

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DERWIN D. KINSTON and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT AGENCY, Fort Lauderdale, FL

*Docket No. 03-790; Submitted on the Record;
Issued April 29, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has more than a 38 percent permanent loss of use of his right leg.

On February 5, 1997 appellant, then a 33-year-old drug enforcement agent, filed a claim for a traumatic injury sustained on February 4, 1997 when he shot himself in the right leg.

Appellant underwent surgery on March 20, 1997: removal of a bullet with open reduction and intermedullary nailing of fractured right tibia. He returned to part-time limited duty on September 19, 1997 and the Office of Workers' Compensation Programs, which was paying compensation for temporary total disability, reduced appellant's compensation to that for partial disability. On February 15, 1998 appellant returned to full-time work and the Office terminated his wage-loss compensation for disability.

On February 20, 1998 appellant filed a claim for a schedule award.

In a February 27, 1998 note, Dr. Barney C. Horvath, the Board-certified orthopedic surgeon, who performed the March 20, 1997 surgery, stated that appellant was maximally improved and that he had a 38 percent permanent impairment of the right leg, consisting of a 5 percent impairment for loss of 10 degrees of flexion and 10 degrees of extension of the knee, an 8 percent impairment for loss of 10 degrees of dorsiflexion and 10 degrees of plantar flexion of the ankle and 25 percent impairment for "nerve damage, giving him weakness, with damage to the posterior tibialis nerve below the calf, or at the level of the calf."

On June 4, 1998 the Office issued a schedule award for a 38 percent permanent impairment of the right leg.

Appellant submitted additional medical evidence. In a report dated August 3, 2000, Dr. Michael D. Sirdofsky, a Board-certified neurologist, stated that appellant's "gunshot injury ... appears to have affected predominantly the lower tibial, motor and sensory division as well as

perhaps the superficial peroneal division given his sensory loss on the leg and dorsum of the foot.” On August 24, 2000 Dr. Sirdofsky further evaluated appellant’s right leg condition with an electromyogram (EMG), which suggested “a partial traumatic tibial nerve injury” and no involvement of the peroneal nerve.

In a report dated September 19, 2000, Dr. Robert H. Wilson, a Board-certified orthopedic surgeon, stated that appellant had a 34 percent permanent impairment of the right leg, consisting of a 14 percent impairment in gait, a 4 percent impairment for atrophy, a 12 percent impairment for diminished knee strength and a 10 percent neurologic impairment.

In a report dated October 25, 2000, Dr. Melinda Gardner, a Board-certified orthopedic surgeon, stated that appellant had a 27 percent impairment of the right leg, consisting of 19 percent for nerve damage and 10 percent for the tibia fracture. An Office medical adviser reviewed Dr. Gardner’s report on December 14, 2000 and stated that it showed a 20 percent permanent impairment “for motor and sensory loss to medial and lateral plantar nerves (branches of tibial nerve).”

By letter dated March 2, 2001, appellant contended that Dr. Horvath’s evaluation of his permanent impairment did not take his nerve damage into account and that Dr. Gardner’s report showed his entitlement to an additional schedule award. On September 13, 2001 appellant filed another claim for a schedule award.

By decision dated October 17, 2001, the Office found that appellant had no more than a 38 percent permanent impairment of his right leg.

By letter dated January 2, 2002, appellant requested reconsideration and submitted a November 12, 2001 report from Dr. Craig R. Faulks, a Board-certified orthopedic surgeon. Dr. Faulks stated that appellant had a 26 percent permanent impairment of his right leg, consisting of 8 percent for calf atrophy and 18 percent for “impairment to the medial and lateral plantar and superficial peroneal nerve.” Appellant submitted a report of an EMG done on May 13, 2002 that showed a right “tibial mononeuropathy, both motor and sensory, with chronic signs of denervation” and normal peroneal motor and sensory conduction.

An Office medical adviser reviewed Dr. Faulks’ report on November 15, 2002 and stated that it showed a 34 percent permanent impairment of the right leg, consisting of 7 percent impairment for 5 degrees of ankle dorsiflexion, 20 percent for motor and sensory impairments of the plantar nerve, 5 percent impairment for sensory loss of the superficial peroneal nerve and 5 percent impairment for calf atrophy.

By decision dated December 26, 2002, the Office found that appellant had no more than a 38 percent permanent impairment of the right leg.

The Board finds that appellant has no more than a 38 percent permanent loss of use of his right leg.

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing regulation² 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

On appeal, appellant contends that the nerve damage he sustained in his February 4, 1997 injury was not included in his schedule award. The record does not support his contention. In the February 23, 1998 report, that was the basis of the Office's schedule award, Dr. Horvath assigned 25 percent for damage to appellant's posterior tibial nerve. This was the major component of the Office's June 4, 1998 schedule award for a 38 percent permanent impairment of the right leg.

None of the reports appellant submitted with his requests for reconsideration establish that the impairment due to nerve damage was more than the 25 percent impairment assigned by Dr. Horvath. Dr. Wilson assigned 10 percent for neurologic impairment, Dr. Gardner assigned 20 percent for nerve damage and Dr. Faulks assigned 18 percent for damage to the plantar and superficial peroneal nerves.

The medical evidence of record does not establish that appellant has more than a 38 percent permanent loss of use of his right leg. The reports appellant submitted with his requests for reconsideration indicate that his impairment has been rated at less than a 38 percent impairment. Dr. Sirdofsky did not provide a percentage impairment rating and Dr. Wilson indicated that appellant's impairment was 34 percent, Dr. Gardner arrived at 27 percent and Dr. Faulks stated that appellant's permanent impairment was 26 percent of the right leg.

Five percent of the Office's thirty-eight percent schedule award was for loss of knee motion, but Drs. Faulks, Gardner and Wilson, the last three physicians to evaluate appellant's permanent impairment, all concluded that appellant had full-knee motion, which suggests that the loss of knee motion found by Dr. Horvath was not permanent. The evidence does not show more than a 38 percent permanent loss of use of the right leg.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

The December 26, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 29, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member