

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD R. COLLINS and U.S. POSTAL SERVICE,
CAMDEN POST OFFICE, Camden, NJ

*Docket No. 99-805; Submitted on the Record;
Issued December 21, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had an eight percent permanent impairment of the left leg.

On January 26, 1967 appellant, then a 33-year-old mail handler, was turning while carrying a heavy load of mail when he developed lower back pain. He underwent surgery on June 22, 1967 for a laminectomy and disc excision of a herniated disc at L4-5. The Office accepted appellant's claim for acute low back strain and a herniated disc and paid compensation for the periods that appellant did not work. On May 2, 1984 he underwent a decompressive laminectomy at L4-5. On November 26, 1984 appellant lifted a tray of mail and fell to the floor due to back spasm. He filed a claim for an injury to the lower back. The Office accepted appellant's claim for lumbosacral strain and sciatica and again paid compensation for the periods appellant did not work. In a December 29, 1988 decision, the Office found that he could perform the duties of a security guard and therefore had a 67 percent loss of wage-earning capacity. On September 13, 1991 appellant underwent surgery for completion of the laminectomy at L4, bilateral foraminotomies at L4 and L5 and a fusion at L4-5. He returned to work at the employing establishment in a rehabilitative position on June 26, 1993. Appellant retired on December 1, 1996.

On November 22, 1993 appellant filed a claim for a schedule award. On July 14, 1996 he refiled his claim for a schedule award. In a December 2, 1997 decision, the Office issued a schedule award for an eight percent permanent impairment of the left leg. He requested a hearing before an Office hearing representative which was conducted on June 25, 1998. In a September 16, 1998 decision, the Office hearing representative affirmed the Office's December 2, 1997 decision.

The Board finds that the Office properly determined that appellant had an eight percent permanent impairment of the left leg.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁴

In a May 26, 1996 report, Dr. Ronald J. Potash, a Board-certified surgeon, diagnosed status post L4-5 herniated nucleus pulposus excision, laminectomies at L4, spinal fusion, foraminotomies at L4-5, lumbar radiculopathy in the left L5-S1 dermatomes, left quadriceps weakness, degenerative facet joint arthrosis and left anterior tibial and gastrocnemius weakness. He reported that appellant had pain in the back, radiating down the left leg to the ankle. Dr. Potash noted that appellant had difficulty getting on and off the examination table and had difficulty in balancing while toe-walking. He found paravertebral muscle spasm and tenderness on palpation. Dr. Potash indicated that appellant had a restricted range of motion in his back. He reported that straight leg raising was positive at 60 degrees on the right and 40 degrees on the left. Dr. Potash noted that appellant had extensor great toe weakness on the left, weakness in the left quadriceps muscle and decreased sensation to pin prick in the L5 dermatome on the left. He concluded that appellant had a five percent permanent impairment due to the superficial peroneal nerve, a two percent permanent impairment due to the sural nerve, a five percent permanent impairment due to the medial plantar nerve, a five percent permanent impairment due to the lateral plantar nerve, a seventeen percent permanent impairment due to a grade three motor weakness of the knee extensor, a seventeen percent permanent impairment due to a weakness of ankle flexion and a twelve percent permanent impairment due to weakness of the ankle extensor. Dr. Potash concluded that appellant had a forty nine percent permanent impairment of the left leg.

In a December 3, 1996 report, Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, who examined appellant at the request of the employing establishment, stated that appellant did not have a true radiculopathy of the legs. He diagnosed preexisting spondylolisthesis, spinal stenosis and a healed spinal fusion with resultant mechanical low back pain. Dr. Mattei noted appellant's history of surgery which he related to spondylolisthesis and not injury. He concluded that appellant had a fourteen percent permanent impairment of the whole body due to the herniated disc, not appellant's preexisting condition.

¹ 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

³ (4th ed. 1993).

⁴ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

In a January 14, 1997 memorandum, an Office medical adviser indicated that there was no provision for payment of a schedule award due to permanent impairment of the back. He concluded that appellant was not entitled to a schedule award.

The Office referred appellant to Dr. Marc L. Kahn, a Board-certified orthopedic surgeon, for an examination. In a June 9, 1997 report, he indicated that appellant was status post multiple spinal surgeries with symptomatic residuals. Dr. Kahn stated that appellant had no impairment with regard to his legs. He noted that appellant had no disability of the hips due to the harvesting of bone graphs for the fusion surgery. Dr. Kahn concluded appellant had a three percent permanent impairment of the whole person due to his back condition, spinal operations and pain in the iliac crest.

In a June 20, 1997 memorandum, the Office medical adviser noted that Dr. Kahn found no permanent impairment due to the legs or the hips. The Office medical adviser again indicated that appellant was not entitled to a schedule award because there was no provision for payment of a schedule award for permanent impairment of the back.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David A. Bundens, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Drs. Potash and Kahn. In an August 26, 1997 report, Dr. Bundens stated that appellant had continued symptomatology and disability due to lumbar disc disease. He indicated that appellant had a ten percent permanent impairment of the whole man due to his back condition, a thirteen percent permanent impairment of the whole man due to his three back operations and a four percent permanent impairment due to restriction of motion of the lower back. Dr. Bundens calculated that appellant had a two percent permanent impairment due to gastroc weakness relating to the S1 nerve root. He noted that appellant had considerable pain which equaled another five percent permanent impairment. Dr. Bundens concluded that appellant had a thirty three percent permanent impairment of the whole man. He stated that appellant's weakness in the left leg was on the basis of the nerve root as opposed to the ankle plantar flexion weakness.

In a November 24, 1997 memorandum, the Office medical adviser indicated that appellant had a class three loss of function due to pain which equaled 60 percent.⁵ He multiplied this result by the five percent maximum permanent impairment of the leg for loss of function of the S1 nerve root due to pain and calculated that appellant had a three percent permanent impairment of the left leg due to pain.⁶ The Office medical adviser also indicated that appellant had a class four loss of strength which equaled 25 percent.⁷ He multiplied this result by the 20 percent maximum permanent impairment of the left leg for loss of function of the S1 nerve root due to loss of strength and calculated that appellant had a five percent permanent impairment of the left leg due to loss of strength. He concluded that appellant had an eight percent permanent impairment of the left leg.

⁵ A.M.A., *Guides*, p. 151, Table 20.

⁶ *Id.*, p. 130, Table 83.

⁷ *Id.*, p. 151, Table 21.

The calculations of the Office medical adviser were based on the report of Dr. Bundens, the impartial medical specialist, who indicated that appellant's permanent impairment of the left leg was due to the effect on appellant's S1 nerve root. In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸ Dr. Bundens' report was sufficiently well rationalized to establish that appellant's permanent impairment of the left leg was due to the impairment of the S1 nerve root. As the Office medical adviser pointed out, the Act does not provide for a schedule award for a permanent impairment of the back.⁹ Appellant, therefore, is only entitled to a schedule award for the permanent impairment of his leg caused by his back injuries and operations. The Office medical adviser properly calculated that appellant had an eight percent permanent impairment due to the employment-related impairment of the S1 nerve root.

The decisions of the Office of Workers' Compensation Programs, dated September 16, 1998 and December 2, 1997, are hereby affirmed.

Dated, Washington, DC
December 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

⁸ *James P. Roberts*, 31 ECAB 1010 (1980).

⁹ 5 U.S.C. § 8101(20); *See George E. Williams*, 44 ECAB 530 (1993).