

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK GERBER and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-1877; Submitted on the Record;
Issued June 18, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has more than a 22 percent permanent impairment of the left leg.

On July 7, 1988 appellant, then a 38-year-old warehouse worker, was lifting 5 to 10 gallon cans of paint when he developed back pain. The Office of Workers' Compensation Programs accepted his claim for a herniated nucleus pulposus. He received continuation of pay from July 8 through August 21, 1988. The Office began payment of temporary total disability compensation effective September 3, 1988. On October 9, 1990 appellant returned to work as a data transcriber for four hours a day. On March 5, 1991 he began working eight hours a day. He subsequently retired.

In a May 1, 1992 letter, appellant, through his attorney, requested a schedule award for his left leg. He submitted a report from Dr. Ronald Goldberg, an osteopath, in support of his request. In a November 10, 1993 decision, the Office issued a schedule award for a 22 percent permanent impairment of the left leg. Appellant requested a hearing before an Office hearing representative. In a June 6, 1994 decision, an Office hearing representative found that the Office's decision was premature because the report of a physician selected by the Office to give a second opinion, Dr. Tim Lachman, a Board-certified neurologist, was found to be insufficient but the Office did not seek clarification of the report. The hearing representative therefore vacated the Office's November 10, 1993 decision and remanded the case so that the Office might seek clarification from the physician or refer appellant to another appropriate specialist for an examination and report. In an April 25, 1995 decision, the Office denied appellant's request for an increased schedule award on the grounds that the medical evidence of record did not establish that appellant did not have any additional permanent impairment due to his accepted condition. In a May 19, 1995 letter, appellant again requested a hearing before an Office hearing representative. In an October 23, 1995 decision, a second Office hearing representative noted that the Office had found a conflict in the medical evidence between Dr. Goldberg and Dr. Stephen Horowitz, a Board-certified orthopedic surgeon and therefore had referred appellant

to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, to resolve the conflict. The hearing representative, however, found that Dr. Horowitz only recommended additional testing and did not give any opinion on the issue of permanent impairment. He indicated that Dr. Okin, therefore was only another second opinion physician. He noted that Dr. Okin did not offer any opinion on the extent of appellant's permanent impairment so the Office medical adviser was requested to review Dr. Okin's report and give his opinion on the extent of appellant's permanent impairment. The hearing representative stated that the medical adviser, in his report, did not explain his assignment of a five percent permanent impairment for pain. He therefore set aside the Office's April 25, 1995 decision and remanded the case for an explanation by the medical adviser. In a February 26, 1996 decision, the Office again denied appellant's request for an increased schedule award. In a February 11, 1997 decision, a third Office hearing representative affirmed the Office's February 26, 1996 decision.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

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 an April 14, 1992 report, Dr. Goldberg indicated that appellant complained of constant lower back pain and left-sided radiculopathy. He described appellant's ranges of motion of the back, loss of sensation due to radiculopathy and permanent impairment due to loss of sexual function and decreased urinary flow. Dr. Goldberg concluded that appellant had a 40 percent permanent impairment of the whole man and a 6 percent permanent impairment of the left leg due to sensory loss at L4 and L5. In a May 2, 1992 memorandum, an Office medical adviser stated that Dr. Goldberg's report was insufficient for schedule award purposes because it did not specify the nerves damaged. He recommended referral of appellant to a Board-certified neurologist.

In a September 3, 1992 report, Dr. Lachman indicated that appellant had reduced strength in the left leg. He reported that the sensory examination was normal except for a diminution

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).

over the left lateral thigh, lateral leg and lateral foot. Dr. Lachman reported appellant's permanent impairment for sexual function, reduced low back motion and disc surgery with residual symptoms. He concluded that appellant had a four percent permanent impairment of the left leg due to pain in the L5 territory and a five percent permanent impairment of the leg due to weakness in the L5 territory. Dr. Lachman concluded that appellant had a five percent permanent impairment of the leg and a 20 percent permanent impairment of the whole man.

In a November 9, 1992 report, Dr. Goldberg indicated that appellant had an absent left Achilles and patellar reflex. He reported that appellant had 0 degrees of dorsiflexion in the left foot which he indicated equaled a 7 percent permanent impairment of the left leg; 25 degrees of plantar flexion of the left foot which equaled a 6 percent permanent impairment of the leg; 10 degrees of inversion of the left foot which equaled a 4 percent permanent impairment of the leg; and 5 degrees of eversion of the left foot which equaled a 3 percent permanent impairment of the leg. Dr. Goldberg calculated that appellant had a 4 percent permanent impairment due to an 80 percent loss of sensation in the L4 nerve root and a 17 percent permanent impairment of the left leg due to a 50 percent loss of motor function in the L4 nerve root, affecting the motor branches of the femoral, obturator and sciatic branches of the nerve root. He further calculated that appellant had a 4 percent permanent impairment of the left leg due to an 80 percent loss of sensation in the L5 nerve root and a 18.5 percent permanent impairment of the leg due to 50 percent loss of motor function in the L5 nerve root, affecting the sciatic, tibial and peroneal nerves. Dr. Goldberg concluded, using the combined value tables of the A.M.A., *Guides* that appellant had a 31 percent permanent impairment of the leg due to loss of sensation and an 8 percent permanent impairment of the leg due to loss of motion in the left foot which equaled a 38 percent permanent impairment of the left leg.

In an April 2, 1993 memorandum, an Office medical adviser stated that Dr. Lachman's report was insufficient for calculation of appellant's schedule award. He indicated that the comments on appellant's sexual function was not related to the claim appellant submitted for permanent impairment of the leg. He noted that a schedule award for the back was not allowed under the Federal Employees' Compensation Act so the ranges of motion of appellant's back and the permanent impairment for back surgery were not to be included in the schedule award calculation. He stated that Dr. Lachman's calculation of the permanent impairment of the leg was insufficient because it did not discuss specifically which nerves were damaged.

In an October 29, 1993 memorandum, the Office medical adviser indicated that, based on the electromyogram (EMG) and nerve conduction studies performed by Dr. George A. Knod, an osteopath, on July 14, 1988 appellant had only an L5 radiculopathy so therefore he was not entitled to a schedule award for an L4 radiculopathy. The Office medical adviser used Dr. Goldberg's report and calculated under the revised third edition of the A.M.A., *Guides* that appellant had a 4 percent permanent impairment of the left leg due to an 80 percent loss of sensation in the L5 nerve root and a 19 percent permanent impairment of the leg due to a 50 percent loss of strength in the L5 nerve root. He used the combined value tables to calculate that appellant had a 22 percent permanent impairment of the leg. This memorandum formed the basis for the schedule award. However, the Office medical adviser did not take into account Dr. Goldberg's description of appellant's loss of motion of the left foot and did not discuss why he disregarded Dr. Goldberg's findings on loss of motion. He also excluded the calculation of

the permanent impairment due to damage to the L4 nerve on the basis of an EMG that was performed four years prior to Dr. Goldberg's examination and two years prior to the January 30, 1991 surgery on appellant's back which consisted of a laminectomy and excision of the L4-5 disc. The Office medical adviser improperly excluded the calculations of the permanent impairment due to the L4 nerve root because the evidence showing damage only to the L5 nerve root was remote in time from the schedule award and was after surgery which may have affected the L4 nerve root. The Office medical adviser's calculation of a 22 percent permanent impairment therefore was incomplete and based on medical evidence that did not reflect appellant's current condition. The schedule award for 22 percent permanent impairment therefore must be set aside.

In an August 18, 1994 report, Dr. Horowitz reviewed appellant's medical history. He commented that appellant complained of decreased sensation in every dermatome tested in the left leg in a nonanatomic distribution. Dr. Horowitz reported that the knee reflexes were normal bilaterally but the left Achilles reflex was slightly diminished when compared to the right leg. He stated that motor strength appeared to be within normal limits and equaled bilaterally. Dr. Horowitz recommended a magnetic resonance imaging scan. He concluded that appellant had some evidence of a left radiculopathy but should be able to return to partial work duty. Dr. Horowitz did not present any findings on the extent of appellant's permanent impairment. His report therefore was not suitable for a schedule award calculation.

In a February 14, 1995 report, Dr. Okin indicated that appellant had equal knee reflexes in both legs but an absent left ankle jerk. He reported that motor function of both legs was equal and normal. Dr. Okin noted decreased sensation of the lateral aspect of the left foot in sensory examination. He commented that he could implicate the L5-S1 level and the S1 nerve root on the left side with lapse in the left ankle jerk and loss of sensation in the lateral side of the left foot. Dr. Orkin reported that appellant had no loss of motion in the legs. The Office medical adviser concluded from Dr. Okin's report that appellant had a 10 percent permanent impairment of the left leg due to the absent left ankle jerk which showed a moderate ligamentous instability,⁵ a 7 percent permanent impairment due to the loss of sensation of the lateral aspect of the left foot which showed dysesthesia in the lateral femoral cutaneous nerve,⁶ and a 5 percent permanent impairment of the left leg due to pain which equaled a 20 percent permanent impairment of the left leg. In a subsequent memorandum the Office medical adviser used Dr. Horowitz' report on the extent of appellant's pain to justify his conclusion that appellant had a five percent permanent impairment due to pain.⁷ Dr. Okin's report conflicts with Dr. Goldberg's report on finding no loss of motor function where Dr. Goldberg found a 50 percent loss of motor function in both the L4 and L5 nerve roots and in finding no loss of motion in the leg where Dr. Goldberg found extensive loss of motion in the foot. These differences in findings lead to differences in

⁵ A.M.A., *Guides*, p. 86, table 64.

⁶ *Id.*, p. 89, table 68.

⁷ The Board held in *Louis Jackson, Sr.*, 47 ECAB 426 (1996) that an Office medical adviser cannot combined the reports of several physicians to reach a schedule award calculation. Similarly, the Office medical adviser cannot combine the reports of different physicians to demonstrate that a claimant is not entitled to an increased schedule award.

the evaluation and calculation of the extent of appellant's permanent impairment of the left leg. The case must therefore be remanded for referral of appellant to an appropriate impartial specialist for resolution of this conflict in the medical evidence.

On remand the Office should refer appellant, together with the statement of accepted facts and the case record, to an appropriate impartial specialist for an examination. The specialist should be requested to submit a full report on appellant's left leg condition, with particular to possible loss of sensation, loss of strength and loss of motion in the left leg. The specialist should then be requested to give a estimate of appellant's permanent impairment, based on the most recent edition of the A.M.A., *Guides*. After further development as it may find necessary, the Office should issue a *de novo* decision.⁸

The decision of the Office of Workers' Compensation Programs, dated February 11, 1997, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.

June 18, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁸ The Board notes that some medical evidence of record showed appellant had a loss of sexual function and loss of urinary function which would demonstrate a permanent impairment of the penis for which a schedule award can be issued. 20 C.F.R. § 10.304. However, the Office has not issued a final decision on whether this condition is causally related to the employment injury and whether appellant is entitled to a schedule award for permanent impairment of the penis.