U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH S. MALLORY and U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA

Docket No. 01-2226; Submitted on the Record; Issued March 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof to establish that he is entitled to a schedule award for permanent impairment of his lower extremities.

On July 23, 1996 appellant, then a 50-year-old letter carrier, filed an occupational disease claim alleging that he sustained back and lower extremity conditions due to walking, standing and casing mail at work. Appellant stopped work on November 22, 1995. The Office of Workers' Compensation Programs accepted that he sustained a permanent aggravation of lumbar spinal stenosis and bilateral L3-4 radiculopathy. Appellant suffered a stroke on December 9, 1996 due to a left frontal parietal hemorrhage of his brain. Appellant received compensation for periods of disability and filed a schedule award claim in October 1998.[1] By decision dated February 15, 2000, the Office determined that appellant did not have permanent impairment of his lower extremities, which would entitle him to a schedule award. The Office determined that any limitations appellant had were due to his December 9, 1996 stroke, which did not constitute a preexisting medical condition. By decision dated January 8, 2001, an Office hearing representative affirmed the Office's February 15, 2000 decision. By decision dated July 12, 2001, the Office denied appellant's request for merit review.

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he is entitled to a schedule award for permanent impairment of his lower extremities.

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[3] including that he sustained an injury in the performance of

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[1] In May 1998 appellant returned to work for the employing establishment in a limited-duty position.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

duty as alleged and that his disability, if any, was causally related to the employment injury.[4] The schedule award provision of the Act[5] and its implementing regulation[6] 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* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[9]

The Board finds that there is a conflict in the medical evidence between the Office medical adviser and Dr. David G. Hollifield and Dr. Ralph D'Auria, appellant's attending Board-certified orthopedic surgeons, regarding whether appellant had a permanent impairment of his lower extremities, which entitled him to a schedule award.

In an undated report received by the Office in January 2001, Dr. D'Auria stated that appellant had a 10 percent permanent impairment of his whole body according to Table 13 of the fourth edition of the A.M.A., *Guides*.[10] He noted that appellant's impairment was based on his difficulty in walking, climbing stairs and getting out of deep chairs and indicated that his permanent impairment predated his December 9, 1996 stroke.[11] In a report dated May 3, 2001,

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[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Id*.

[8] 5 U.S.C. § 8123(a).

[9] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[10] A.M.A., *Guides* 148, Table 13 (4th ed., 1993). This table is located in Chapter 4, which deals with permanent impairment related to injury of the central nervous system. Impairment ratings of 10 to 19 percent are assigned when an individual can rise to a standing position and walk some distance with difficulty and without assistance but is limited to level surfaces.

[11] In a report dated April 16, 1996, Dr. D'Auria had provided a similar assessment of appellant's impairment. It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included; *see Dale B. Larson*, 41 ECAB 481, 490 (1990); *Pedro M. DeLeon, Jr.,* 35 ECAB 487, 492 (1983).

Dr. D'Auria stated that the 10 percent permanent impairment of appellant's whole body was related to his employment-related spinal stenosis and L3-4 radiculopathy. He again indicated that this impairment preceded and was not related to appellant's stroke. Dr. D'Auria indicated that Dr. Hollifield had converted appellant's whole body impairment rating into an impairment rating for each lower extremity.[12] In a report dated September 23, 1998, Dr. Hollifield indicated that, due to lower extremity limitations, appellant had a 10 percent permanent impairment of his whole body. He asserted that Board precedent dictated that this whole body impairment could be translated into a 15 percent permanent impairment of each leg.[13]

In contrast, an Office medical adviser determined in a February 7, 2000 report that appellant did not have any permanent impairment of his lower extremities, which would entitle him to a schedule award. The Office medical adviser stated that the decreased lower extremity strength appellant exhibited on examination was due to his December 9, 1996 stroke, *i.e.*, a condition which did not preexist his employment injury. He indicated that Dr. Scott G. Kleiman, a Board-certified orthopedic surgeon, who served as an Office referral physician, indicated in his October 20, 1999 report that appellant did not have any permanent impairment related to his employment injury.[14]

Therefore, there is a conflict in the medical evidence between the Office medical adviser and appellant's attending physicians, regarding whether appellant is entitled to a schedule award for permanent impairment of his lower extremities. In particular, the record contains opposing opinions regarding whether appellant's limitations are related to his employment injury or to his December 9, 1996 stroke, *i.e.*, a condition which did not preexist his employment injury.

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence regarding whether appellant has a permanent impairment of his lower extremities, which would entitle him to a schedule award. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter.[15] After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's schedule award claim.[16]

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[12] Dr. D'Auria indicated that his first impairment evaluation of appellant preceded his December 9, 1996 stroke.

[13] Dr. Hollifield made reference to the case *Gordon G. McNeill*, 42 ECAB 140 (1990).

[14] In his report, Dr. Kleiman stated, "With respect to the degree of permanent impairment of the lower extremities due to loss of function from decreased strength, the decreased strength in the lower extremities appears to be a result of the [cardiovascular accident] and not a result of the work-related injury."

[15] If it is determined that appellant has a ratable employment-related permanent impairment, the specialist should specify describe how he or she has calculated such impairment in accordance with the standards of the A.M.A., *Guides* (4th ed., 1993), including an indication whether the calculations are based on Chapter 3 (pertaining, in part, to impairment due to peripheral nerve disorders), Chapter 4 (pertaining to impairment due to central nervous system disorders), or some other appropriate section.

[16] Given the Board's disposition of the merit issue of the present case, it is not necessary to consider the Office's nonmerit decision of July 12, 2001.

The July 12 and January 8, 2001 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
March 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member