

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS FRAGALE and U.S. POSTAL SERVICE,
POST OFFICE, Plymouth Meeting, PA

*Docket No. 01-1260; Submitted on the Record;
Issued February 1, 2002*

DECISION and ORDER

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

The issue is whether appellant has a ratable permanent impairment to his legs causally related to his employment injury.

The Office of Workers' Compensation Programs accepted that appellant sustained thoracic sprain/strain, as well as a lumbar strain with intermittent radiculopathy, in the performance of duty on July 5, 1994.

By decision dated June 5, 1998, the Office determined that appellant was not entitled to a schedule award under 5 U.S.C. § 8107. In a decision dated October 22, 1998, an Office hearing representative remanded the case for further development. In a decision dated March 3, 1999, the Office again determined that the evidence did not establish entitlement to a schedule award. By decision dated December 21, 1999, an Office hearing representative remanded the case for further development. In a decision dated April 25, 2000, the Office found that the weight of the medical evidence established that appellant did not have an employment-related permanent impairment to a specified member of the body under the Federal Employees' Compensation Act. By decision dated January 4, 2001, an Office hearing representative affirmed the prior decision.

The Board finds that the case is not in posture for decision.

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.¹ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body, for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(b) (1999).

be determined. The Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.²

In a report dated January 21, 1998, Dr. Ronald J. Potash, a Board-certified surgeon, provided a history and results on examination. Dr. Potash opined that appellant's condition was causally related to the employment injury; he further opined that appellant had a 27 percent right leg impairment and a 31 percent left leg impairment, based on Table 39 of the A.M.A., *Guides*, (4th ed. 1995).³

An Office hearing representative found, in the October 22, 1998 decision, that there was a conflict between Dr. Potash and Dr. Erwin Schmidt, Jr., a Board-certified orthopedic surgeon. The January 4, 2001 hearing representative's decision, however, finds that there was no existing conflict on the issue of permanent impairment.⁴ The Office referred appellant to Dr. Bong S. Lee, a Board-certified orthopedic surgeon. His reports, however, were properly found by an Office hearing representative to be of diminished probative value as Dr. Lee was not provided an accurate background.

In a report dated February 21, 2000, Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, provided a history and results on examination. Dr. Mattei opined that appellant's current condition was the result of preexisting degenerative changes, not the July 5, 1994 incident. He found that residuals of the employment injury had ceased and, therefore, implicitly found that appellant did not have any permanent impairment from the employment injury.

In the January 4, 2001 decision, the hearing representative found that Dr. Mattei represented the weight of the evidence; she indicated that Dr. Potash was not aware of appellant's prior back problems. The January 21, 1998 report of Dr. Potash does, however, note that initial diagnostic tests showed degenerative back changes.

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁵ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁶

The case will be remanded to the Office to resolve the conflict as to whether appellant has a permanent impairment to a scheduled member of the body under section 8107 that is

² 20 C.F.R. § 10.404 (1999).

³ Table 39, at page 77, provides impairments for lower extremity muscle weakness.

⁴ Dr. Schmidt did not provide a reasoned opinion on whether appellant had an employment-related permanent impairment under the A.M.A., *Guides*.

⁵ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

⁶ *William C. Bush*, 40 ECAB 1064 (1989).

causally related to the employment injury. After such further development as the Office deems necessary, it should issue an appropriate decision.

The January 4, 2001 and April 25, 2000 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
February 1, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member