

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

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**S.K., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
U.S. SECRET SERVICE UNIFORMED  
DIVISION, Memphis, TN, Employer**

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**Docket No. 09-425  
Issued: August 18, 2009**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 28, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated January 9 and October 9, 2008 which denied an increased schedule award. 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 is entitled to an increased schedule award for his left lower extremity, greater than the 10 percent impairment previously awarded, as a result of his accepted employment injury or authorized surgeries.

**FACTUAL HISTORY**

On July 10, 2001 appellant, then a 29-year-old special agent, filed a traumatic injury claim alleging that on July 9, 2001 he experienced a sharp pain in his lower back and continuous pain in his left leg. By decision dated October 9, 2001, the Office denied his claim. It found the

evidence insufficient to establish that he sustained a medical condition causally related to the accepted July 9, 2001 employment incident. On April 4, 2002 appellant requested reconsideration. By decision dated June 4, 2002, the Office vacated the October 9, 2001 decision. It found the evidence sufficient to establish that appellant sustained left herniated nucleus pulposus at L5 causally related to the accepted July 9, 2001 employment incident and accepted his claim. On August 28, 2002 the Office authorized a lumbar discectomy which was performed on September 11, 2002 by Dr. Keith D. Williams, an attending Board-certified orthopedic surgeon.

On October 4, 2002 appellant filed a claim (Form CA-7) for a schedule award. By decision dated September 24, 2003, the Office granted him a schedule award for a 10 percent impairment of the left lower extremity.

On March 21 and July 3, 2006 Dr. Williams performed left L5 discectomy revision due to recurrent left L5 disc herniation which was authorized by the Office.

On March 25, 2007 appellant filed a Form CA-7 claim for an additional schedule award. In a March 20, 2007 medical report, Dr. Williams stated that appellant sustained a 15 percent impairment of the whole person which constituted a 38 percent impairment of the left lower extremity based on Table 17-3 on page 527 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed. 2001).

On April 24, 2007 Dr. G.M. Pujadas, an Office medical adviser, reviewed appellant's medical records. He stated that the July 3, 2006 revision surgery did not improve appellant's clinical factors. Dr. Pujadas opined that appellant's 10 percent impairment rating for the left lower extremity had not changed.

By decision dated June 6, 2007, the Office denied appellant's claim for an increased schedule award based on Dr. Pujadas' April 24, 2007 opinion. On July 11, 2007 appellant requested reconsideration. In a June 29, 2007 treatment note, Dr. Williams stated that his symptoms had significantly worsened since his initial impairment rating in 2003. Appellant's leg pain was more distal and severe in nature. He had minimal weakness in the S1 distribution which he did not have before. Dr. Williams stated that his 38 percent impairment rating for the left lower extremity was based on the diagnosis-related estimate (DRE) Category III in the A.M.A., *Guides* with a conversion to impairment from the whole person to the lower extremity. He related that his impairment rating included the previously awarded 10 percent impairment rating.

On September 25, 2007 Dr. Robert Wysocki, an Office medical adviser, reviewed appellant's medical records. He noted that, although appellant continued to experience back and left leg pain following the July 3, 2006 surgery, he returned to full-duty work on January 19, 2007. Dr. Wysocki stated that appellant reached maximum medical improvement on June 29, 2007. He determined that appellant sustained a three percent impairment of the left lower extremity for high severity Grade 3 pain in the distribution of the S1 nerve root (A.M.A., *Guides* 424, Tables 15-15 and 15-18). Dr. Wysocki further determined that appellant sustained two percent impairment for low-mid severity Grade 4 motor deficit in distribution of the S1 nerve root (A.M.A., *Guides* 424, Tables 15-15 and 15-18). He combined the three percent

impairment rating for pain and the two percent impairment for motor deficit to calculate a five percent impairment of the left lower extremity (A.M.A., *Guides* 604 and Combined Values Chart). Dr. Wysocki stated that, since this impairment rating was less than the prior schedule award, appellant was not entitled to an increased schedule award.

By decision dated October 18, 2007, the Office denied modification of the June 6, 2007 decision. It found that appellant was not entitled to an increased schedule award based on Dr. Wysocki's September 25, 2007 opinion. On October 31, 2007 appellant requested reconsideration.

On December 26, 2007 Dr. Wysocki again reviewed appellant's medical records. He reiterated his prior opinion that appellant sustained a five percent impairment of the left lower extremity (A.M.A., *Guides* 424, 604, Tables 15-15 and 15-18, Combined Values Chart).

By decision dated January 9, 2008, the Office denied modification of the October 18, 2007 decision. Appellant requested reconsideration on July 7, 2008.

In a July 3, 2008 letter, Dr. Williams contended that Dr. Wysocki improperly used the range of motion methodology in rating appellant's impairment. He, however, stated that Dr. Wysocki properly utilized Tables 15-15 and 15-18 of the A.M.A., *Guides* in determining that appellant sustained an eight percent impairment of the left lower extremity. Dr. Williams related that, based on section 15.8, range of motion method, on page 398 of the A.M.A., *Guides*, Dr. Wysocki failed to include range of motion of the impaired spine and accompanying diagnoses listed in Table 15-7 on page 404 of the A.M.A., *Guides* with his spinal nerve deficit impairment rating. He stated that no range of motion determinations had been obtained. Dr. Williams determined that appellant sustained a 10 percent impairment of the whole person based on Table 15-7 under Category II, intervertebral discs or other soft tissue lesion, which constituted a 25 percent impairment based on Table 17-3 on page 527 of the A.M.A., *Guides*. He combined this 25 percent impairment of the back with Dr. Wysocki's 8 percent impairment to calculate a 31 percent impairment of the lower extremity (A.M.A., *Guides* 604, Combined Values Chart). Dr. Williams, however, stated that this impairment rating was still incomplete as it did not include the necessary element of a range of motion evaluation as directed by the A.M.A., *Guides*. He noted that his previous finding of 38 percent impairment was based on the DRE methodology and, appellant's additional surgery and residual symptoms. Dr. Williams stated that if the range of motion method must be used, it would require range of motion determinations to be made. He further stated if appellant sustained an impairment based on this element, then it would have to be added to the 31 percent impairment rating utilizing the Combined Values Chart.

On September 24, 2008 Dr. Amon Ferry, an Office medical adviser, reviewed appellant's medical records. He stated that Dr. Williams' 38 percent impairment for the left lower extremity did not conform to the A.M.A., *Guides* as he utilized Table 17-3 to award impairment of the whole person and suggested determining permanent impairment for decreased range of motion of the back. Dr. Ferry noted that a schedule award cannot be awarded for the axial skeleton or person as a whole but, only for the extremities under the A.M.A., *Guides*. He stated that, under this guideline, impairment for the whole person or range of motion of the spine could not be awarded. He further stated that using Table 17-3 to calculate permanent impairment from whole

person impairment was inappropriate. Dr. Ferry concluded that Dr. Williams' impairment rating should be disregarded. He opined that there was no additional medical evidence that warranted a change in appellant's schedule award.

In an October 9, 2008 decision, the Office denied modification of the January 9, 2008 decision. It found that appellant did not sustain more than a 10 percent impairment of the left lower extremity based on Dr. Ferry's September 24, 2008 opinion.

### **LEGAL PRECEDENT**

A claim for an increased schedule award may be based on new exposure.<sup>1</sup> Absent any new exposure to employment factors, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.<sup>2</sup>

In determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.<sup>3</sup> Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.<sup>4</sup>

The schedule award provision of the Federal Employees' Compensation Act<sup>5</sup> and its implementing regulations<sup>6</sup> sets 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.<sup>7</sup> 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, under the law 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.<sup>8</sup>

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<sup>1</sup> *Linda T. Brown*, 51 ECAB 115 (1999).

<sup>2</sup> *Id.*

<sup>3</sup> *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (November 1998).

<sup>5</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> 5 U.S.C. § 8107(c)(19).

<sup>8</sup> 20 C.F.R. § 10.404.

## ANALYSIS

Appellant previously received a schedule award for 10 percent impairment of his left lower extremity due to his accepted left herniated nucleus pulposus at L5 and lumbar discectomy. He subsequently filed a claim for an increased schedule award for his accepted condition, including additional surgeries. In a March 20, 2007 report, Dr. Williams, an attending physician, stated that appellant sustained a 15 percent impairment of the whole person which constituted a 38 percent impairment of the left lower extremity (A.M.A., *Guides* 527 and Table 17-3). His June 29, 2007 treatment note explained that his 38 percent impairment rating included the 10 percent impairment previously awarded and was based on the DRE Category III in the A.M.A., *Guides*. Dr. Williams related that appellant's symptoms significantly worsened since his initial impairment rating in 2003. He further related that his leg pain was more distal and severe in nature and he had minimal weakness in the S1 distribution which he had not previously experienced. The Board finds that Dr. Williams' use of Table 17-3 to convert his back derived 15 percent impairment of the whole person to a 38 percent left lower extremity impairment is of limited probative value as it was impermissibly based on back impairment. The Board notes that the DRE Category III relates to the lumbosacral spine (A.M.A., *Guides* 384-88, section 15.4). Neither the Act, nor the implementing federal regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. A claimant is not entitled to such a schedule award.<sup>9</sup> The Board notes that section 8101(20) of the Act specifically excludes the back from the definition of organ.<sup>10</sup> A claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originates in the spine. However, the Board finds that appellant did not submit sufficient medical evidence to support any additional impairment to his left lower extremity causally related to the accepted back condition.<sup>11</sup>

When the medical evaluator improperly uses the A.M.A., *Guides* and the Office may follow the advice of the Office medical adviser if he or she has properly used the A.M.A., *Guides*.<sup>12</sup> In this case, the Office medical advisers, Dr. Pujadas, Dr. Wysocki and Dr. Ferry determined that appellant did not sustain any increased impairment to the left lower extremity. Dr. Pujadas opined that appellant's prior schedule award for a 10 percent impairment of the left lower extremity remained unchanged as the July 3, 2006 revision surgery did not improve his clinical factors. Dr. Wysocki stated that appellant sustained a five percent impairment of the left lower extremity, noting that this was less than the impairment for which he had already received a schedule award. In calculating his impairment rating, he determined that appellant sustained a three percent impairment of the left lower extremity for high severity Grade 3 pain in the distribution of the S1 nerve root (A.M.A., *Guides* 424, Tables 15-15 and 15-18). Dr. Wysocki further determined that appellant sustained two percent impairment for low-mid severity Grade 4 motor deficit in distribution of the S1 nerve root (A.M.A., *Guides* 424, Tables

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<sup>9</sup> 5 U.S.C. § 8107; *see also* *Richard R. Lemay*, 56 ECAB 341 (2006).

<sup>10</sup> 5 U.S.C. § 8101(20).

<sup>11</sup> *See* *Richard R. Lemay*, *supra* note 9; *see also* *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>12</sup> *See* *Carolyn E. Sellers*, 50 ECAB 393 (1999).

15-15 and 15-18). He combined the three percent impairment rating for pain and the two percent impairment for motor deficit to calculate a five percent impairment of the left lower extremity (A.M.A., *Guides* 604 and Combined Values Chart). The Board notes that Dr. Wysocki improperly referred to Table 15-15 in rating appellant's impairment for motor deficit as this table refers to impairment due to sensory loss. Dr. Wysocki's finding of a Grade 4 motor deficit in the S1 nerve root multiplied by the maximum leg impairment for loss of strength in the S1 nerve root of 20 percent results in a 5 percent impairment of the left lower extremity (A.M.A., *Guides* 424, Tables 15-16 and 15-18). In combining the three percent impairment for pain and five percent impairment for motor deficit, the Board finds that appellant sustained an eight percent impairment of the whole person (A.M.A., *Guides* 604 and Combined Values Chart). In a July 3, 2008 letter, Dr. Williams stated that Dr. Wysocki used the improper methodology to determine that appellant sustained an eight percent impairment of the left lower extremity as he failed to provide range of motion measurements and diagnosed conditions related to appellant's back. He stated that Dr. Wysocki should have used Table 15-7 on page 404 of the A.M.A., *Guides* and Table 17-3 which converted back impairment of the whole person to lower extremity impairment. Utilizing these tables, Dr. Williams determined that a 10 percent back impairment of the whole person represented a 25 percent impairment of the left lower extremity. He combined Dr. Wysocki's 8 percent impairment and his 25 percent impairment rating to calculate a 38 percent impairment of the left lower extremity. However, as stated, appellant is not entitled to a schedule award for permanent loss of the back or the body as a whole.<sup>13</sup> Therefore, the Board finds that Dr. Wysocki's 38 percent impairment rating is of diminished probative value. Dr. Ferry also stated that Dr. Williams' 38 percent impairment rating for the left lower extremity did not conform to the A.M.A., *Guides* as he referred to Table 17-3 and suggested rating impairment for decreased range of motion of the back in finding that appellant did not sustain increased impairment to the left lower extremity.

The Board finds that the evidence of record establishes that appellant did not sustain more than a 10 percent impairment of the left lower extremity, for which he received a schedule award. Appellant did not submit any other medical evidence sufficient to establish that he sustained additional impairment to his left lower extremity. Accordingly, the Board finds that he has not established entitlement to an increased schedule award resulting from his employment injury and accepted surgeries.

### **CONCLUSION**

The Board finds that appellant is not entitled to an increased schedule award as a result of his accepted employment injury or authorized surgery.

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<sup>13</sup> See *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 9 and January 9, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 18, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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