

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID E. LEWIS and INTERNAL REVENUE SERVICE,
FIELD OFFICE, Richardson, Tex.

*Docket No. 96-1204; Submitted on the Record;
Issued March 2, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly calculated appellant's schedule award at 12 percent permanent impairment of the right lower extremity; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for further review on the merits under 5 U.S.C. § 8128(a).

On December 27, 1994 appellant, then a 48-year-old criminal investigator and inspector, filed a claim alleging that he injured his lower right back and experienced pain in his upper right buttock, right leg, and right foot on December 22, 1994 when he unloaded a box of ammunition in the performance of duty. Appellant requested a schedule award on January 27, 1995.

On April 12, 1995 the Office accepted the claim for lumbar sprain and on June 30, 1995 the Office authorized a discectomy, L4-5.

On July 27, 1995 the Office referred appellant to Dr. Richard R. Jones, a physician Board-certified in physical medicine and rehabilitation, to render a determination regarding permanent impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

On August 8, 1995 Dr. Jones reviewed the medical records and noted numbness in appellant's right knee radiating down to his big right toe. Dr. Jones also indicated that there was a one centimeter atrophy in the right gastrocnemius muscle and that there was decreased pinprick on L5 dermatome right side, especially the big toe, which was completely numb dorsally. He further indicated that hip pain was present. Dr. Jones only calculated the impairment rating relevant to appellant's back. In this regard, he calculated lumbar range of motion pursuant to figure 79, page 134, entitled "[l]umbar [r]ange of [m]otion (ROM)." Dr. Jones indicated that pursuant to Table 71, page 109, entitled "DRE [i]mpairment [c]ategory [d]ifferentiators," there was evidence of decreased circumference, atrophy, indicating a loss of girth of two centimeters or more below the knee and that there was electrodiagnostic evidence of nerve root compromise.

Dr. Jones indicated that pursuant to Table 72, page 110, entitled “DRE [l]umbosacral [s]pine [i]mpairment [c]ategories” that there was a Grade III DRE impairment due to radiculopathy and a Grade IV DRE impairment due to loss of motion. Pursuant to Table 70, page 108, entitled “[s]pine [i]mpairment [c]ategories for [c]ervicothoracic, [t]horacolumbar, and [l]umbosacral [r]egions,” Dr. Jones indicated that there was a category III radiculopathy and a category IV previous spine operation without loss of motion segment integrity or radiculopathy. He did not calculate an impairment rating for appellant’s right lower extremity. Dr. Jones found that appellant had a 20 percent total spine impairment.

On September 29, 1995 the Office medical adviser reviewed Dr. Jones’ clinical data and indicated that there was a 12 percent permanent loss of the use of appellant’s right lower extremity. The Office medical adviser indicated that Dr. Jones found a Grade 3 sensory deficit resulting in a 3 percent permanent impairment pursuant to Table 11, page 48, and a Grade 4 motor deficit resulting in a 9 percent permanent impairment pursuant to Table 11, page 48. Table 11, page 48, entitled “[d]etermining [i]mpairment of the [u]pper [e]xtremity [d]ue to [p]ain or [s]ensory [d]eficit [r]esulting from [p]eripheral [n]erve [d]isorders” relates only to impairments of the upper extremity. The Office medical adviser combined his impairment ratings to determine that appellant had a 12 percent permanent impairment of the right lower extremity.

In a decision dated October 3, 1995, the Office awarded appellant a schedule award for a 12 percent permanent loss of his right lower extremity.

On January 25, 1996 appellant requested reconsideration. In support, he resubmitted Dr. Jones’ August 8, 1995 opinion.

In a decision dated February 8, 1996, the Office found that the evidence submitted in support of the request for review was repetitious in nature and was not sufficient to warrant review of the prior decision. In an accompanying memorandum, the Office noted that it had previously considered Dr. Jones’ opinion.

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

The schedule award provisions of the Federal Employees’ Compensation Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act’s compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body. The Act does not, however, specify the manner in which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.² For consistent results and to ensure equal justice under the law to all claimants, good administrative practices

¹ 5 U.S.C. § 8107 *et seq.*

² *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.³

In the instant case, Dr. Jones, a physician Board-certified in physical medicine and rehabilitation, provided clinical data indicating that appellant had an impairment of his right lower extremity. In particular, he noted numbness and atrophy in appellant's right lower extremity. Dr. Jones, however, only rendered impairment ratings relevant to appellant's back and his whole person. Because schedule awards are not payable for whole person impairment and nonschedule members of the body, such as the back, Dr. Jones' opinion is insufficient, by itself, to substantiate a schedule award.⁴

The Office, therefore, relied on the opinion of its medical adviser, who extrapolated the raw data generated by Dr. Jones to find that appellant was entitled to a 12 percent schedule award for a permanent impairment to his right lower extremity. In reaching his conclusion, the Office medical adviser indicated that appellant had a Grade 3 sensory deficit resulting in a 3 percent permanent impairment pursuant to Table 11, page 48, and a Grade 4 motor deficit resulting in a 9 percent permanent impairment pursuant to Table 11, page 48. The Office medical adviser combined his impairment ratings to determine that appellant had a 12 percent permanent impairment of the left lower extremity. As noted previously, however, Table 11, page 48, relates only to determining impairment of the upper extremity due to pain or sensory deficit resulting from peripheral nerve disorders. Because this case involves an impairment of appellant's right lower extremity, the Office medical adviser's calculation and the Office's schedule award is in error. The Board, therefore, will remand this case so that the Office can properly develop the medical evidence on the issue of the event of permanent impairment to appellant's right lower extremity.⁵ Because this case is being remanded for further development, the Board need not address whether the Office abused its discretion by refusing to reopen appellant's case for further review on the merits under 5 U.S.C. § 8128(a).

³ *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

⁴ *George E. Williams*, 44 ECAB 530 (1993).

⁵ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1979).

The decision of the Office of Workers' Compensation Programs dated February 8, 1996 and October 3, 1995 are set aside and the case remanded to the Office for further action consistent with the decision of the Board.

Dated, Washington, D.C.
March 2, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member