U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. GREGORY and U.S. POSTAL SERVICE,
BROOKS ROAD ANNEX, Memphis, TN

Docket No. 98-692; Submitted on the Record;
Issued March 28, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant is entitled to a schedule award for a permanent impairment of both lower extremities as a result of his April 28, 1971 employment injury.

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

On April 28, 1971 appellant, then a 44-year-old distribution clerk, filed a claim alleging that on that date he stubbed his toe while lifting a mailbag onto the conveyor belt. Appellant stated that he pulled a muscle in his left hip, side and back.

The Office of Workers' Compensation Programs accepted appellant's claim for low back strain, left hip strain and a ruptured lumbar disc.

In an April 28, 1995 letter, the Office advised appellant that he previously indicated that he sustained nerve damage in his legs as a result of his April 28, 1971 employment-related back injury and that he may be entitled to a schedule award for permanent impairment of the lower extremities. The Office then advised appellant to have his physician complete an enclosed form regarding the extent of impairment of both legs based on the fourth edition of the American Medical Association (A.M.A.,) *Guides to the Evaluation of Permanent Impairment*. The Office further advised appellant that the Federal Employees' Compensation Act did not allow for the payment of schedule awards for impairments to the back, neck and/or whole body. The Office explained that a schedule award for a back injury can be paid if the injury caused nerve damage and thus, an impairment to the extremities.

The Office received several medical reports from Dr. Melvin D. Law, an orthopedic surgeon of the spine and appellant's treating physician, indicating a diagnosis of foraminal stenosis at L3-4, recurrent disc herniation and stenosis at L4-5, foraminal stenosis at L5-S1 and spondylolisthesis. Dr. Law's medical reports also indicated that appellant had a 25 percent

permanent impairment of the whole person despite the Office's request that Dr. Law determine the extent of appellant's impairment of the lower extremities based on the fourth edition of the A.M.A., *Guides*.

By letter dated September 4, 1996, the Office referred appellant, along with medical records, a list of specific questions and a statement of accepted facts to Dr. William Ledbetter, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Ledbetter of the referral.

In a September 27, 1996 medical report, Dr. Ledbetter agreed with Dr. Law's diagnoses and his finding that appellant had a 25 percent permanent impairment of the whole person.

On December 6, 1996 Dr. Harry L. Collins, Jr., an Office medical adviser, reviewed appellant's medical records and determined that appellant did not have any permanent impairment due to his employment injury.

By letter dated April 22, 1997, the Office referred appellant along with medical records and a list of specific questions to Dr. Jan Gorzny, a Board-certified orthopedic surgeon, for an impartial medical examination due to a conflict in the medical opinion evidence between Dr. Ledbetter and Dr. Collins. The Office advised Dr. Gorzny to determine the extent of permanent impairment of appellant's lower extremities based on the fourth edition of the A.M.A., *Guides*. By letter of the same date, the Office advised Dr. Gorzny of the referral.

Dr. Gorzny submitted a May 2, 1997 medical report revealing that appellant had a 25 percent permanent impairment of the whole person.

By letter dated June 18, 1997, the Office advised Dr. Gorzny that the A.M.A., *Guides* did not make any provision for the payment of a schedule award for an impairment to the spine or the body as a whole. The Office then advised Dr. Gorzny to determine whether appellant had a work-related impairment of his legs. In an August 2, 1997 response letter, Dr. Gorzny stated that appellant's impairment of his lower extremities should not exceed 68 percent based on the fourth edition of the A.M.A., *Guides*.

On September 23, 1997 an Office medical adviser reviewed appellant's medical records and determined that appellant's disability was not related to his employment injury and that he had a 31 percent impairment to each lower extremity based on the second opinion that appellant had a 25 percent impairment of the whole body.

By decision dated September 30, 1997, the Office found that appellant was not entitled to a schedule award for his lower extremities as a result of the April 28, 1971 employment injury.

The schedule award provision of the Act[1] and its implementing regulation,[2] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.304.

of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[3] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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. The A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

Section 8123(a) of the Act provides that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[5] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

In this case, Dr. Law, appellant's treating physician, opined that appellant had a 25 percent permanent impairment of the whole person. Dr. Collins, an Office medical adviser, determined that appellant did not have any impairment due to his April 28, 1971 employment injury. Therefore, the Office properly referred appellant to Dr. Gorzny for an impartial medical examination pursuant to section 8123(a) of the Act.

In finding that appellant did not have any impairment of his lower extremities due to his April 28, 1971 employment injury, the Office relied on the medical opinion of an Office medical adviser, who reviewed appellant's medical records on September 23, 1997, rather than the impartial medical opinion of Dr. Gorzny. The Office medical adviser indicated appellant's present status of weakness and atrophy of both lower extremities and diffuse loss of sensation of both lower extremities below the knees, which was not radicular (due to the herniated nucleus pulposus). The Office medical adviser also indicated a diagnosis of spinal stenosis at the L3-5 level and spondylothesithesis. The Office medical adviser stated that all of appellant's present disability was due to the spinal stenosis and not his acromioclavicular of the herniated nucleus pulposus at L4/5. He further stated that the second opinion physician rated appellant as having a

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[3] 5 U.S.C. § 8107(c)(19).

[4] *See James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[5] 5 U.S.C. § 8123(a).

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

25 percent permanent impairment of the whole body, which amounted to a 31 percent permanent impairment of each lower extremity.

It is well established that proceedings under the Act[7] are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence.[8] Furthermore, once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.[9] In this case, the Office relied on its medical adviser's opinion that appellant's disability was not related to his employment injury; however, the Office medical adviser failed to provide any medical rationale to support his opinion. Therefore, the Office was required to refer appellant to another medical specialist to determine the degree of permanent impairment of appellant's lower extremities.[10]

On remand, the Office should refer appellant to an appropriate specialist for a rationalized medical opinion on the extent of appellant's permanent impairment of the lower extremities and its relationship to his April 28, 1971 employment injury. The Office should also inform the specialist of its evidentiary requirements for the payment of a schedule award for permanent impairment resulting from a back injury. After such further development as the Office deems necessary, a *de novo* decision should be issued.

[7] 5 U.S.C. §§ 8101-8193.

[8] *John J. Carlone*, 41 ECAB 354 (1989); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[9] *Edward Schoening*, 41 ECAB 277 (1989).

[10] *See James C. Talbert,* 42 ECAB 974 (1991)*; Margaret Ann Connor,* 40 ECAB 214 (1988).

The September 30, 1997 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further action in accordance with this decision of the Board.

Dated, Washington, D.C.
March 28, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member