

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES FORTNER and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 98-641; Submitted on the Record;
Issued February 16, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has more than a five percent permanent impairment to his right and left legs.

In this case, the Office of Workers' Compensation Programs declared a conflict in the medical evidence regarding the degree of permanent impairment resulting from appellant's accepted employment injury of a herniated nucleus pulposus L4-5.¹ To resolve the conflict under 5 U.S.C. § 8123(a),² appellant was referred to Dr. Samuel F. Broudo, a Board-certified orthopedic surgeon. By decision dated February 7, 1995, the Office determined that appellant was not entitled to a schedule award. In a decision dated June 6, 1995, an Office hearing representative remanded the case, finding that Dr. Broudo had not resolved the conflict. The hearing representative indicated that Dr. Broudo had failed to refer to the proper edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, and had not provided a reasoned opinion as to whether appellant had impairment of the legs due to residual pain.

The Office, however, failed to receive a supplemental report from Dr. Broudo, and requested an opinion from an Office medical adviser. In a report dated October 10, 1995, the medical adviser opined that appellant had a four percent impairment to each leg.

By decision dated October 13, 1995, the Office issued a schedule award for a four percent permanent impairment to each leg. In a decision dated March 2, 1996, an Office hearing

¹ The conflict was between an attending physician, David Weiss, who opined that appellant had a 31 percent permanent impairment of the left leg and an Office referral physician, Dr. Richard Bennett, who found no impairment.

² 5 U.S.C. § 8123(a) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.

representative remanded the case again, finding that the Office had failed to secure a reasoned medical opinion to resolve the conflict under section 8123(a). The Office then referred appellant to Dr. Joseph A. Fabiani, a Board-certified orthopedic surgeon, who submitted a report dated June 17, 1996.

By decision dated August 16, 1996, the Office issued a schedule award for an additional one percent impairment to each leg. In a decision dated September 16, 1997, an Office hearing representative affirmed the August 16, 1996 decision.

The Board has reviewed the record and finds that the case is not in posture for decision, as the conflict in the medical evidence remains unresolved.

Section 8107 of the Federal Employees' 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.³ 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 A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴

An Office hearing representative directed the Office to secure a report from an impartial medical specialist that utilized the fourth edition of the A.M.A., *Guides* and provided a reasoned opinion as to appellant's degree of permanent impairment causally related to the employment injury. In this case, the report of the impartial specialist, Dr. Fabiani, is of little probative value. In his June 17, 1996 report, Dr. Fabiani refers to the 3rd edition of the A.M.A., *Guides*, and states that appellant had "five percent maximum [impairment] for some persistent leg complaints," without clearly describing the impairment and explaining how the degree of impairment was calculated. Since the Office referred appellant to Dr. Fabiani as an impartial medical specialist, it has an obligation to secure a reasoned medical opinion that resolves the conflict.⁵ The Board notes that the record contains a report dated June 13, 1997 from an Office medical adviser, but this report essentially refers to the October 10, 1995 report from another medical adviser, and concludes that appellant had no more than a four percent impairment to each leg. A conflict under section 8123(a) cannot be resolved by an Office medical adviser; the Office must secure a report from a physician selected as an impartial medical specialist that provides a reasoned medical opinion, based on the appropriate edition of the A.M.A., *Guides*, as to the degree of employment-related permanent impairment to the legs.

Accordingly, the case will be remanded to the Office for proper resolution of the conflict. After such further development as is deemed necessary, it should issue an appropriate decision.

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

⁴ *A. George Lampo*, 45 ECAB 441 (1994).

⁵ *See Thomas Graves*, 38 ECAB 409 (1987).

The decision of the Office of Workers' Compensation Programs dated September 16, 1997 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
February 16, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member