

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCE M. NIZZARDI and DEPARTMENT OF THE NAVY,
RELATIONS & COMPENSATION DIVISION, Philadelphia, PA

*Docket No. 02-315; Submitted on the Record;
Issued August 21, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award for his lower extremities.

The case is on appeal to the Board for the second time.¹ In the first appeal, the Board set aside the decision of the Office of Workers' Compensation Programs dated May 12, 1998, finding that a conflict existed between appellant's treating physician, Dr. Ronald J. Potash, a Board-certified surgeon, with a specialty in emergency medicine, and the referral physician, Dr. Jon Glass, a Board-certified psychiatrist and neurologist, regarding whether appellant had a permanent partial impairment to his lower extremities pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994). The Board remanded the case to the Office to send appellant with the case record and a statement of accepted facts to an impartial medical specialist for an evaluation to resolve the conflict in the medical evidence, to be followed by a *de novo* decision.

On remand, the Office referred appellant to the impartial medical specialist, Dr. Victor R. Frankel, a Board-certified orthopedic surgeon. In his report dated October 10, 2000, Dr. Frankel considered appellant's history of injury, performed a physical examination and reviewed results of x-rays, a magnetic resonance imaging (MRI) scan and a cervical computerized axial tomography (CAT) scan. He stated that appellant had a longterm history of over a decade of chronic neck and back complaints and complaints of upper and lower extremity symptoms. He stated that according to the A.M.A., *Guides* (3rd ed. 1993), there was no evidence of sensory, motor or functional deficits "whatsoever." Dr. Frankel stated that there was evidence of arthritis and degenerative discogenic changes in the lumbar spine which "clearly could contribute" to appellant's impairment regarding his subjective complaints. He opined that there was no evidence of residual lumbar strain and sprain to account for appellant's ongoing symptoms from any of the specific work injuries reported. Dr. Frankel stated that appellant's lumbar discogenic

¹ Docket No. 98-2351 (issued July 24, 2000). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

disease, facet arthropathy and cervical degeneration could not be attributed to the specific history of work-related injuries.

By letter dated October 26, 2000, the Office informed Dr. Frankel that it had erroneously asked him to evaluate the extent of appellant's impairment pursuant to the third edition of the A.M.A., *Guides*. The Office therefore asked Dr. Frankel to provide a supplemental report assessing appellant's impairment, if any, pursuant to the A.M.A., *Guides* (4th ed. 1994).

In a report dated October 31, 2000, Dr. Frankel stated that using the fourth edition of the A.M.A., *Guides* did not change the actual findings of his initial report which indicated that there were no motor or sensory impairment or pain involving any neurologic compromise involving the legs or nerves. He stated that there was also no evidence of instability or limitation in range of motion that would involve the legs which would contribute to appellant's impairment.

By decision dated December 6, 2000, the Office denied appellant's claim, stating that Dr. Frankel's opinion constituted the weight of the evidence.

By letter dated December 18, 2000, appellant requested an oral hearing before an Office hearing representative which was held on May 15, 2001. At the hearing, appellant's attorney contended that Dr. Frankel's opinion that appellant had no sensory, motor or functional deficits was inaccurate since the EMG showed radiculopathy and the MRI and CAT scans showed disc damage. The attorney contended that Dr. Frankel should at least discuss these positive findings and state whether or not they are work related. The attorney also stated that Dr. Frankel did not use charts or the A.M.A., *Guides* in stating his opinion. The attorney stated that appellant's symptoms of pain in his legs were unchanged.

By decision dated July 27, 2001, the Office hearing representative affirmed the Office's December 6, 2000 decision.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴

Pursuant to the Board's instructions, the Office sent appellant to Dr. Frankel to resolve the conflict in the medical evidence as to whether he was entitled to a schedule award for a permanent partial impairment to his lower extremities. In his October 10 and October 31, 2000 reports, Dr. Frankel stated that appellant had no sensory, motor or functional deficits, no

² 5 U.S.C. § 8107 *et seq.*

³ 20 C.F.R. § 10.404.

⁴ *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 306, 308 (1986).

evidence of instability or limitation in range of motion in his legs, and no pain involving any neurologic compromise of the legs and nerves. He based his findings on his consideration of appellant's history of injury, appellant's physical examination, and his review of the diagnostic tests. In his October 10, 2000 report, Dr. Frankel considered the EMG results, stating that they were normal except for a minimal C8 irritability and chronic L5 radiculopathy with no evidence of active nerve root irritation. He also noted that the x-rays showed discogenic changes and arthritis of the cervical and lumbar spines but found no evidence of disc herniation. Dr. Frankel stated that the July 16, 1991 MRI scan showed degenerative disc disease at L2-3 and L3-4 and a paramedial disc herniation at L4-5 and at L3-4. In his conclusion, Dr. Frankel stated that appellant's arthritis and degenerative discogenic changes in the lumbar spine "could" contribute to his subjective complaints but his lumbar discogenic disease, facet arthropathy and cervical degeneration could not be attributed to his work injury. He stated that using the A.M.A., *Guides* (4th ed. 1994), appellant had no impairment.

In situations where there are 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 on a proper factual background, must be given special weight.⁵ In this case, Dr. Frankel's opinion that appellant had no permanent partial impairment resulting from his October 28, 1990 employment injury is sufficiently well rationalized to establish that appellant is not entitled to a schedule award and constitutes the weight of the evidence. Because Dr. Frankel found that appellant had no sensory, motor or functional deficit, he did not have to refer to charts and tables in the A.M.A., *Guides*. Appellant has therefore failed to establish his claim.

The July 27, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 21, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).