U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLENN L. ACHESON and U.S. POSTAL SERVICE,
POST OFFICE, Woodbury, NJ

Docket No. 00-1484; Submitted on the Record;
Issued April 27, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant sustained more than a two percent permanent impairment of the left lower extremity for which he received a schedule award.

On April 30, 1997 appellant, then a 53-year-old letter carrier, sustained a strain and avulsion fracture of the left ankle strain in the performance of duty. On November 26, 1997 appellant filed a claim for a schedule award.

In a report dated October 25, 1997, Dr. David Weiss, a Board-certified orthopedic surgeon, provided findings on examination and opined that appellant had a 17 percent permanent impairment of the left lower extremity.

In a report dated May 5, 1998, Dr. Michael Lafon provided findings on examination and indicated that appellant had a permanent impairment of the left lower extremity due to loss of range of motion and to weakness, atrophy, pain or anesthesia. He did not provide an opinion as to the percentage of impairment.

In a report dated June 17, 1998, Dr. Frederick George, a Board-certified orthopedic surgeon and an Office of Workers' Compensation Programs' referral physician, provided findings on examination and opined that appellant had no permanent impairment of his left lower extremity.

In a report dated July 13, 1998, an Office medical adviser determined that appellant had a two percent permanent impairment based on Dr. Lafon's May 5, 1998 report.

By decision dated July 14, 1998, the Office granted appellant a schedule award for 5.76 weeks based upon a two percent permanent impairment of the left lower extremity.

By decision dated January 12, 1999, an Office hearing representative vacated the Office's July 14, 1998 schedule award decision on the grounds that there existed an unresolved conflict in

the medical evidence between Drs. Weiss and Lafon, appellant's physicians, and Dr. George, the Office referral physician. The hearing representative noted that, in addition to the differences in impairment percentages in the medical reports, there were also conflicts in the findings concerning range of motion and motor function and weakness. He remanded the case for referral of appellant to an impartial medical specialist for an examination and evaluation to resolve the conflict in the medical evidence.

By decision dated May 25, 1999, the Office found that the evidence did not establish that appellant sustained more than a two percent permanent impairment of the left lower extremity.

By letter dated June 1, 1999, appellant requested an oral hearing, which was held on November 8, 1999.

By decision dated November 15, 1999, the Office hearing representative affirmed the Office's May 25, 1999 decision.

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

The Federal Employee' Compensation 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 be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Associaton, *Guides to the Evaluation of Permanent Impairment* as a standard for evaluating schedule losses and the Board has concurred in such adoption.[2] The schedule award provisions of the Act provide for compensation to employees sustaining impairment from loss or loss of use of, specified members of the body.[3] The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter, which rests in the sound discretion of the Office.[4] For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[5]

In the present case, the Office determined that there was a conflict in the medical opinion between appellant's physicians, Drs. Weiss and Lafon, and the government physician, Dr. George, on the issue of appellant's employment-related permanent impairment. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the

[1] 5 U.S.C. § 8107(a).

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

[3] 5 U.S.C. § 8107.

[4] *See Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[5] *Luis Chapa, Jr.*, 41 ECAB 159 (1989).

Act, to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.[6]

By letter dated March 10, 1999, the Office referred appellant, together with, a statement of accepted facts, a list of specific questions, the case record and copies of relevant pages from the A.M.A., *Guides* (4th ed. 1993), to Dr. Maslow. The Office asked Dr. Maslow to determine whether appellant had reached maximum medical improvement and, if so, the date of maximum medical improvement. He was asked to provide his opinion as to the percentage of impairment of appellant's left lower extremity showing how he arrived at the percentage by reference to the applicable tables in the A.M.A., *Guides* and to include a description of any subjective complaints causing impairment such as pain and discomfort.

In situations where there exist 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.[7]

In a report dated April 22, 1999, Dr. Maslow provided findings on examination and opined that appellant had a one percent permanent impairment of the whole person based on atrophy of the left calf. However, he provided two different measurements of left calf circumference in his report -- one centimeter at page two of his report and one-half centimeter at page three of his report. Additionally, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person.[8] Dr. Maslow noted that appellant complained of periodic swelling, pain, and stiffness but he provided no opinion as to whether he had any impairment based upon these complaints of pain or weakness. He noted that x-rays revealed some arthritic changes but he did not opine as to whether there was any permanent impairment based upon this finding. Dr. Maslow did not provide an opinion as to the date of maximum medical improvement. Moreover, Dr. Maslow did not explain, with reference to the A.M.A., *Guides*, how he arrived at his determination of impairment. Due to these deficiencies, his opinion as to appellant's permanent impairment is not entitled to special weight and is not sufficient to resolve the conflict in the medical evidence.

In a report dated May 25, 1999, an Office medical adviser indicated that appellant had a two percent impairment of the left lower extremity, based on Dr. Maslow's report, which included one percent for a one centimeter atrophy of the left calf and a one percent impairment for "subjective findings and the minimal arthritis." He indicated that the date of maximum medical improvement was May 5, 1998, the date of Dr. Lafon's evaluation. However, he did not explain, with reference to the A.M.A., *Guides*, how he arrived at his determination of appellant's

[6] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990).

[8] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

permanent impairment or why he selected the date of Dr. Lafon's report, May 5, 1998, as the date of maximum medical improvement.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[9] For the reasons discussed above, the April 22, 1999 report of Dr. Maslow is in need of clarification and elaboration. However, it appears from the deficiencies in his report that Dr. Maslow is not familiar with the application of the A.M.A., *Guides* and the Office's procedures in making a determination of permanent impairment. Therefore, on remand the Office should refer appellant to a Board-certified specialist who is familiar with the proper application of the A.M.A., *Guides* for an examination and evaluation as to appellant's permanent impairment due to his employment-related injury to his left lower extremity. After such further development as the Office deems necessary, a *de novo* decision should be issued regarding appellant's employment-related permanent impairment.

The decisions of the Office of Workers' Compensation Programs dated December 15 and May 25, 1999 are hereby set aside and the case is remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
April 27, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[9] *See Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).