

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES V. MEHLBERGER and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Willow Grove, PA

*Docket No. 98-2427; 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 has more than a six percent permanent impairment of his left leg, for which he received a schedule award.

The Board has carefully reviewed the case record and finds that this case is not in posture for decision because of an unresolved conflict in the medical opinion evidence.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for the permanent impairment of specified body members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.³ However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.⁴ The method used in making such determinations rests in the sound discretion of the Office of Workers' Compensation Programs.⁵ For consistent results and to ensure equal justice for all claimants, the Office has adopted and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.⁶

¹ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ 5 U.S.C. § 8107(c)(19).

⁴ A. *George Lampo*, 45 ECAB 441, 443 (1994).

⁵ *George E. Williams*, 44 ECAB 530, 532 (1993).

⁶ *James J. Hjort*, 45 ECAB 595, 599 (1994).

Section 8123 of the Act⁷ provides that if there is disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁸ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality.⁹ This evaluation is based on the opportunity for and thoroughness of, the physical examination; the accuracy and completeness of the physicians' knowledge of the facts and medical history; the care and skill of the physician's analysis and the medical rationale expressed in support of the physician's opinion.¹⁰

In this case, appellant filed a traumatic injury claim on January 4, 1996 after he injured his back and head when he slipped and fell on ice while getting out of a tow truck. The Office accepted appellant's claim for herniated nucleus pulposus L4-5, low back strain and a laceration of the head on March 28, 1996. The Office authorized surgical repair of the L4-5 herniated disc as well as removal of a disc fragment on May 1, 1996.

Appellant, through his counsel, applied for a schedule award on March 21, 1997 and submitted a report dated February 7, 1997 by Dr. Ronald J. Potash, a Board-certified surgeon, in support of his request for a schedule award. He noted appellant's history of injury that appellant had back surgery on May 1, 1996 and subsequently underwent physical therapy. On physical examination, Dr. Potash noted "no reaction at the L5 dermatome on either modality" and noted a "loss of sensation at the S1 dermatome on the left foot. As to objective factors, the physician noted a positive Patrick's test bilaterally, a positive femoral stretch test bilaterally and the Lassegue's signs were positive for pain in both legs. The physician noted that appellant's straight leg raising was positive for pain at 75 degrees. Regarding appellant's motor impairment, Dr. Potash noted:

"Manual motor testing of the hip flexors, knee flexors and knee extensors are globally 5 [to] 5 on the right and left. The deep tendon reflexes at the right knee is 2+ [to] 4 and 2+ [to] 4 on the left. The Achilles reflex is 1+ [to] 4 on the right and 0 [to] 4 on the left."

Dr. Potash concluded, based upon the fourth edition of the A.M.A., *Guides* that appellant had a 54 percent impairment of the left lower extremity. In reaching this conclusion, Dr. Potash referred Table 83, page 130 to find that appellant had a 40 percent impairment of the S5 nerve of the left lower extremity and a 24 percent impairment of the S1 nerve root in the left lower extremity. Dr. Potash then utilized the Combined Values Chart at page 322 of the fourth edition of the A.M.A., *Guides* to arrive at a 54 percent impairment of the left lower extremity.

⁷ 5 U.S.C. § 8123(a).

⁸ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

⁹ *Connie Johns*, 44 ECAB 560, 570 (1993).

¹⁰ *Melvina Jackson*, 38 ECAB 443, 449 (1987).

In a report dated March 24, 1997, Dr. M. Richard Katz, appellant's attending Board-certified neurosurgeon, indicated that appellant had reached maximum medical improvement in March 1997 and noted work restrictions as to kneeling, twisting, no lifting or carrying over 30 pounds. On physical examination, he noted that the range of motion in the back was mildly restricted, no weakness with heel or toe gait.

On April 24, 1997 the Office medical adviser reviewed the reports of Drs. Potash and Katz and stated that appellant had a six percent impairment of the left knee based upon appellant's pain and sensory impairment. The Office medical adviser opined that Dr. Potash's calculation was incorrect as there was no motor impairment.

The Office granted appellant a schedule award for a six percent impairment of the left leg on May 2, 1997. The award ran from February 7 to June 6, 1997.

Appellant disagreed with the amount of the award and requested an oral hearing, which was held on April 1, 1998. By decision dated May 8, 1998, the hearing representative affirmed the six percent schedule award, according to determinative weight to the rating of the Office medical adviser.

The Board finds that a conflict in the medical opinion evidence exists between the six percent impairment rating found by the Office medical adviser and the higher impairment rating found by Dr. Potash. He provided the following ratings based upon the fourth edition of the A.M.A., *Guides*: a 40 percent impairment of the S5 nerve of the left lower extremity and a 24 percent impairment of the S1 nerve root in the left lower extremity, for a total of 54 percent.

The Office medical adviser on April 24, 1997 advised that there was no evidence of any motor impairment based upon the reports of Drs. Katz and Potash so that appellant only had a six percent impairment of the left knee based upon appellant's pain and sensory impairment.

While Dr. Potash's application of the A.M.A., *Guides* may lack clarity on the issue of motor impairment, the Board finds that the conflicting views requires remand for resolution.¹¹ On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an impartial of the medical evaluation pursuant to section 8123(a) regarding the extent of the permanent impairment of appellant's left leg.¹²

The May 8, 1998 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

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

¹¹ See *Joseph D. Lee*, 42 ECAB 172, 181 (1990) (remanding the case because of a conflict in the impairment ratings of appellant's physician and the Office medical adviser).

¹² See 20 C.F.R. § 10.408; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member