *See John L. McClanic*, 48 ECAB 552 (1997); *see also Paul R. Evans*, 44 ECAB 646, 651 (1993).

ANALYSIS

The Office accepted that appellant sustained thoracic and lumbar sprains, aggravation of cervical and lumbar degenerative disc disease, left elbow ulnar neuropathy, a single episode of major depression and post-traumatic stress disorder. On June 25, 2003 appellant received a schedule award for 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity. By decision dated October 19, 2007, the Office found that he was not entitled to any additional schedule award. The Board finds that appellant has not met his burden to establish that he has impairment greater than that already awarded.

On April 17, 2007 Dr. Rodriguez, an attending physician, noted a Grade 3 sensory loss (60 percent) associated with the ulnar nerve distribution above the mid forearm for the left arm which, when multiplied by the 7 percent maximum value for ulnar nerve loss, yielded 4 percent impairment of the left upper extremity (A.M.A., *Guides* 482, 492, Tables 16-10 and 16-15, respectively). Dr. Rodriguez classified appellant's sensory nerve loss to the left lower sciatic nerve as Grade 3, which he stated corresponded to 50 percent sensory deficit. The maximum sensory impairment of the sciatic nerve was 17 percent, resulting in 9 percent impairment (A.M.A., *Guides* 482, 552, Tables 16-10 and 17-37, respectively). Dr. Rodriguez further determined the motor deficit of appellant's left lower extremity. He found 37 percent for a Grade 3 motor strength deficit of the gluteus max extensor muscle, 12 percent for a Grade 4 motor strength deficit of the quad extensor, 17 percent for a Grade 3 motor strength deficit of the biceps femoris flexor, 25 percent for a Grade 3 motor strength deficit of the gastrocnemius flexor, 12 percent for a Grade 4 motor strength deficit of the anterior tibial extensor and 2 percent for a Grade 4 motor strength deficit of the hallucis longus extensor, resulting in 71 percent impairment (A.M.A., *Guides* 484, 532, Tables 16-11 and 17-8). Dr. Rodriguez combined the maximum sensory deficit of 9 percent with the 71 percent maximum motor deficit to find that appellant sustained 74 percent impairment of the left lower extremity.

As noted, Dr. Rodriguez calculated an impairment rating for sensory loss of the sciatic nerve in appellant's left lower extremity. The Board notes, however, that the sciatic nerve was not involved. Therefore, the Board finds that his impairment rating based on the sciatic nerve, rather than specific nerve roots, was inappropriate as appellant's accepted conditions pertain to various nerve roots, namely L5 and S1.

Chapter 16.8a on page 508 of the A.M.A. *Guides* provides that loss of grip strength may be rated separately only if the loss of strength represents an impairing factor that has not been considered adequately by the other methods of the A.M.A., *Guides*. As the criteria for rating such weakness relies on subjective factors which are difficult to control, the A.M.A., *Guides* do not assign a large role to such measurements. The A.M.A., *Guides* clearly state that impairment ratings based on objective anatomic findings take precedence. Dr. Rodriguez did not adequately explain why strength deficit was an appropriate rating method to apply in determining appellant's left lower extremity impairment. He did not explain why his loss of strength represented an impairing factor that had not been considered adequately by other methods in the A.M.A., *Guides*. Further the sciatic nerve was not involved in appellant's case.

Dr. Hanley, an Office referral physician, and Dr. Berman, an Office medical adviser, agreed that appellant sustained six percent impairment of the left lower extremity. They

determined that 50 percent sensory loss of L5 and S1 represented 3 percent impairment of each nerve (A.M.A., *Guides* 484, Table 16-11). These impairment ratings were added to calculate six percent impairment of the left lower extremity. As appellant's accepted conditions pertain to various nerve roots, namely L5 and S1, Dr. Berman's rationale for not using Dr. Rodriguez's impairment rating for the left lower extremity is supported by the record. Dr. Hanley and Dr. Berman properly utilized the A.M.A., *Guides* and provided rationale in determining that appellant does not have more than 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity. The Board finds that the opinions of Dr. Hanley and Dr. Berman represent the weight of the medical evidence of record. Appellant has no more than 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than 54 percent impairment of the left lower extremity and 3 percent impairment of the left upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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