

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN SIMPSON and U.S. POSTAL SERVICE,  
POST OFFICE, Birmingham, AL

*Docket No. 02-82; Submitted on the Record;  
Issued September 9, 2002*

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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 permanent impairment of his left lower extremity as a result of his employment-related low back condition.

The Board finds that appellant is not entitled to a schedule award for his left lower extremity as a result of his employment-related low back condition.

The schedule award provisions of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulation<sup>2</sup> 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>3</sup> has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

On October 30, 1995 appellant, then a 42-year-old motor vehicle operator filed a traumatic injury claim alleging that on October 24, 1995 he injured his back and left groin while in the performance of duty. The Office accepted his claim for a lumbar strain and a left groin contusion. Appellant thereafter, had intermittent periods of disability. On May 25, 1999 he retired on medical disability.

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<sup>1</sup> 5 U.S.C. §§ 8107.

<sup>2</sup> 20 C.F.R. § 10.404 (1999).

<sup>3</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

On August 27, 1998 appellant filed a claim (Form CA-7) for a schedule award. On September 14, 1998 the Office requested that Dr. Scott Touger, a physician specializing in internal medicine, determine the extent of appellant's permanent partial impairment related to his accepted low back condition. On September 30, 1998 Dr. Touger submitted a functional capacity evaluation conducted by a rehabilitation specialist performed February 26, 1998 which showed that appellant had a 55 percent disability rating to his back related to the accepted employment injury.

On June 29, 1999 the Office again requested that Dr. Touger provide his opinion concerning any impairment appellant might have had to either of his lower extremities related to his accepted low back condition. The Office requested a report which indicated objective findings, his diagnosis of the conditions affecting appellant's lower extremities and the percentage of appellant's impairment of the lower back due to spinal pathology found in Chapter 3.3 of the Fourth Edition of the A.M.A., *Guides*. The Office requested that Dr. Touger include whether there was significant pain, sensory deficit or motor impairment related to the accepted employment condition. The Office further requested the date appellant reached maximum medical improvement. Dr. Touger did not respond to the Office's request.

On September 20, 1999 the Office submitted the case file to an Office medical adviser for review of the medical evidence, including the February 26, 1998 functional capacity examination. The Office medical adviser found that the medical evidence failed to support permanent partial impairment to either lower extremity. In a letter dated September 30, 1999, the Office informed appellant of this finding and requested that he provide his physician with a copy of the letter which also contained the methods of quantifying impairment to determine eligibility of a schedule award.

In a letter dated September 24, 1999, Dr. Touger responded that although he had never provided an impairment rating under the designated guidelines, he nevertheless reevaluated appellant on July 12, 1999 and offered findings. Dr. Touger stated:

"I would estimate that [appellant] has a [G]rade 4 impairment with regard to his lower back and a [G]rade 4 impairment with regard to his left arm and hand. He reports weakness and numbness in his lower back. [Appellant] is unable to stoop or bend. He says he can walk without too much trouble but is unable to climb steps unless he goes up sideways. [Appellant] usually walks with a cane or a back brace as best as he can. I give him an impairment rating of about 65 [to]70 percent as far as his back is concerned. With regard to [appellant's] left arm and left hand, he is unable to grip anything securely and is unable to loosen jar lids with his left hand due to weakness. I would give his left arm and left hand again about a 65 [to] 70 percent impairment rating."

On February 3, 2000 the Office referred appellant to Dr. John Bacon, a Board-certified orthopedic surgeon for a second opinion examination performed on February 25, 2000. In his report dated March 3, 2000, Dr. Bacon reviewed appellant's history of illness, medical records, objective findings and his examination of appellant. He indicated that appellant had reached maximum medical improvement and noted appellant's diagnosis of chronic lumbar strain and degenerative disc disease of the lumbar spine. Dr. Bacon indicated that his objective findings

were muscle spasms in the lumbar region and an abnormal diskogram at the L3-5 levels, however, he did not find evidence of significant pain, sensory deficit or motor impairment of the lower extremity. He opined that appellant's current conditions were causally related to employment factors. In quantifying impairment, Dr. Bacon stated:

"I do not believe there is any impairment to the lower extremity as a result of [T]able 83 on page 130 along with [T]able 11 and 12 on page 48 [to] 49.... [Appellant] would not have impairment to the lower extremities as pertains to his chronic lumbar strain. However[,] he would have a permanent partial impairment for his back problem. It is my feeling that [appellant] falls into DRE, lumbosacral category, minor impairment on page 102. This would entitle him to an impairment rating of five percent of the person as a whole."

By decision dated September 15, 2000, the Office found the evidence of record insufficient to establish that any permanent impairment was causally related to the employment-related lumbar strain and left groin contusion.

In an October 13, 2000 letter, appellant through counsel, requested an oral hearing, which was held on May 30, 2001. His counsel argued that appellant had been reevaluated for an impairment rating. Appellant's counsel noted that a new functional capacity evaluation performed by Oliver Daniel, an occupational therapist, provided an impairment rating of four percent for the body as a whole, however, no specific evaluation for the lower extremity. Appellant's counsel argued that Dr. Donald Deinlein, a Board-certified orthopedic surgeon, reviewed the functional capacity evaluation and, in a May 8, 2001 report, found that appellant sustained a loss of muscle strength of the left lower extremity due to an internal disc disruption at L5. Appellant's counsel submitted the functional capacity evaluation and the May 8, 2001 report for the record, which updated the impairment rating to include Mr. Daniel's calculation of impairment of the lower extremity and whole person. Dr. Deinlein restated Mr. Daniel's assessment that appellant had an impairment of "37 percent due to strength deficit, 25 percent for Grade 4 muscle strength (Table 12, p.49) times 37 percent equals 9.25 percent lower extremity impairment ... 9.25 percent times 4 equals 3.7 percent whole person impairment."

By decision dated July 31, 2001, an Office hearing representative affirmed the prior decision finding that appellant failed to establish a permanent impairment of the left lower extremity as a result of his employment-related low back condition.

In this case, Dr. Scott Touger, an internist submitted a February 26, 1998 functional capacity evaluation from a vocational rehabilitation specialist supportive that appellant sustained a 55 percent impairment to his back. The Office properly determined that the report from the rehabilitation specialist providing an impairment rating for appellant's back was insufficient for schedule award purposes, therefore, it requested that Dr. Touger quantify appellant's level of impairment in accordance with the designated guidelines and the applicable sections of the A.M.A., *Guides*. In his September 24, 1999 report, Dr. Touger indicated that appellant had a Grade 4 impairment of the back of 65 to 70 percent and a Grade 4 impairment with regard to his left arm and left hand of 65 to 70 percent. The report by Dr. Touger does not support appellant's claim of permanent impairment to his left lower extremity, which would entitle him to a schedule award. Dr. Touger did not give an impairment rating of appellant's left lower extremity related

to the accepted employment-related conditions and did not explain upon what tables in the A.M.A., *Guides* he based his determination of permanent impairment. Therefore, his report is of diminished probative value and does not meet appellant's burden in this case.

During the oral hearing, appellant's counsel submitted a report from Dr. Deinlein dated May 8, 2001 in which he provided an updated impairment rating based on an examination performed by Mr. Oliver Daniel, an occupational therapist during a functional capacity evaluation on November 4, 1999. The Office hearing representative correctly noted that Dr. Deinlein, without any rationale, merely reiterated the impairment rating outlined by Mr. Daniel on November 4, 1999; that appellant had a 9.25 percent impairment of the lower extremity for loss of muscle strength or a 3.7 percent whole person impairment. The Board finds that this report does not provide sufficient rationale and is also of diminished probative value.

The record contains a report from the second opinion physician, Dr. Bacon, a Board-certified orthopedic surgeon, dated March 3, 2000 in which he found that appellant had no impairment of the lower extremity. He determined that appellant's accepted employment injury had not caused any loss of function due to sensory or strength deficit, which might equate to an impairment of the lower extremity, however, he found that appellant did suffer from muscle spasms as a result of the injury. Dr. Bacon opined that appellant fell into the category of Diagnostically Related Group II which corresponded to a five percent total body disability, based on the fourth edition of the A.M.A., *Guides*. The Board notes that neither the Act nor its implementing regulations provide for a schedule award for impairment to the body as a whole.<sup>4</sup> Consequently, a five percent whole body impairment is not compensable under the Act.

The Board finds that the weight of the medical evidence rests with the report provided by Dr. Bacon, which supports that appellant had no impairment to the lower extremity, according to the applicable tables of the A.M.A., *Guides*. As Dr. Deinlein did not provide a written report explaining how the measurements provided by the occupational therapist on November 4, 1999 were correct, appellant has not provided sufficient medical evidence to outweigh or to create a conflict with the report of Dr. Bacon. The Board finds therefore, that appellant has not demonstrated entitlement to a schedule award for an impairment of his left lower extremity.

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<sup>4</sup> See *James E. Mills*, 43 ECAB 215 (1991).

The decision of the Office of Workers' Compensation Programs dated July 31, 2001 is affirmed.

Dated, Washington, DC  
September 9, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member