

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCE M. NIZZARDI and DEPARTMENT OF THE NAVY,
RELATIONS & COMPENSATION DIVISION, Philadelphia, PA

*Docket No. 98-2351; Submitted on the Record;
Issued July 24, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award for his lower extremities.

The Office of Workers' Compensation Programs accepted appellant's claim for a low back strain resulting from an October 28, 1990 employment injury and appellant received compensation for his disability commencing October 29, 1990 and continuing. The Office also accepted that appellant sustained two low back strains in 1986 at work, which resulted in appellant's missing less than 45 days of work for each injury.

On January 6, 1995 appellant sought a claim for a schedule award to his lower extremities.

In a report dated April 14, 1994, appellant's treating physician, Dr. Roy T. Lefkoe, a Board-certified orthopedic surgeon, opined that appellant had a 30 percent impairment to the upper extremities, a 30 percent impairment to the lower extremities and a 30 percent impairment to the whole person as a result of his genitourinary dysfunction. He stated that he used the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* but did not specify, which edition or the tables and page numbers.

A magnetic resonance imaging (MRI) scan dated July 17, 1991 stated that there was degenerative disc disease at the L2-3 and L4-5 levels and at the L4-5 level there was a moderate degree of diffuse annul bulge on which a broad based central and left paramedian disc herniation appeared to be superimposed. The reading also stated that there was a diffuse annular bulge with slight central predominance at the L3-4 and L2-3 levels and "[t]he possibility of small associated centralized herniations [could] not be ruled out at [those] levels." X-ray films dated August 2, 1991 showed abnormalities in the L2-3 and L4-5 discs with disc degeneration and disc configurations "grossly similar to that seen on the present study [presumably the July 17, 1991 study] allowing for improved technique seen on the disc examination."

A June 29, 1994 MRI scan performed by Dr. Lefkoe showed a small central herniation at L5-S1, which did not compress or deform the thecal sac or exiting nerve roots and an annular disc bulging at L4-5.

On June 26, 1995 the district medical adviser opined that the evidence of record with particular reference to Dr. Lefkoe's report, was insufficient to establish that appellant had a permanent impairment to his lower extremities and recommended that appellant be referred to a neurologist for another examination. Appellant was subsequently referred to Dr. Jon Glass, a Board-certified psychiatrist and neurologist.

In his report dated July 20, 1995, Dr. Glass considered that appellant injured himself at work on October 28, 1990, reviewed the July 17, 1991 MRI scan, which he stated showed degenerative disc disease at L4-5 and an acute annular bulge at L4-5 and at L2-4 and performed a physical examination. He found that the neurological examination revealed lumbar paraspinal spasm but no evidence of other objective neurological findings to suggest nerve root impingement, no evidence of loss of range of motion of the low back, no abnormalities of motor or sensory function in the lower extremities and no other factors contributed to his impairment. Dr. Glass stated that appellant reached maximum medical improvement.

On November 27, 1995 the Office medical adviser, relying on Dr. Glass's report, concluded that appellant had zero percent impairment to each leg due to the accepted work injury.

By decision dated February 8, 1996, the Office denied appellant's claim, stating that the evidence of record failed to establish that appellant was entitled to a schedule award.

Appellant requested an oral hearing before an Office hearing representative, which was held on July 25, 1996. At the hearing, appellant stated that he sustained injuries at work in 1986, 1987 and 1990, that he continued to have constant low back pain and constant pain and tingling in his legs, which worsened in cold weather. Appellant explained that the car salesman work he performed was light and sedentary. Appellant's attorney who represented appellant at the hearing stated that the evidence contemporaneous to the October 29, 1990 employment injury indicated that appellant sustained a disc herniation at L4-5 resulting in nerve damage and lumbar radiculopathy and the Office should accept the disc herniation as work related. Appellant's attorney stated that Dr. Lefkoe's April 14, 1994 report established that appellant was entitled to 30 percent impairment to his lower extremities.

By decision dated February 11, 1997, the Office hearing representative affirmed the Office's February 8, 1996 decision.

By letter dated February 11, 1998, appellant requested reconsideration of the decision and submitted a medical report dated February 6, 1998 from Dr. Ronald J. Potash, a Board-certified surgeon, with a specialty in emergency medicine. In his report, Dr. Potash considered appellant's history of injury including his injuries on April 4, 1986, May 6, 1987 and in October 1990, extensively reviewed the medical documents in the record, performed a physical examination and reviewed diagnostic tests including the July 16, 1991 and June 29, 1994 MRI scans. His diagnoses included residuals of acute lumbar strain and sprain with chronic diffuse

myositis and multiple recurrences and exacerbations as well as a herniated disc at L5-S1. Dr. Potash found paravertebral muscle spasm and tenderness, restrictions in forward flexion and backward extension and pain at the extremes of all ranges of motion. He stated that, the April 4, 1996 injury apparently meaning the April 4, 1986 injury, which is the injury he referred to in his report was “the competent producing factor for ...[appellant’s] subjective and objective findings...” At one point in his report, Dr. Potash stated that, “the activities of daily living in this report were prepared according to the A.M.A., *Guides*.” Subsequently, he stated that, using the New Jersey Workers Compensation Act, with specific reference to tables and page numbers, appellant had a 30 percent impairment to the right lower extremity and a 13 percent impairment to the left lower extremity. In the request for reconsideration, appellant’s attorney stated that Dr. Potash’s rating conformed with the A.M.A., *Guides* (fourth edition 1994) despite his citing the New Jersey Workers’ Compensation Act in his report and, in fact, Dr. Potash’s references to tables and page numbers correspond exactly to the A.M.A., *Guides* (fourth edition 1994).

By decision dated May 12, 1998, the Office denied appellant’s request for modification.

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

The schedule award provision 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 by 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 practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.³ Appellant has the burden to establish his entitlement to a schedule award.⁴

Section 8123(a) of the Act provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.⁵ In the present case, a conflict exists between the opinion of appellant’s treating physician, Dr. Potash, that appellant had a 30 percent impairment to the right lower extremity and a 13 percent impairment to the left lower extremity and the opinion of the referral physician, Dr. Glass, that appellant had no work-related impairment. The case will be remanded for the Office to refer the case and appellant with a statement of accepted facts to an impartial medical specialist to evaluate the medical evidence and provide a rationalized opinion on the issue of whether the condition of appellant’s

¹ 5 U.S.C. § 8107 *et seq.*

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Daniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁴ *See Lourdes Harris*, 45 ECAB 545, 547 (1994).

⁵ 5 U.S.C. § 8123(a); *Esther Velasquez*, 45 ECAB 249, 252-253 (1993).

lower extremities establishes his entitlement to a schedule award using the A.M.A., *Guides* (fourth edition 1994), if applicable. The Office should then make a *de novo* decision based on the augmented record.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 12, 1998 is hereby set aside and the case is remanded to the Office for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

Dated, Washington, D.C.
July 24, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member