# United States Department of Labor Employees' Compensation Appeals Board

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**R.L., Appellant** 

and

# U.S. POSTAL SERVICE, POST OFFICE, Manchester, NH, Employer

Docket No. 07-1568 Issued: July 11, 2008

Appearances: James G. Noucas, Jr., Esq., for the appellant Office of Solicitor, for the Director Case Submitted on the Record

# **DECISION AND ORDER**

Before: DAVID S. GERSON, Judge COLLEEN DUFFY KIKO, Judge JAMES A. HAYNES, Alternate Judge

#### **JURISDICTION**

On April 22, 2007 appellant filed a timely appeal from the February 22, 2007 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

### <u>ISSUE</u>

The issue is whether appellant is entitled to an additional schedule award for each of his lower extremities.

## FACTUAL HISTORY

This case is on appeal to the Board for the sixth time.<sup>1</sup> By decision dated December 23, 1993, the Board found that the Office did not abuse its discretion in denying authorization for the

<sup>&</sup>lt;sup>1</sup> This case was adjudicated by the Office under file number 020260095. On October 9, 1987 appellant, then a 40-year-old distribution clerk, sustained an employment-related lumbar strain. The case was later expanded to include sciatica and myofascial pain syndrome. Appellant has not worked since December 1993 and is receiving wage-loss compensation under file number 010312958, accepted for carpal tunnel syndrome. In the instant case, on

purchase of orthopedic work boots.<sup>2</sup> In a June 3, 1996 order, the Board dismissed appellant's appeal for lack of jurisdiction.<sup>3</sup> By decision dated February 16, 2005, the Board found that the case was not in posture for decision with respect to a schedule award determination and set aside an Office decision dated March 18, 2004 that denied modification of its November 26, 2002 schedule award. The Board remanded the case to the Office for an Office medical adviser to review the March 7, 2002 opinion of Dr. Frank A. Graf, a Board-certified orthopedic surgeon, who had provided an impartial evaluation for the Office.<sup>4</sup> On December 20, 2005 the Board found that Dr. Graf's report established that appellant had a total 62 percent impairment to his lower extremities and remanded the case to the Office for an additional schedule award.<sup>5</sup> By decision dated January 22, 2007, the Board found that appellant was entitled to a 62 percent total impairment for each lower extremity and remanded the case to the Office for an additional schedule award.<sup>6</sup> The law and the facts of the previous Board decisions are incorporated herein by reference. Subsequent to the Board's January 22, 2007 decision, on February 22, 2007 the Office granted appellant a schedule award for an additional 24 percent impairment.

# **LEGAL PRECEDENT**

Under section 8107 of the Federal Employees' Compensation Act<sup>7</sup> and section 10.404 of the implementing federal regulations,<sup>8</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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>9</sup> has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>10</sup>

<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence*, Jr., 53 ECAB 331 (2002).

<sup>10</sup> See Joseph Lawrence, Jr., id.; James J. Hjort, 45 ECAB 595 (1994); Leisa D. Vassar, 40 ECAB 1287 (1989); Francis John Kilcoyne, 38 ECAB 168 (1986).

November 26, 2002 he was granted a schedule award for a 16 percent impairment on the right and a 14 percent impairment on the left. On March 29, 2005 he was granted a schedule award for an additional eight percent and on March 1, 2006 a schedule award for an additional 24 percent.

<sup>&</sup>lt;sup>2</sup> Docket No. 93-205 (issued December 23, 1993).

<sup>&</sup>lt;sup>3</sup> Docket No. 94-1140 (issued June 3, 1996).

<sup>&</sup>lt;sup>4</sup> 56 ECAB 341 (2005).

<sup>&</sup>lt;sup>5</sup> Docket No. 05-1382 (issued December 20, 2005).

<sup>&</sup>lt;sup>6</sup> Docket No. 06-937 (issued January 22, 2007).

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.<sup>11</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>12</sup> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.<sup>13</sup>

### <u>ANALYSIS</u>

The Board finds that appellant is entitled to an additional 18 percent impairment of the right lower extremity and an additional 20 percent impairment of the left lower extremity, to total a 62 percent impairment for each. A review of the schedule awards appellant has received in the past shows that on November 26, 2002 he was granted schedule awards for a 16 percent right lower extremity impairment and a 14 percent impairment on the left. On March 29, 2005 he was granted a schedule award for an additional eight percent (or four percent on each side). On March 1, 2006 he was granted a schedule award for an additional 24 percent (or 12 percent on each side), and on February 22, 2007 for an additional 24 percent (or 12 percent on each side). Appellant has therefore received schedule awards totaling 44 percent on the right and 42 percent on the left.<sup>14</sup> As the Board has found previously,<sup>15</sup> the medical evidence, as characterized by the referee opinion of Dr. Graf, establishes that appellant is entitled to an additional 18 percent impairment on the right and an additional 20 percent impairment on the left. The case must be remanded for the Office to issue additional schedule awards.

### **CONCLUSION**

The Board finds that appellant is entitled to a 62 percent impairment for each lower extremity.

<sup>&</sup>lt;sup>11</sup> Pamela J. Darling, 49 ECAB 286 (1998).

<sup>&</sup>lt;sup>12</sup> Thomas J. Engelhart, 50 ECAB 319 (1999).

<sup>&</sup>lt;sup>13</sup> Patricia J. Penney-Guzman, 55 ECAB 757 (2004).

<sup>&</sup>lt;sup>14</sup> Supra note 1.

<sup>&</sup>lt;sup>15</sup> Supra notes 5 and 6.

## <u>ORDER</u>

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 22, 2007 be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: July 11, 2008 Washington, DC

> David S. Gerson, Judge Employees' Compensation Appeals Board

> Colleen Duffy Kiko, Judge Employees' Compensation Appeals Board

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