

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE SMITH and DEPARTMENT OF THE NAVY,
U.S. MARINE CORPS, Albany, NY

*Docket No. 98-1371; Submitted on the Record;
Issued June 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained more than a three percent permanent impairment of the right lower extremity, for which he has received a schedule award.

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

In the present case, the Office of Workers' Compensation Programs accepted that appellant, a painter, sustained a lumbar strain and herniated L4-5 disc while lifting a M-60 fuel cell in the performance of duty on September 11, 1987. Appellant underwent a L4-5 laminectomy and discectomy in December 1995, which was required due to his employment injury.

On May 9, 1996 appellant filed a claim for a schedule award. On February 27, 1997 the Office granted appellant a schedule award for a 37 percent permanent impairment of the right lower extremity.

Appellant requested a review of the written record. Appellant noted that he also had pain in his lower left extremity resulting from the accepted back injury. By decision dated November 5, 1997, the Office hearing representative set aside the Office's decision dated February 27, 1997 and remanded the case for clarification from the Office medical adviser regarding the calculation of appellant's permanent impairment. The hearing representative noted that an Office medical adviser had reviewed appellant's treating physician, Dr. Debra Ann Schilling's, reports and on October 18, 1996 had calculated that appellant had a three percent impairment for sensory deficit of L5 and a three percent impairment for sensory deficit of the S1 nerve root for a total impairment of the right lower extremity of six percent. The hearing representative further stated that the Office, thereafter, referred appellant to Dr. Rembert McLendon and on December 26, 1996 Dr. McLendon had reported that appellant had a 15 percent permanent impairment of the whole man, which was equivalent to a 37 percent

permanent impairment of the right lower extremity. The hearing representative then noted that on February 6, 1997 another Office medical adviser had reviewed the record and had calculated that appellant had a three percent permanent impairment of the right lower extremity due to sensory loss of the S1 nerve root. The hearing representative set aside the prior decision and requested that the Office clarify the basis for the schedule award.

On December 30, 1997 the Office medical adviser who previously concluded on February 6, 1997 that appellant had a three percent permanent impairment of the right lower extremity, reported that appellant was not entitled to a whole body impairment and that his pain and numbness of the right lower extremity only resulted in a three percent permanent impairment of the right lower extremity.

On January 7, 1998 the Office granted appellant a schedule award for three percent permanent impairment of the right lower extremity.

It is well-established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.¹ In other schedule award cases, the Board has reiterated that the Office bears the burden of proof to modify an award of compensation benefits.² The Office, therefore, bears the burden of proof to modify appellant's schedule award benefits in this case.

Section 8107 of the Federal Employees' Compensation Act³ provides that, if there is a 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. For consistent results and to insure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants in the evaluation of permanent physical impairment. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁴

In the present case, the Office initially granted appellant a schedule award for 37 percent permanent impairment of the right lower extremity based upon Dr. McLendon's opinion that appellant's back injury had caused a 15 percent permanent impairment of the whole man, which was equivalent to a 37 percent permanent impairment of the right lower extremity. The Act specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.⁵ Further, while the A.M.A., *Guides* provide for both impairment to the individual member and to the whole person, the Act does not provide for

¹ *Edwin L. Lester*, 34 ECAB 1807 (1983).

² *See Leonard J. Khajet*, 41 ECAB 283 (1989).

³ 5 U.S.C. § 8107.

⁴ *James J. Hjort*, 45 ECAB 595 (1994).

⁵ *Francesco C. Veneziani*, 48 ECAB 572 (1997).

permanent impairment for the whole person.⁶ Therefore, the Office hearing representative properly set aside the schedule award for 37 percent permanent impairment of the right lower extremity as this award was premised upon the conclusion that a 15 percent permanent impairment of the whole man was equivalent to a 37 percent permanent impairment of the lower extremity. Since there was no medical report of record which actually documented that appellant had a 37 percent impairment of the right lower extremity, pursuant to the A.M.A., *Guides*, the Office properly set aside this award.

The hearing representative remanded the case to the Office on November 5, 1997 for clarification of the amount of appellant's impairment. The Office upon remand requested that the same Office medical adviser who had reviewed the case record on February 6, 1997 and had calculated only had a three percent permanent impairment of the right lower extremity again review the record. On December 30, 1997 this medical adviser reiterated that appellant had a three percent permanent impairment of the right lower extremity. The December 30, 1997 report from the Office medical adviser did not address whether appellant had sensory loss of both the L5 and S1 nerve roots, as found by Dr. Schilling, which had been previously rated by another Office medical adviser on October 18, 1996 as a six percent impairment of the right lower extremity. The December 30, 1997 report from the Office medical adviser also did not address appellant's claim that he had sustained impairments to both his right and left lower extremities as a result of the accepted back injury. As the Office bore the burden to modify appellant's schedule award, the Board finds that the Office did not sufficiently clarify the findings regarding the impairments of appellant's lower extremities resulting from the accepted injury. Upon remand, the Office shall refer appellant to an appropriate specialist for examination and evaluation of the degree of permanent impairment of his lower extremities causally related to the accepted injury. After such further development as necessary, the Office shall issue a *de novo* decision.

⁶ *John Year*, 48 ECAB 243 (1996).

The decision of the Office of Workers' Compensation Programs dated January 7, 1998 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
June 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member