

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK L. GERBER and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 01-2067; Submitted on the Record;
Issued June 12, 2002*

DECISION and ORDER

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

The issue is whether appellant has more than a 23 percent permanent impairment of the left leg.

The case has been on appeal previously.¹ In a June 18, 1999 decision, the Board noted that appellant injured his back on July 7, 1988 while lifting 5 to 10 gallon cans of paint. The Office of Workers' Compensation Programs accepted appellant's claim for a herniated nucleus pulposus and issued a schedule award for a 22 percent permanent impairment of the left leg. The Board found that there existed a conflict in the medical evidence on the extent of appellant's permanent impairment of the left leg. The Board, therefore, remanded the case for referral of appellant to an appropriate impartial medical specialist.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. William D. Simon, a Board-certified orthopedic surgeon, for an examination and opinion on the extent of appellant's permanent impairment. In an August 26, 1999 report, Dr. Simon reported that appellant's left calf was ½ inch smaller than the right calf. He stated that the range of motion of the knees was 0 degrees of extension and flexion of 140 degrees. Dr. Simon indicated that the range of motion of the ankles was dorsiflexion 20 degrees, plantar flexion 40 degrees, inversion 15 degrees and eversion 10 degrees. He noted that appellant had normal power in the knees and ankles. Dr. Simon indicated that deep tendon reflexes around the knees were hypoactive but symmetrical. He reported that sensation was decreased on the outer aspect of the left calf and the inner and outer aspects of the left heel. Dr. Simon stated that appellant had 25 percent permanent impairment of the whole body.

¹ Docket No. 97-1877 (issued June 18, 1999). The history of the case is contained in the prior decision and is incorporated by reference.

In an October 25, 1999 memorandum, the Office medical adviser stated that Dr. Simon's report did not use the appropriate tables from the A.M.A., *Guides*.² He indicated that a schedule award was allowed a permanent impairment due to lumbar radiculopathy in the leg. The medical adviser concluded that appellant had a 25 percent loss of strength in the L5 nerve root. He multiplied this figure for loss of strength that the maximum 37 percent permanent impairment allowed for total loss of strength in the L5 nerve root and concluded appellant had a 9 percent permanent impairment for loss of strength. The medical adviser stated that appellant had an 80 percent permanent impairment due to pain in the L5 nerve root. He multiplied that figure by the maximum five percent permanent impairment allowed for sensory loss in the L5 nerve root and concluded appellant had a four percent permanent impairment due to pain. The medical adviser indicated that appellant had a 2 percent permanent impairment of the leg due to 15 degrees of inversion. He concluded that appellant had a 15 percent permanent impairment of the left leg. The medical adviser stated that the Board wanted a determination of which nerve root was affected by the employment injury. He noted that a decrease in sensation in the outer side of the left calf and heel would affect either the L4 or L5 dermatome. He, therefore, recommended that Dr. Simon be asked to clarify this point.

In an October 26, 1999 letter, the Office requested clarification from Dr. Simon on which left nerve roots were involved in appellant's motor or sensory impairments. He responded that the L5 and S1 nerve roots on the left were affected.

In a November 1, 1999 memorandum, the Office medical adviser repeated his determination of the permanent impairment due to sensory and motor loss of the L5 nerve root and permanent impairment due to loss of inversion in the left ankle. He calculated that appellant had a 25 percent loss of strength in the S1 nerve root. The medical adviser multiplied that figure by the 20 percent maximum permanent impairment for loss of strength in the S1 nerve roots and determined that appellant had a 5 percent permanent impairment. He determined that appellant had an 80 percent sensory impairment of the S1 nerve root. The medical adviser multiplied that figure by the maximum five percent permanent impairment allowed for total sensory loss in the S1 nerve root and concluded that appellant had a four percent permanent impairment. The Office medical adviser used the Combined Values Chart to concluded that appellant had a 23 percent permanent impairment of the left leg.

In a November 1, 1999 decision, the Office issued a schedule award for an additional one percent permanent impairment of the left leg.

Appellant's attorney requested a hearing before an Office hearing representative, which was conducted on February 20, 2000. In a May 11, 2000 decision, the Office hearing representative found that the Office had erred in seeking only a clarification from Dr. Simon rather than a full report after informing him that a schedule award could not be awarded for the back. The hearing representative, therefore, set aside the November 1, 1999 decision and remanded the case so that the Office could seek a clarifying report from Dr. Simon.

The Office requested from Dr. Simon an estimate of the permanent impairment of appellant's left leg. In a May 31, 2000 report, Dr. Simon stated that, under the fourth edition of

² (4th ed. 1993).

the A.M.A., *Guides*, appellant had a 1 to 2 percent permanent impairment for atrophy of the calf and a 12 percent permanent impairment for mild weakness of extension and flexion of the ankle. He concluded that appellant had a 14 percent permanent impairment of the left leg.

In a June 20, 2000 memorandum, the Office medical adviser indicated that a permanent impairment for atrophy could not be considered together with a permanent impairment calculation for weakness in the ankle. He, therefore, found that Dr. Simon had indicated appellant had a 12 percent permanent impairment of the left leg.

In an August 14, 2000 decision, the Office found that appellant had no more than a 23 percent permanent impairment of the left leg.

Appellant's attorney again requested a hearing before an Office hearing representative, which was conducted on February 27, 2001. In a May 16, 2001 decision, the Office hearing representative affirmed the Office's August 14, 2000 decision.

The Board finds that appellant has no more than a 23 percent permanent impairment of the left leg.

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides*⁵ has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁶

Dr. Simon, in his August 26, 1999 report, gave a complete description of his findings of appellant's physical condition but only expressed appellant's permanent impairment in terms of the whole body, not the left leg. The Office medical adviser acted properly in reviewing Dr. Simon's report and applying the A.M.A., *Guides* to his findings.⁷ He properly determined appellant's permanent impairment due to sensory loss and weakness in the L5 and S1 nerve roots

³ 5 U.S.C. § 8107(c).

⁴ 20 C.F.R. § 10.304.

⁵ (4th ed. 1993).

⁶ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

⁷ *John L. McClenic*, 48 ECAB 552 (1997).

and properly found that appellant had a two percent permanent impairment due to loss of inversion in the left ankle.⁸ The subsequent report of Dr. Simon only gave appellant a 12 percent permanent impairment based on the same findings. It was, therefore, proper to find that appellant had more than a 23 percent permanent impairment of the left leg.

The decision of the Office of Workers' Compensation Programs, dated May 16, 2001, is hereby affirmed.

Dated, Washington, DC
June 12, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ Under FECA Bulletin No. 01-05 (issued January 29, 2001) the fifth edition of the A.M.A., *Guides* was to be used for all calculations of permanent impairment after February 1, 2001. Awards calculated under any previous edition should be evaluated according to the edition originally used. In this case, the fourth edition was applied to appellant's permanent impairment of the left leg through the Office's August 14, 2000 decision. It was therefore proper to review appellant's permanent impairment under the fourth edition of the A.M.A., *Guides*.