U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS A. THOMPSON and DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONS INSTITUTION, Sandstone, Minn.

Docket No. 97-1861; Submitted on the Record;
Issued April 8, 1999

DECISION and ORDER

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

The issue is whether appellant has met his burden of proof in establishing greater than a three percent permanent impairment of his right lower extremity, for which he received a schedule award.

On August 17, 1995 appellant, then a 46-year-old cook foreman, filed a traumatic injury claim, alleging that he had injured his back on December 9, 1994 while closing a manual elevator door.[1] The Office of Workers' Compensation Programs accepted this claim for a herniated disc at the L5 to S1 level. On June 13, 1995 appellant underwent surgery for lateral recessed decompression of the L5 to S1. Appellant filed a claim for a schedule award on July 19, 1996. On December 30, 1996 the Office issued appellant a schedule award for a three percent permanent impairment of his right lower extremity. The period of the award ran from September 13 to November 12, 1995 and he received 8.64 weeks of compensation. In informational letters dated February 20 and March 12, 1997, the Office advised appellant that the Federal Employees' Compensation Act did not provide for a "whole body impairment" schedule award or for a schedule award based on impairment of the back.

The Board has reviewed the case record and finds that this case is not in posture for review.

Section 8107 of the Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the

---

[1] On May 28, 1994 appellant sustained another injury to his back which the Office accepted for low back strain.

[2] 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.304.

manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.[4]

In the present case, appellant submitted reports from Dr. John G. Stark, appellant's treating physician and a Board-certified orthopedic surgeon, to establish an impairment rating related to his December 9, 1994 injury. In reports dated June 5, 1996, Dr. Stark indicated that appellant had a 15 percent whole body disability as a result of his laminectomy and noted that appellant's "lingering symptoms" would resolve with time. By letter dated July 10, 1996, the Office requested further information from Dr. Stark, including an opinion which was based on the fourth edition of the A.M.A., *Guides* and which discussed appellant's residual pain and/or sensory deficit in terms of residual nerve root impairment and residual weakness. In a report dated September 26, 1996, Dr. Stark noted that appellant had weakness of the hip abductors, quadriceps and dorsi plantar flexors which would be included under L4 and L5 of Table 83 of the A.M.A., *Guides*. He concluded that appellant had a 61 percent "whole body disability according to the 'maximum percent loss of function due to strength deficit,'" as demonstrated by appellant's difficulty with walking and getting up from a chair. Dr. Stark found a corresponding lower extremity of 24 percent of the whole body by multiplying the 61 percent impairment by 4.[5]

The Office referred appellant together with his medical record to Dr. Robert H.N. Fielden, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 4, 1996, Dr. Fielden found no objective clinical findings on which to base a permanent disability and that appellant had a five percent disability based on the decompression surgery. He also indicated that appellant's complaints of the leg and back were not associated with any clinical evidence or neurological or spinal involvement. This report was reviewed by an Office medical adviser who found that only the L5 radiculopathy was an impairment of the lower extremities. In accordance with Table 83 of the A.M.A., *Guides*, he indicated that there was a maximum impairment rating of five percent which was modified by Table 11 to give a three percent permanent impairment of the right lower extremity for grade 3 dysesthesia in the right nerve root distribution.

There is an unresolved conflict in the medical evidence between the reports of Drs. Stark and Fielden with respect to whether appellant had a sensory deficit or a loss of strength which caused a permanent impairment, whether appellant's complaints of symptoms in his legs was related to his employment injury and subsequent surgery and whether any impairment was bilateral or restricted to the right leg wherein Dr. Fielden noted numbness of the right foot while all of the problems noted by Dr. Stark were bilateral. Section 8123 of the Act[6] provides that if

[4] *Quincy E. Malone*, 31 ECAB 846 (1980).

[5] A review of Table 83 L4 and L5 impairments reveals ratings of 34 and 37 percent, respectively, for the maximum percentage for loss of function, for a total of 71 percent. In addition, the A.M.A., *Guides* indicate that the corresponding lower extremity value is derived by multiplying the whole body percentage by point four.

[6] 5 U.S.C. § 8123(a)

there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[7] As the conflict in the medical evidence has not been resolved, this case should be remanded for referral of appellant, together with his medical record to an appropriate impartial medical examiner for resolution of the conflict. After such further development as the Office deems necessary, a *de novo* decision on the merits should be issued.

The decision of the Office of Workers' Compensation Programs dated December 30, 1996 is set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
April 8, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[7] *Shirley L. Steib*, 46 ECAB 309 (1994).