

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID K. ASKINS and U.S. POSTAL SERVICE,
GATES CENTER POST OFFICE, Topeka, KS

*Docket No. 02-609; Submitted on the Record;
Issued August 7, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has greater than a seven percent permanent loss of use of the right leg and a two percent permanent loss of use of the left leg.

The Office of Workers' Compensation Programs accepted that appellant sustained lumbosacral strains in employment injuries sustained on July 7, 1993 and November 30, 1994. On September 27, 1996 the Office terminated appellant's compensation on the basis that he had recovered from all effects of his employment injuries.

Appellant appealed this decision to the Board, which, by decision dated June 18, 1999,¹ found that the Office did not meet its burden of proof to terminate appellant's compensation, due to an unresolved conflict of medical opinion between appellant's attending physician, Dr. Michael J. Schmidt, and the Office's referral physician, Dr. Satish Bansal.

By letter dated January 6, 2000, the Office referred appellant, the case record and a statement of accepted facts to Dr. Glenn M. Amundson, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion on whether appellant continued to have residuals of his employment injuries. In a report dated January 27, 2000, Dr. Amundson concluded that appellant's July 7, 1993 and November 30, 1994 employment injuries "resulted in continued, chronic low back pain" and in "destabilization of the L5-S1 tenuous fusion² or pseudarthrosis...."

By letter dated March 15, 2000, the Office advised appellant that it had accepted the additional condition of "permanent aggravation of L5-S1."

¹ *David K. Askins*, Docket No. 97-2486 (issued June 18, 1999).

² Appellant underwent a fusion of several levels of his lumbar spine in 1970 or 1971 due to a motor vehicle accident in the military service.

On November 21, 2000 appellant filed a claim for a schedule award.

On December 27, 2000 an Office district medical director reviewed the medical evidence and noted that Dr. Schmidt indicated that appellant had a 16 percent permanent impairment of the whole person, but that this rating was not based on radicular signs or symptoms affecting a lower extremity. The Office district medical director recommended referral to a physician skilled in use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On January 5, 2001 the Office referred appellant to Dr. George Varghese, a Board-certified physiatrist, for an evaluation of his permanent impairment according to the A.M.A., *Guides*. In a report dated February 2, 2001, Dr. Varghese noted that appellant continued to have low back pain radiating down the right leg more than the left, that he was able to work full time despite the pain, that activity increased the pain and that he had occasional numbness in the foot, more on the right side. He stated that examination showed pain mostly in the distribution of L5 predominantly on the right side, full range of all leg joints, 5/5 motor strength “in all muscles except for mild weakness of evertors on the right side and possibly minimal weakness of the extensor hallucis longus,” and, on sensory examination, “some subjectively decreased sensation along L5 pattern on the right side.” Dr. Varghese then stated:

“As you requested, I have done a permanent partial impairment rating for the residual deficits. As per instructions, I took only the effect of the radiculopathy in the extremities for the calculations and no axial skeletal limitation was used for the impairment rating.

“I used *Guides*, 4th edition, published by the A.M.A., for this calculation. The following factors were taken into consideration: (1) Pain. Patient has pain with prolonged standing and walking. Patient has some restrictions on lifting weights more than 25 pounds. Symptoms are worse on the right side than on the left side. Using Table 20, I gave a 60 percent grade in the L5 root distribution on the right side and 40 percent grade for the left side. Using Table 83, this is converted to 3 percent for the right lower extremity and 2 percent for the left lower extremity. Patient also has mild weakness of L5 muscles on the right side. Using Table 21, I gave a 10 percent grade for the residual weakness. Again, using Table 83, this is converted to 4 percent for the right lower extremity.

“In summary, his permanent partial impairment rating for the right lower extremity is seven percent and for the left lower extremity it is two percent.”

On April 2, 2001 the Office issued a schedule award for a seven percent permanent loss of use of the right leg and a two percent permanent loss of use of the left leg.

By letter dated April 30, 2001, appellant requested reconsideration, contending that the Office should have based the schedule award on the 16 percent impairment found by Dr. Schmidt, since Dr. Amundson indicated this was an accurate assessment.

By decision dated May 8, 2001, the Office found that appellant's request for reconsideration was insufficient to warrant review, as it did not present any new medical evidence or legal arguments.

By letter dated August 6, 2001, appellant requested reconsideration and submitted a June 27, 2001 report from Dr. Amundson, who stated:

"I opined in my January 27, 2000 independent medical evaluation and rating, that his total disability due to his on-the-job injuries was 16 percent impairment of the whole person, but based on his preexisting treatment that 50 percent should be assigned as due to his on-the-job injury. [Appellant], therefore, has suffered an eight percent impairment to the whole person based on his two on-the-job injuries and subsequent residuals' impact on his working and functional ability."

By decision dated September 12, 2001, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions, as the Federal Employees' Compensation Act "does not recognize whole body impairment ratings for residuals of axial skeletal conditions."

The Board finds that appellant has no greater than a seven percent permanent loss of use of the right leg and a two percent permanent loss of use of the left leg.

The schedule award provision of the Act³ and its implementing regulation⁴ 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.

Dr. Varghese, a Board-certified physiatrist, used the appropriate tables of the fourth edition of the A.M.A., *Guides* to rate the permanent loss of use of appellant's legs related to his back condition: from Chapter 4, Table 20, page 151, "Classification and Procedure for Determining Impairment Due to Pain or Sensory Deficit Resulting from Peripheral Nerve Disorders," and Table 21, page 151, Classification and Procedure for Determining Nervous System Impairment Due to Loss of Muscle Power and Motor Function Resulting from Peripheral Nerve Disorders"; from Chapter 3, "Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity." Examining physicians may select a percentage within the allowable ranges in the tables of the A.M.A., *Guides*,⁵ and Dr. Varghese's selections of grades and percentages within those grades in Tables 20 and 21 appear consistent with his description of appellant's complaints and findings on examination. The percentages from these tables were then properly

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ See *John Keller*, 39 ECAB 543 (1988).

applied to the maximums for the L5 nerve root from Table 83, page 130, which are 5 percent for sensory deficit or pain and 37 percent for strength deficit.⁶ The seven percent permanent loss of use of the right leg and the two percent permanent loss of use of the left leg were properly calculated under the A.M.A., *Guides*.

There is no evidence that appellant has greater than these percentages of permanent impairment of the legs. Appellant's attending physician, Dr. Schmidt, stated that appellant had a 16 percent impairment of the whole person based on impairments of the lumbar spine, specifically surgery with residuals and limited lumbar flexion. A schedule award, however, is not payable for the loss, or loss of use of a part of the body not specifically enumerated in the Act.⁷ There is no provision in the Act⁸ or the regulation on schedule awards⁹ for payment of a schedule award for impairment to the back or to the body as a whole.¹⁰ Furthermore, the back is specifically excluded from the definition of "organ" under the Act.¹¹ A schedule award is payable for an employment-related permanent impairment of the legs, members enumerated in the Act, for an impairment that originates in the spine.¹²

Because it rated the impairment of appellant's spine and did not indicate he had any permanent impairment of the legs, Dr. Schmidt's report is of no probative value in determining appellant's entitlement to a schedule award under the Act. Dr. Amundson's concurrence with Dr. Schmidt's rating of permanent impairment is of no value for the same reason, and also because Dr. Amundson based his support of Dr. Schmidt's rating in part on the impact on appellant's working and functional ability, which are not factors to be considered under the A.M.A., *Guides*. Given Dr. Amundson's support of a whole person impairment based on improper considerations, it was reasonable for the Office to refer appellant to Dr. Varghese for an evaluation of the permanent impairment of his legs. At no time has there been a conflict of medical opinion regarding a permanent impairment of a member of the body for which a schedule award is payable under the Act.

⁶ At the time of the referral to Dr. Varghese, the Office was using the fourth edition of the A.M.A., *Guides*. Per FECA Bulletin No. 01-05, issued January 29, 2001, the Office began using the fifth edition of the A.M.A., *Guides* effective February 1, 2001. As the corresponding tables in the fourth and fifth editions contain identical numerical values for the impairments rated in this case, the Office's use of the fourth rather than the fifth edition of the A.M.A., *Guides* as the basis of its April 2, 2001 schedule award had no effect on that award.

⁷ *James E. Jenkins*, 39 ECAB 860 (1988).

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ 5 U.S.C. § 8107(20).

¹² *John Litwinka*, 41 ECAB 956 (1990).

The September 12 and April 2, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 7, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member