

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT McGUIRL and U.S. POSTAL SERVICE, REGIONAL
CHIEF POSTAL INSPECTOR, NORTHEAST REGION, Newark, NJ

*Docket No. 98-1775; Submitted on the Record;
Issued March 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether appellant has more than five percent permanent impairment of his right lower extremity for which he received a schedule award.

The Board has duly reviewed the case on appeal and finds that appellant has no more than five percent permanent impairment of his right lower extremity for which he received a schedule award.

Appellant, a security supervisor, filed a claim on June 3, 1991 alleging that he injured his lower back in the performance of duty. The Office of Workers' Compensation Programs accepted his claim for lumbosacral strain and nerve root irritation and herniated disc L5-S1. Appellant requested a schedule award on May 2, 1995. By decision dated February 19, 1997, the Office granted appellant a schedule award for five percent permanent impairment of his right lower extremity due to his accepted back conditions. Appellant requested an oral hearing and by decision dated February 18, 1998, the hearing representative affirmed the Office's February 19, 1997 decision.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. 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 for all claimants, the Office adopted the American Medical

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

Association, *Guides to the Evaluation of Permanent Impairment*³ as a standard for determining the percentage of impairment, and the Board has concurred in such adoption.⁴

In this case, appellant submitted a report from Dr. David Weiss, an osteopath, noting appellant's history of injury and reviewing the diagnostic studies including magnetic resonance imaging (MRI) and electromyogram (EMG) which demonstrated lumbar radiculitis L4-5 and L5-S1. Dr. Weiss diagnosed herniated nucleus pulposus L5-S1 by positive MRI scan; lumbar radiculitis L4-5 and L5-S1 by positive EMG⁵ and exacerbation of preexisting degenerative disc disease L4-5 and L5-S1. His physical examination revealed a hypoesthesia of the right L5-S1 dermatome. Applying the A.M.A., *Guides*, Dr. Weiss found that appellant had sensory impairment of L5 and S1 nerve roots for eight percent impairment of the right lower extremity.⁶ He did not provide any explanation for including the L5 nerve root in his calculation.

In a report dated May 22, 1996, Dr. David W. Richardson, a Board-certified internist and second opinion physician, noted appellant's history of injury, reviewed diagnostic testing and diagnosed chronic right S1 radiculopathy with sensory loss and reflex asymmetry. He found that appellant had reached maximum medical improvement. In a supplemental report dated September 22, 1996, Dr. Richardson again reported sensory loss in the distribution of the S1 dermatome related to the finding of disc herniation at the L5-S1 level.

The Office medical adviser reviewed Dr. Richardson's reports and found that sensory impairment of the right dermatome was a five percent impairment of the right leg using the maximum impairment rating.⁷ The Office granted appellant a schedule award for five percent impairment of his right lower extremity.

The hearing representative referred the medical evidence to Dr. Neven A. Popovic, a Board-certified orthopedic surgeon, who noted that appellant's claim was approved for only the S1 nerve injury rather than both the L5 and S1 nerve injuries as indicated by Dr. Weiss.

The Board notes that, if the medical evidence established a preexisting L5 nerve root injury affecting appellant's right lower extremity, this impairment would be compensable. The Office's procedure manual provides that the percentage of impairment should include the conditions accepted by the Office as job related and any preexisting permanent impairment of the same member or function.⁸ However, in this case, Dr. Weiss did not provide any physical findings in support of his conclusion that appellant experienced radiculopathy of the L5

³ A.M.A., *Guides* (fourth edition 1993).

⁴ *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ The EMG dated October 10, 1991 was suggestive of radiculitis at L4-5 and L5-S1. However, the test indicated that the radiculitis was demonstrated only in the lumbar paraspinal muscles and not in the lower extremities.

⁶ The A.M.A., *Guides* provide that bilateral sensory nerve root involvement should be combined which results in an impairment rating of eight percent. A.M.A., *Guides*, 130.

⁷ A.M.A., *Guides*, 130, Table 83; 48, Table 130.

⁸ Federal (FECA) Procedure Manual, Part 3 – Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (October 1990).

dermatome. His findings on physical examination relate only to the S1 nerve root. Furthermore, the EMG mentioned in his report which found radiculopathy from the L5 nerve root was qualified by the finding that the radiculopathy extended only to the paraspinal muscles and not to the lower extremity. Without medical opinion evidence with supporting physical findings for L5 radiculopathy in the lower extremity, appellant is not entitled to a schedule award for this condition.

The decision of the Office of Workers' Compensation Programs dated February 18, 1998 is hereby affirmed.

Dated, Washington, D.C.

March 6, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member