

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of S.B. DAVIS, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

*Docket No. 99-616; Submitted on the Record;
Issued June 13, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof to establish that he is entitled to a schedule ward for permanent impairment.

On April 25, 1995 appellant, then a 38-year-old custodian, sustained an employment-related right knee strain and herniated nucleus pulposus at C3-4.¹ He stopped work on April 27, 1995 and received compensation for periods of disability. In June 1997 appellant returned to work in a light-duty position at the employing establishment and by decision dated September 10, 1997, the Office adjusted appellant's compensation to reflect his actual earnings in this position. He alleged that he was entitled to a schedule award due to his April 25, 1995 injury and, by decision dated September 23, 1998, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence in support thereof.²

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

An employee seeking compensation under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,⁴ 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.⁵

¹ Appellant underwent a cervical discectomy on July 21, 1995 which was approved by the Office of Workers' Compensation Programs.

² The record also contains an October 20, 1998 decision in which the Office denied appellant's claim that he sustained an employment-related recurrence of disability on June 7, 1997. Appellant has not appealed this decision to the Board and the matter is not currently before the Board.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁶

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.⁷ 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* (4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁸

In the present case, the Office referred appellant on January 30, 1998 to Dr. James C. Metcalf, an attending Board-certified neurosurgeon, for evaluation regarding whether he was entitled to a schedule award for permanent impairment. In a report dated February 3, 1998, Dr. Metcalf noted that appellant's condition remained unchanged since November 1995 and stated, "he continues to have profound weakness of a spastic nature in his lower extremities, bowel and bladder dysfunction as well as upper extremity weakness. He was previously given a disability rating of 60 percent the body as a whole based on these multiple findings and I see nothing that would change that rating at this time."⁹ In a report dated February 13, 1998, Dr. Metcalf stated that appellant continued to have spasticity in both legs, left greater than right; that he walked with a scissored gait and the assistance of a cane; and that he had moderate intrinsic weakness of his left hand and mild intrinsic weakness of his right hand.

In a report dated September 11, 1998, an Office medical adviser stated that Dr. Metcalf's records and the other records in the file were not sufficient to show the permanent impairment of appellant's four extremities. He stated, "a cumulative examination is likely to give sufficient information for partial permanent impairment of all extremities." Dr. Metcalf was provided with forms to complete for various tests to be performed in evaluating impairment of the extremities in accordance with the relevant standards of the A.M.A., *Guides*. He did not complete these forms and it does not appear that the Office attempted to secure their completion. Prior to the issuance of its September 23, 1998 decision, it does not appear that the Office complied with the recommendation of the Office medical adviser to perform an additional evaluation of appellant's condition before determining his permanent impairment.

⁶ *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

⁷ 5 U.S.C. § 8107(a).

⁸ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁹ Dr. Metcalf indicated that appellant had reached maximum medical improvement on November 27, 1995. In a report dated November 27, 1995, he had indicated that appellant had a disability rating of 66 percent the body as a whole.

As noted above, the Office shares in responsibility in the development of the evidence and the evaluation of appellant's permanent impairment is incomplete.¹⁰ The record contains significant evidence from Dr. Metcalf and other physicians which suggests that appellant may have permanent impairment of his four extremities, related to his April 25, 1995 employment injury, which entitles him to a schedule award.¹¹ Therefore, the case should be remanded to the Office for a complete evaluation in accordance with the relevant standards of the A.M.A., *Guides* to determine whether appellant has permanent impairment in his four extremities which would entitle him to a schedule award.¹² After further development deemed necessary, the Office should issue an appropriate decision regarding such entitlement.

The decision of the Office of Workers' Compensation Programs dated September 23, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
June 13, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

¹⁰ It should be noted that the Office properly indicated in its September 23, 1998 decision that neither the Act nor its implementing regulations provides for a schedule award for impairment of the body as a whole. *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹¹ The record contains other evidence which shows that appellant has residuals in his extremities due to the April 25, 1995 employment injury. For example, in a report dated March 31, 1997, Dr. Edward S. Kaplan, a Board-certified neurosurgeon to whom the Office referred appellant, noted that appellant had employment-related spasticity in all extremities. Although he did not fully explain his rating, Dr. Dee J. Canale, a Board-certified neurosurgeon to whom the Office referred appellant, indicated in a May 30, 1997 report that appellant had a 31 percent impairment due to spastic quadriplegia and cervical disc surgery.

¹² See generally Chapter 3 of the fourth edition of the A.M.A., *Guides* for the appropriate testing and standards.