U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN D. PATRICK and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

Docket No. 99-1668; Submitted on the Record;
Issued March 20, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a six percent permanent impairment of his right leg, for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record as untimely.

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

An employee seeking compensation under the Federal Employees' Compensation Act[1] 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 has adopted the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent*

---

[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).

Impairment (4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.[5]

On May 9, 1998 appellant, then a 49-year-old clerk, sustained an employment-related low back strain and an extruded lumbar disc. Appellant underwent several surgeries, which were authorized by the Office, including a 1990 laminectomy at L4-5. By decision dated November 3, 1998, the Office granted appellant a schedule award for a six percent permanent impairment of his right leg.[6] By decision dated March 12, 1999, the Office denied appellant's request for a review of the written record as untimely.

In the present case, the Office properly determined, based on an October 15, 1998 report of an Office medical adviser, that appellant had a six percent permanent impairment of his right leg. In his report, the Office medical adviser properly calculated that appellant had a three percent impairment rating for pain associated with the L5 nerve distribution and a three percent impairment rating for pain associated with the S1 nerve distribution. For each nerve distribution, the Office medical adviser correctly chose the maximum value for pain deficit, 5 percent and multiplied it by the appropriate pain grade level, 60 percent.[7] These calculations are consistent with the findings of record regarding appellant's lower extremity condition. The Office medical adviser based his impairment rating on the findings of Dr. Rupert A. Schroeder, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion.[8] In his April 27, 1998 report, Dr. Schroeder detailed appellant's medical history and reported symptoms, he noted objective pain findings in appellant's right leg which were modest, particularly in relation to his left leg.

Appellant asserted that the reports of Dr. Paul Wallace, an attending Board-certified orthopedic surgeon, show that he has more than a six percent permanent impairment of his right leg. In a report dated July 14, 1993, he indicated that appellant had 50 percent "disability" of his whole body.[9] In a form report dated September 12, 1996, Dr. Wallace noted that appellant's L4-5 and L5-6 nerve branches were affected and indicated that he had a total impairment of his legs equaling 50 percent due to loss of function from decreased strength and from sensory deficit, pain or discomfort. In a report dated June 23, 1997, he indicated that appellant had a 50 percent impairment of his legs due to sensory deficit pain, discomfort and weakness and a 50 percent impairment of his back due to pain. Dr. Wallace noted that appellant's back impairment would

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

[6] In 1993 and 1995, the Office also awarded appellant schedule awards for permanent impairment of his left leg equaling 40 percent. This matter is not currently on appeal before the Board.

[7] *See* A.M.A., *Guides* 130, 150-51, Tables 20, 83.

[8] As noted above appellant's left leg impairment is not currently before the Board. Dr. Schroeder indicated that appellant had a 25 percent impairment of the body, but the Act does not provide for schedule awards for the whole body. *See infra* note 12 and accompanying text.

[9] Dr. Wallace indicated that this "disability" was due to appellant's back surgeries, back and leg pain and impotence.

equal a 25 percent impairment of his body. In a report dated December 9, 1997, he again stated that appellant had a 25 percent impairment of his body.[10]

The Board notes, however, that impairment opinions of Dr. Wallace are of limited probative value in that he failed to provide an explanation of how his assessments of permanent impairment were derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.[11] Moreover, 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.[12] It should be further noted that Dr. Wallace's reports do not contain findings on examination or diagnostic testing, which show appellant had pain in his right leg justifying a level of impairment higher than six percent.

As the report of the Office medical adviser provided the only evaluation, which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[13] Appellant has not shown that he has more than a six percent permanent impairment of his right leg, for which he received a schedule award.

The Board further finds that the Office properly denied appellant's request for a review of the written record as untimely.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision. The Office's regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[14]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary

---

[10] Dr. Wallace indicated that factors not found in the A.M.A., *Guides* should be considered including "weakness in the legs, pain in the legs, pain in the back" and "inability to do many activities."

[11] *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).

[12] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990). In his April 27, 1998 report, Dr. Schroeder indicated that appellant had a 25 percent of his body due to intervertebral disc surgery, spinal stenosis with surgery and additional surgeries. As noted above, schedule awards are not awarded for the back and Dr. Schroeder did not explain how his impairment assessment accorded with the standards of the A.M.A., *Guides*.

[13] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[14] 20 C.F.R. § 10.616(a); *see Michael J. Welsh*, 40 ECAB 994, 996 (1989).

authority in deciding whether to grant a hearing.[15] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[16]

In the present case, appellant's February 17, 1999 request for a review of the written record was made more than 30 days after the date of issuance of the Office's prior decision dated November 3, 1998 and, thus, appellant was not entitled to a review of the written record as a matter of right. Hence, the Office was correct in stating in its March 12, 1999 decision that appellant was not entitled to a review of the written record as a matter of right because his request for a review of the written record was not made within 30 days of the Office's November 3, 1998 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office, in its March 12, 1999 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that appellant's claim could be addressed through a reconsideration application. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error.[17] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record, which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated March 12, 1999 and November 3, 1998 are hereby affirmed.

Dated, Washington, DC
March 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

[15] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[16] *See Welsh*, *supra* note 14 at 996-97.

[17] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Willie T.C. Thomas, Member, dissenting:

Appellant herein is appealing the six percent schedule award for his right lower extremity, awarded to him by the Office of Workers' Compensation Program in a decision dated November 3, 1998.

Appellant was previously awarded a 40 percent impairment of his right lower extremity based on the revised third edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (1990)*, by the Office in a decision dated November 9, 1995. This award was based on the medical reports of Dr. Paul F. Wallace, a Board-certified orthopedic surgeon. In his February 8, 1993 report, he reported that appellant had undergone two back operations, the first of which was unsuccessful and the second of which required fusion with rods which markedly limited appellant's motion in his back. Dr. Wallace reported that appellant had continuing pain in his left leg which stared in his buttock area and went down the back of his thigh and down into his calf and the arch of his foot. He further reported that appellant dragged his left foot and had weakness in his left leg, which affected his walking pattern. Dr. Wallace reported a 40 percent impairment of appellant left leg. Thus the extent of permanent impairment of appellant's left lower extremity is not currently before the Board on this appeal.

In the instant appeal, the Office referred appellant to Dr. Rupert A. Schroeder, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of appellant's permanent impairment of his lower extremities. In a report of seven pages dated April 27, 1998, he stated under "Impressions," the following:

> "I believe in this incident of May 9, 1989, this man exacerbated and aggravated a preexisting degenerative disc disease and apparent bulging disc at L4-5, diagnosed from studies following an auto[mobile] accident in 1987.
>
> "His symptoms were markedly increased and these led to three surgeries on his spine, a laminectomy and discetomy at L4-5, an extensive laminectomy at multiple levels and for foraminoties and fusion from L4 to S1 with implantation of Rogozinsky Rods and interpedicular screws at L4-5 and S1. Then, removal of the rods on a later date, with a fourth surgery of implanting a spinal cord stimulator/generator to help control his persistent back pain.
>
> "He was found, on CT scan, prior to his second surgery, to have spinal stenosis, secondary to short pedicles. The short pedicles were certainly not caused by the episode at work, but are a congenital or development condition.
>
> "According to the A.M.A., *Guides*, I would rate [appellant] partial impairment as follows. Secondary to the intervertebral disc surgery, with residuals, 10 percent. Secondary to the spinal stenosis at multiple levels with surgery, 12 percent and 3 percent more for the multiple surgeries that were necessary. This totals 25

percent of the body. In spite of this percentage of partial impairment, [appellant] is able to work at a supervisory-type job."

An Office medical adviser reviewed Dr. Schroeder's April 27, 1998 report and submitted the following analysis in a report dated October 15, 1998:

"Status > P.P Laminectomies, Decompression, and Fusion L4-S1

"Residuals > Persistent back and left lower extremity pain. Persistent weakness left lower extremity. Unable to walk uphill, down stairs, and kneel.

"A.M.A., *Guides* > Table 83, page 130; Table 20 & 21, page 151. Unable to walk uphill, down stairs, & kneel.

"Pain L5 5 percent x 60 percent = 3 percent; Pain S1 5 percent x 60 percent = 3 percent) Bilateral.

"Weakness L5 37 percent x 25 percent = 8.25 percent; Weakness S1 20 percent x 25 percent = 5 percent; 14 percent left lower extremity.

"Combined 20 percent permanent partial impairment left lower extremity; (Twenty percent permanent partial impairment lower left extremity); 6 percent permanent partial impairment right lower extremity (six percent permanent partial extremity)."

From a careful analysis of Dr. Schroeder's report, it is totally unexplained how the Office medical adviser arrived at a six percent impairment of appellant's right lower extremity.

Dr. Schroeder gave his impairments in terms of whole person impairment based on intervertebral disc surgery, and spinal stenosis at multiple levels with surgery. There is no basis for any of the impairment rating provided by the Office medical adviser utilizing Dr. Schroeder's report. Schedule awards are simply not permissible for impairments of the back and impairments given in terms of whole person impairment under the Federal Employees' Compensation Act. Dr. Schroeder simply did not describe weakness in appellant's right lower extremity. He did report measurements of the left and right lower extremities at various points. These measurements could be extrapolated to show atrophy of the left lower extremities based on smaller measurements. However, the extremity in issue here is the right lower extremity. I see no basis for calculating a schedule award for either extremity under the fourth edition of the A.M.A., *Guides,* based on Dr. Schroeder's report with impression and findings quoted above. I can only assume that the Office medical adviser extrapolated from other medical reports without disclosing his source.

For the reasons noted above I cannot in good conscience affirm a schedule award where I cannot discern the basis of the award from the examining physician's report, or the Office medical adviser, who reviewed the report and allegedly related that physician's findings to appropriate pages of the A.M.A., *Guides*. I would set aside the Office's November 3, 1998 award of 6 percent for appellant's right lower extremity and remand the case for an orthopedic examination and decision, that is consistent with the Act and the A.M.A., *Guides*. Accordingly, I respectfully must record this dissent.

Willie T.C. Thomas
Member