

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICKIE D. LAJOICE and ARCHITECT OF THE CAPITOL,  
Annex #2, Washington, DC

*Docket No. 98-974; Submitted on the Record;  
Issued December 23, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 15 percent permanent impairment of his left lower extremity for which he received a schedule award; and (2) whether appellant met his burden of proof to establish entitlement to a schedule award for his right lower extremity.

In the present case, the Office of Workers' Compensation Programs accepted that on June 22, 1987 appellant, then a 35-year-old laborer, sustained an employment-related lumbar strain while pulling trash trucks apart. The Office subsequently accepted an L5-S1 bulging disc condition and, on January 16, 1996, authorized a L3-4 laminectomy and disectomy for the effects of the work injury. By decision dated February 13, 1997, the Office awarded appellant a schedule award for a 15 percent permanent impairment to his left lower extremity. Appellant alleged that he should have received a schedule award for both the lower left and right extremities. By decision dated December 19, 1997, the Office awarded appellant a 15 percent permanent impairment of his left lower extremity only. The Office further found that the additional evidence did not warrant any impairment to appellant's right lower extremity. This decision superseded the February 13, 1997 decision.

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 15 percent permanent impairment of his left lower extremity for which he received a schedule award. However, the Board finds that appellant has submitted adequate information which requires development regarding a permanent impairment to his right lower extremity.

An employee seeking compensation under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable,

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

probative and substantial evidence,<sup>2</sup> including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.<sup>3</sup>

Section 8107 of the 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.<sup>4</sup> 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 Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed., 1995) as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>5</sup>

In a September 27, 1996 report, Dr. Alan G. Schreiber, appellant's attending physician and a Board-certified orthopedic surgeon, indicated that appellant had a 26 percent permanent disability rating to his lumbar spine. This equated to a six percent impairment due to loss of range of motion, a 10 percent disability rating for atrophy, persistent pain in appellant's lower back and a 10 percent disability rating from appellant's disc operation.<sup>6</sup> In a December 23, 1996 letter, Dr. Schreiber noted that in September 1996 he gave appellant a 26 percent disability rating for his back. He stated that a 10 percent rating was for appellant's persistent left leg symptoms. He noted that appellant has decreased function of his left leg with pain into the left leg and stated that the L4 nerve root was affected. Dr. Schreiber advised that 10 percent of the 26 percent impairment rating was secondary to the lower extremity, while the remaining 16 percent was for the back.

In a January 8, 1997 letter, the Office advised Dr. Schreiber that a schedule award for the back was not allowed under the Act. The Office further requested that Dr. Schreiber complete the form entitled "Items Necessary to Calculate Schedule Awards for the Permanent Functional Loss of an Extremity." On December 9, 1996 Dr. Schreiber completed the form indicating that the total percentage of permanent impairment to the lower extremity was 10 percent. He designated a five percent permanent impairment of the lower extremity due to loss of function from sensory deficit, pain or discomfort and a five percent permanent impairment due to loss of function from decreased strength. Utilizing Table 83 on page 130, the Office medical adviser noted that the impaired L4 nerve root resulted in a five percent loss of function due to sensory deficit or pain and a ten percent loss of function due to strength deficit. The Office medical adviser calculated a 15 percent left lower extremity impairment.

In a treatment note of March 3, 1997, Dr. Schreiber stated that he had only mentioned appellant's disability rating with respect to his left leg. He indicated that appellant had an

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<sup>2</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> 5 U.S.C. § 8107(a).

<sup>5</sup> *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

<sup>6</sup> This figure was derived by utilizing Table 75 on page 113.

identical process going on his right leg. Dr. Schreiber stated that, since appellant's symptoms were almost identical to the left side, he would give that an equal amount of disability rating. Dr. Schreiber indicated that appellant had at least a 10 to 15 percent disability rating for his right leg. In a March 5, 1997 report, Dr. Schreiber referred to appellant's trouble with his right leg. He stated that appellant's right leg had pain that radiated into the posterior thigh and calf. Diffuse weakness in the right side was noted. Dr. Schreiber again indicated that appellant's disability for his right lower extremity was the same as his left side. He stated that he would give appellant an additional 10 percent for that side as well. On March 31, 1997 Dr. Schreiber indicated that the total percentage of permanent impairment of the lower extremities was 20 percent. He stated that appellant had bilateral leg pain, there was a 10 percent permanent impairment of each lower extremity from sensory deficit, pain or discomfort and a 10 percent permanent impairment of each lower extremity due to loss of function from decreased strength.

In a May 21, 1997 memorandum to the Office medical adviser, the Office inquired as to whether there was an additional impairment over and above the 15 percent impairment of the left lower extremity awarded. In a September 20, 1997 letter, the Office medical adviser stated that no additional impairment over the 15 percent was warranted. The Office medical adviser rationalized that the problem he had with Dr. Schreiber's December 23, 1996 letter was the logic which included an award for limitation of motion of the lower back. The Office medical adviser explained that as range of motion deals with the back, it is not covered in Department of Labor awards.

In a November 10, 1997 report, Dr. Schreiber stated that utilizing Table 83 in the fourth edition of the A.M.A., *Guides*, he felt that appellant has an L4 both sensory and motor deficit. He indicated that appellant has some subjective weakness in his quad muscles. Dr. Schreiber stated that he felt appellant had a 15 percent impairment rating to his left lower extremity and a 15 percent lower extremity rating on his right lower extremity as well. He stated that this was a bilateral problem and they are essential equal in intensity and severity.

In a December 10, 1997 report, the Office medical adviser stated that there was no additional impairment of appellant's left lower extremity over and above the 15 percent awarded. He also stated that there was no schedule award for the right lower extremity.

The Board finds that appellant has no more than a 15 percent left lower extremity impairment. The Office medical adviser found that the impairment of the L4 spinal nerve root resulted in both a sensory and motor deficit. Utilizing Table 83 on page 130, the Office medical adviser calculated a five percent loss of function due to pain and a ten percent loss of function due to loss of strength. The Office medical adviser properly utilized Table 83 on page 130 in arriving at these values. As there was both a sensory and motor impairment of the L4 nerve root, the Office medical adviser properly combined the values using the Combined Values Chart, p. 322 to arrive at a 15 percent left lower extremity impairment. Although Dr. Schreiber subsequently offered differing values ranging from a 10 to 20 percent left lower extremity impairment, the reports of Dr. Schreiber are of limited probative value as there was no explanation concerning how an additional left extremity impairment would be justified and Dr. Schreiber did not provide a consistent impairment value.<sup>7</sup> Accordingly, Dr. Schreiber's

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<sup>7</sup> For example, on December 9, 1996 Dr. Schreiber indicated that appellant had a ten percent permanent

reports are not sufficient to overcome the Office medical adviser's opinion regarding the appropriate impairment rating for appellant's left lower extremity. Therefore, the Office properly determined that appellant did not meet his burden of proof to establish that he has more than a 15 percent permanent impairment to his left lower extremity for which he received a schedule award.

The Board notes, however, that medical evidence of record showed that appellant had a loss of strength and sensory deficit in his right lower extremity for which a schedule award can be issued. Dr. Schreiber noted that appellant had an identical disability process going on his right side which was almost identical to his left side. In a March 5, 1997 report, Dr. Schreiber described appellant's right side symptoms and provided a 10 percent impairment rating. On March 31, 1997 Dr. Schreiber advised that appellant had a bilateral extremity impairment which resulted in a 20 percent total impairment for each extremity. A 10 percent impairment value was provided for sensory deficit and a 10 percent impairment value was provided for strength deficit for each extremity. In his November 10, 1997 report, Dr. Schreiber related appellant's right extremity impairment to a L4 deficit. He also provided a 15 percent right lower extremity impairment. The Board notes that the Office consistently inquired as to whether appellant had an additional impairment beyond the 15 percent permanent impairment of his left leg. The Office medical adviser simply stated, "No additional [illegible], no s/a for right lower extremity." The case must therefore be remanded to the Office for further consideration on the extent of permanent functional loss of appellant's right lower extremity. A physician should be requested to give an 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.

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impairment to his left lower extremity. On March 31, 1997 Dr. Schreiber indicated that appellant had a 20 percent permanent impairment of both lower extremities. Then, on November 10, 1997 Dr. Schreiber indicated that appellant had a 15 percent impairment rating to his left lower extremity.

The decision of the Office of Workers' Compensation Programs, dated December 19, 1997, is hereby affirmed in part and vacated in part and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.  
December 23, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member