

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVATORE P. Di BETTA and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Avoca, PA

*Docket No. 97-1765; Submitted on the Record;
Issued August 20, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained greater than a 12 percent impairment of his lower extremities for which he received a schedule award.

On July 22, 1991 appellant, then a 37-year-old air traffic control specialist, filed a notice of traumatic injury alleging that he lost feeling in his right leg when he tipped over in a chair and fell onto the floor. On October 25, 1991 the Office of Workers' Compensation Programs accepted the claim for a low back sprain and he received compensation for total temporary disability.

On September 11, 1993 Dr. David Weiss, an osteopath, diagnosed a herniated nucleus pulposus, L4-5 and a right lumbar radiculopathy with right foot drop. He indicated that appellant had a 47 percent impairment rating to the right lower extremity based on a 10 percent range of motion deficit, 10 percent muscle weakness, 10 percent chronic pain, 10 percent abnormal gait and 7 percent for intervertebral herniated nucleus pulposus L4-5. Dr. Joseph S. Lombardi, appellant's treating physician and a Board-certified orthopedic surgeon, reviewed Dr. Weiss' report and indicated that he agreed with the impairment rating on December 5, 1993.

On October 20, 1993 and August 16, 1994 appellant requested a schedule award.

On October 20, 1994 Dr. Weiss indicated that appellant reached maximum medical improvement on September 7, 1993.

On January 20, 1995 the Office medical adviser indicated that appellant had a 12 percent impairment of the lower extremity due to pain and muscle weakness.

On March 28, 1995 the Office awarded appellant a schedule award for a 12 percent permanent loss of use of the lower extremity.

On April 3, 1995 appellant's representative requested a hearing.

By decision dated December 15, 1995, the Office hearing representative found that the Office must refer the case to a Board-certified specialist to provide a rationalized medical opinion on the issue of appellant's impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th edition). The hearing representative indicated that Dr. Weiss failed to properly evaluate appellant's impairment in accordance to the A.M.A., *Guides* and noted that the Office failed to indicate which lower extremity was impaired in its prior decision.

On February 13, 1996 the Office referred appellant to Dr. Norman Heyman, a Board-certified orthopedic surgeon, to provide a second opinion examination on the extent of appellant's impairments to his lower extremities.

On March 14, 1996 Dr. Heyman indicated that the previous award of a 12 percent permanent impairment of the lower extremity was correct and that no additional percentage was indicated. He indicated that pursuant to Table 38, page 77, of the A.M.A., *Guides* appellant's lower extremities demonstrated a Grade 4 description of muscle function indicating active movement against gravity with some resistance based on ankle dorsiflexion muscle weakness. Dr. Heyman indicated that pursuant to Table 39, page 77, of the A.M.A., *Guides* that this resulted in a 12 percent impairment of appellant's "lower extremities, particularly the right." He also stated that Table 68, page 89, of the A.M.A., *Guides* for peripheral nerve impairments also resulted in a finding of a 12 percent impairment of appellant's foot based upon appellant's dysesthesias, but that since this table involved whole peripheral nerve dysfunction rather than partial it was not an appropriate table to measure appellant's impairment. Dr. Heyman indicated that appellant failed to show any impairment due to leg muscle atrophy because there was only a small decrease in the circumference of his calf. He further indicated that appellant failed to demonstrate any impairment pursuant to Table 36, page 76, of the A.M.A., *Guides* because he did not have advance arthritic changes of the hip and knee, did not have a Trendelenberg sign with advanced osteoarthritis of the hip, did not use crutches or a cane, did not require a short leg brace or an ankle-foot orthosis and was not wheel chair dependent. Dr. Heyman noted a normal range of motion in the hips, knees, ankles and feet.

By decision dated April 2, 1996, the Office found that the evidence of file failed to demonstrate that appellant sustained a permanent partial impairment of a degree greater than that previously awarded. In an accompanying memorandum, the Office indicated that it relied on the opinion of Dr. Heyman in reaching its determination.

On April 9, 1996 appellant's representative requested a hearing which was held on November 20, 1996. At the hearing, appellant indicated that he was having trouble with both his left and right legs.

By decision dated January 30, 1997, the Office hearing representative found that appellant established no more than a 12 percent permanent impairment of the right lower extremity for which he received a schedule award. The hearing representative indicated that she relied on the well-rationalized opinion of Dr. Heyman in reaching her determination.

The Board finds that the medical evidence in this case requires further development of the case record by the Office.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations,² set forth that schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment is to be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., Guides as a standard for determining the percentage of impairment.³

In obtaining medical evidence for schedule award purposes, the Office must obtain an evaluation by an attending physician which includes a detailed description of the impairment including, where applicable, the loss in degrees of motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. The description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.⁴ If the attending physician has provided a detailed description of the impairment, but has not properly evaluated the impairment pursuant to the A.M.A., Guides, the Office may request that the Office medical adviser review the case record and determine the degree of appellant's impairment utilizing the description provided by the attending physician and the A.M.A., Guides.⁵

In this case, the Office requested that Dr. Heyman, provide a second opinion examination on the extent of appellant's impairment to his lower extremities. On March 14, 1996 he rendered his second opinion examination. Dr. Heyman stated that pursuant to Table 38, page 77, of the A.M.A., *Guides* appellant's lower extremities demonstrated a Grade 4 description of muscle function indicating active movement against gravity with some resistance based on ankle dorsiflexion muscle weakness. He, therefore, indicated that pursuant to Table 39, page 77, of the A.M.A., *Guides* that this resulted in a 12 percent impairment of appellant's "lower extremities, particularly the right." Dr. Heyman, however, failed to clarify the extent of the permanent partial impairment appellant suffered in each lower extremity. The Office hearing representative, however, relied on his report to find that appellant established only a 12 percent permanent impairment in only his right lower extremity. Because Dr. Heyman's opinion failed to specify the extent of permanent partial impairment in each lower extremity, the Office hearing representative erred in relying on the opinion to find that appellant had only a 12 percent impairment of his right upper extremity. When the Office undertakes the development of the medical evidence, it shares responsibility for the development of the evidence and has an obligation to see justice done.⁶ Consequently, the Board remands this case to the Office to further develop the medical evidence by requesting that Dr. Heyman submit a rationalized

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ *Leisa D. Vassar*, 40 ECAB 1287 (1989).

⁴ *Joseph D. Lee*, 42 ECAB 172 (1990).

⁵ *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

⁶ *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

medical opinion addressing the extent of impairment in each lower extremity pursuant to the A.M.A., *Guides*. After the development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs dated January 30, 1997 is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, D.C.
August 20, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member