

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALONZO R. WITHERSPOON and GENERAL SERVICES
ADMINISTRATION, FEDERAL SUPPLY SERVICE, Fort Worth, Tex.

*Docket No. 97-1815; Submitted on the Record;
Issued July 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant met his burden of proof to establish that he has more than a 56 percent permanent impairment of his right leg for which he received schedule awards.

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 56 percent permanent impairment of his right leg for which he received schedule awards.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.³

Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office of Workers' Compensation Programs has adopted the American Medical Association, *Guides to the*

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107(a).

Evaluation of Permanent Impairment (third edition rev., 1990) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

In the present case, the Office accepted that on August 13, 1987 appellant sustained employment-related fractures of his right distal tibia, fibula and ankle. The Office provided authorization for reconstructive vascular surgery and a right ankle fusion and paid compensation for periods of disability. The Office awarded appellant schedule awards for a 56 percent permanent impairment of his right leg. The Office based the schedule awards on findings regarding loss of motion, ankylosis and arthritis provided by Ross Wilkins, an attending Board certified orthopedic surgeon and Dr. Donald Harder, an attending physician Board-certified in physical medicine and rehabilitation. Appellant alleged that he had a greater permanent impairment of his right leg and, by decision dated March 22, 1995, the Office denied his claim on the grounds that he did not submit sufficient evidence in support thereof. By decisions dated August 28, 1995, August 15, 1996 and March 26, 1997, the Office denied modification of its prior decisions.⁶

Appellant submitted reports dated between mid 1994 and mid 1995 in which Dr. Yechiel Kleen, an attending physician Board-certified in physical medicine and rehabilitation, indicated that, in addition to his 56 percent impairment, he had a 25 percent impairment due to pain related to chronic osteomyelitis. In a report dated November 29, 1995, Dr. Harder indicated that he agreed with Dr. Kleen's assessment that appellant should receive an additional impairment rating related to pain from osteomyelitis. The Board notes, however, that appellant's pain symptoms were accounted for when he received schedule awards for a 56 percent permanent impairment of his right leg based on loss of motion, ankylosis and arthritis.⁷ Although Dr. Kleen and Dr. Harder properly noted that in some cases impairment due to pain may be assessed in addition to impairment due to range of motion and other deficits, they did not adequately explain how such an additional impairment rating would be justified in the present case.⁸ In a report dated November 27, 1995, Dr. Stan Ginsburg, an attending Board-certified neurologist, indicated that appellant had an additional 10 percent impairment of his right lower extremity due to an abnormality of his peroneal nerve distribution. In some cases, additional impairment may be found for damage to certain nerve distributions.⁹ Dr. Ginsburg did not, however, provide sufficient findings on examination and diagnostic testing to document such a nerve problem; nor does the evidence show that this condition preexisted or was caused by appellant's employment injury.

⁵ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁶ By decision dated October 29, 1996, the Office denied appellant's request for a review of the written record. Appellant did not request review of this decision and this matter is not currently before the Board.

⁷ See A.M.A., *Guides* at 55-72.

⁸ For example, Dr. Kleen made reference to cases where extra impairment may be assessed for "other musculoskeletal system defects." However, this section refers to certain upper extremity conditions not relevant to appellant's case; see A.M.A., *Guides* at 52.

⁹ *Id.* at 72-80.

Appellant also submitted a June 21, 1996 report in which Dr. Harder recorded the findings of his examination, including range of motion findings for appellant's back. Dr. Harder stated:

“Impairment is five percent due to specific disorder and five percent due to loss of movement. This results in 10 percent impairment as a whole person that is secondary to the patient's right lower extremity problem. For this reason, it is my opinion that his low back pain is a work-related injury.”

In an attached form report, Dr. Harder indicated that appellant had a 10 percent impairment of his lumbar spine. In a report dated September 4, 1996, Dr. Harder indicated that appellant's lower extremity condition and resultant limp caused him to develop back pain. The Board notes, however, a schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.¹⁰ Although section 8107 of the Act provides that compensation is payable regardless of whether the cause of the disability originates in a body part other than the part sustaining loss of use, the body part sustaining loss of use must be a scheduled body part under the Act in order to qualify for a schedule award.¹¹

The reports of appellant's attending physicians are of limited probative value on the relevant issue of the present claim in that they do not provide an adequate explanation of how the claimed additional permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹² Therefore, the Office properly determined that appellant did not meet his burden of proof to establish that he has more than a 56 percent permanent impairment of his right leg for which he received schedule awards.

¹⁰ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹¹ *See* 5 U.S.C. § 8107.

¹² *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

The decisions of the Office of Workers' Compensation Programs dated March 26, 1997 and August 15, 1996 are affirmed.

Dated, Washington, D.C.
July 12, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member