

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS CRONIN and U.S. POSTAL SERVICE,
POST OFFICE, Williamstown, N.J.

*Docket No. 95-3111; Submitted on the Record;
Issued January 22, 1998*

DECISION and ORDER

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

The issue is whether appellant has established that he has greater than a 16 percent permanent impairment for loss of use of the left lower extremity, for which he received a schedule award.

On February 25, 1988 appellant, a 39-year-old letter carrier, experienced pain in his lower back radiating down to his lower leg while delivering mail. Appellant filed a Form CA-2 claim for compensation based on occupational disease on February 25, 1988, seeking compensation for wage loss. Appellant went off work on February 26, 1988 and returned to work on a part-time limited-duty basis on September 23, 1989. The Office accepted appellant's claim for left lumbar radiculitis by aggravation on May 15, 1989.

Appellant was examined on October 11, 1990 by Dr. Ronald Goldberg, an osteopath, who opined in a medical report dated December 17, 1990 that appellant had a 35 percent impairment of the left lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, third edition.

In a letter to the Office dated January 7, 1991, appellant's attorney requested that the Office issue a schedule award for a 35 percent permanent impairment to appellant's left lower extremity based on Dr. Goldberg's December 17, 1990 report, a copy of which accompanied the letter. In a follow-up letter to the Office dated January 22, 1991, appellant's attorney stated that he had enclosed another copy of Dr. Goldberg's January 22, 1991 report which contained a notation from appellant's treating physician, Dr. Perry Kaplan, an osteopath, wherein Dr. Kaplan concurred with Dr. Goldberg's diagnosis of a 35 percent permanent impairment of the left lower extremity.

The Office referred appellant to Dr. Mark G. Schwartz, a Board-certified orthopedic surgeon, for a second-opinion examination, which took place on January 2, 1992. Dr. Schwartz stated in a report dated January 2, 1992 that appellant had "plateaued" (sic) with conservative

therapy and could consider either accepting his current condition or undergoing further diagnostic tests and, if necessary, additional back surgery. In follow-up notes dated February 3 and 28, 1992, Dr. Schwartz opined that appellant had a 5 percent permanent impairment of the whole person resulting from the back injury in accordance with the second edition of the A.M.A., *Guides*.

To resolve the conflict in medical opinion between Dr. Goldberg and Dr. Schwartz, the Office referred appellant to Dr. Abdul R. Khaleel, a Board-certified orthopedic surgeon. In a report dated September 25, 1992, the date he examined appellant, Dr. Khaleel stated his findings regarding appellant's range of motion, flexion and extension and diagnosed pressure on the L4-5 nerve root, left side, but did not provide any rating of a permanent impairment to the left lower extremity.

In a note dated June 24, 1993, an Office medical adviser indicated that appellant had a five percent impairment of the left leg. Based on the Office medical adviser's note, the Office in a decision dated October 28, 1993 granted appellant an award for a 1 percent permanent impairment for loss of use of his left leg for the period from June 24 to July 14, 1993, for a total of 2.88 weeks of compensation.

In a letter to the Office dated November 5, 1993, appellant's attorney requested an oral hearing. A hearing was not scheduled, but appellant's case was reviewed by a hearing representative who issued a decision dated March 28, 1994. The hearing representative vacated the Office's finding of a one percent impairment rating, stating that it was premature. The hearing representative stated that the Office had failed to ask Dr. Khaleel to provide an assessment of permanent partial impairment of the left leg in accordance with the fourth edition of the A.M.A., *Guides*, and had failed to provide Dr. Khaleel with records of appellant's medical treatment prior to his February 25, 1988 employment injury. The hearing representative remanded the case back to the Office, ordered appellant to provide the medical records of his back condition prior to February 25, 1988 and ordered the district office to return the case file to Dr. Khaleel so that he could provide a reasoned opinion as to whether appellant had any permanent partial impairment in his left lower extremity due to his accepted back condition in accordance with the fourth edition of the A.M.A., *Guides*.

In a report dated May 27, 1994, Dr. Khaleel again stated his findings regarding appellant's physical condition and evaluated appellant's ability to perform his employment duties, but once again failed to provide an opinion as to whether appellant had a permanent partial impairment of the lower extremity in accordance with the fourth edition of the A.M.A., *Guides*.

In a note dated June 13, 1994, an Office medical adviser determined that appellant had a 12 percent impairment of the left lower extremity based on Dr. Khaleel's May 27, 1994 report, citing table 68 on page 89 of the A.M.A., *Guides*.

In a decision dated June 17, 1994, the Office granted appellant an additional 11 percent permanent impairment award under the schedule for his left lower extremity, amounting to a total award for a 12 percent permanent impairment of the left lower extremity in accordance with the fourth edition of the A.M.A., *Guides*.

In a letter to the Office dated July 1, 1994, appellant's attorney requested an oral hearing. A hearing was held on January 30, 1995, at which appellant testified and was represented by his attorney. At the hearing, appellant's attorney argued that Dr. Khaleel failed to provide any estimate of impairment in accordance with the A.M.A., *Guides* and noted that no measurement was included regarding sensory deficit nor radiculopathy, as described in table 10 of the fourth edition of the A.M.A., *Guides*.

In a decision dated April 3, 1995, an Office hearing representative vacated the Office's award based on a 12 percent permanent impairment for loss of use of the left lower extremity. The hearing representative noted that Dr. Khaleel's report failed to include a rating for appellant's permanent partial impairment pursuant to the A.M.A., *Guides*, or detailed findings sufficient to establish appellant's actual impairment, even though he had been specifically requested to do so. The hearing representative therefore concluded that Dr. Khaleel had failed to provide a report containing findings of sufficient detail to be accorded special weight as an independent medical examiner. The hearing representative remanded the case to the district office and ordered the Office to refer appellant and the entire case record to a specialist in neurology for a new, impartial evaluation and opinion regarding the nature and extent of appellant's employment-related disability. The hearing representative ordered that the specialist be requested to perform a comprehensive neurological evaluation, addressing motor, sensory and dysesthesia deficits, with reference to the fourth edition of the A.M.A., *Guides*, and to explain the basis for his calculations. The hearing representative stated that upon receipt of the specialist's conclusions and any further development the case may warrant, the Office should issue a *de novo* decision.

To resolve the conflict in medical opinion between Dr. Goldberg and Dr. Schwartz, the Office referred appellant to Dr. Donald A. Barone, an osteopath, for an independent medical examination on May 10, 1995. In his report dated May 10, 1995, Dr. Barone concluded that appellant had a 7 percent whole person impairment for sensory disturbance relative to the sciatic nerve and a 5 percent whole person impairment for dysesthesia, a painful sensation associated with the sciatic nerve and that overall appellant had a 12 percent whole person impairment based on his conclusions.

On June 7, 1995 an Office medical adviser reviewed Dr. Barone's May 10, 1995 opinion, the rest of appellant's medical records and the statement of facts and determined that appellant had a 16.2 percent permanent impairment for loss of use of the left lower extremity pursuant to the fourth edition of the A.M.A., *Guides*. In arriving at this figure, the Office medical adviser found that appellant had a 17 percent sensory impairment of the sciatic nerve by citing table 68 on page 89 of the A.M.A., *Guides*, and a 60 percent class 3 sensory impairment pursuant to table 20 on page 151 of the A.M.A., *Guides*, which, multiplied together, amounted to an overall 10.2 percent sensory impairment. The Office medical adviser further found that appellant had a dysesthesia impairment of 12 percent, citing page 89, table 68 of the A.M.A., *Guides*, and a class 3 dysesthesia impairment of 60 percent pursuant to page 151, table 20 of the A.M.A., *Guides*, which, multiplied together, amounted to an overall dysesthesia impairment of 7.2 percent. After multiplying and combining these two values, the Office medical adviser concluded that appellant had a 16.2 percent permanent impairment of the left lower extremity.

Based on the Office medical adviser's conclusions, the Office on June 19, 1995 granted appellant a schedule award for an additional 4 percent permanent impairment in his left lower extremity for the period from May 10 to July 29, 1995, amounting to a 16 percent permanent impairment in his left lower extremity, for a total of 11.52 weeks of compensation.

Appellant appealed to the Board.

The Board finds that appellant has no more than a 16 percent permanent impairment for his left lower extremity, for which he has received a schedule award.

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 the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.³ However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.⁴

In the instant case, the Office medical adviser determined that appellant had a 16.2 percent permanent impairment of his left lower extremity by adopting the rating of Dr. Barone, the independent medical examiner who thoroughly examined appellant and submitted an impartial report dated May 10, 1995. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁵ Thus, the Office medical adviser could properly rely on the opinion of Dr. Barone in finding that appellant had a 16 percent permanent impairment of the left lower extremity.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a 16 percent permanent impairment for the left lower extremity, for which he has received a schedule award and that appellant has failed to provide probative, supportable medical evidence that he has greater than the 16 percent impairment already awarded.

¹ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ 5 U.S.C. § 8107.

⁴ *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

⁵ *Aubrey Belnavis*, 37 ECAB 206 (1985); 5 U.S.C. § 8123(a) .

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 19, 1995 is hereby affirmed.

Dated, Washington, D.C.
January 22, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member