

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY W. THOMAS and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

Docket No. 03-1699; Submitted on the Record;
Issued November 13, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to more than a three percent permanent impairment for the loss of use of his left lower extremity, for which he received a schedule award.

On February 3, 1999 appellant, then a 43-year-old letter carrier, filed an occupational disease claim alleging that he first became aware of his left sciatica on January 13, 1999. Appellant also alleged that he first realized that his condition was caused by factors of his employment on January 25, 1999. Appellant stated that on January 13, 1999 his foot and leg started to hurt while he was at work and he thought it was related to his service-connected disability. He further stated that when he saw the doctor and found out that he had a different problem, he realized it was caused by his work.

By letter dated April 7, 1999, the Office of Workers' Compensation Programs accepted appellant's claim for sciatica and lumbar strain with radiculopathy.

On January 18, 2002 appellant filed a claim for a schedule award and submitted a January 12, 2002 attending physician's report from his treating physician, Dr. Sofjan Lamid, a Board-certified physiatrist, finding that his left sciatica and multilevel lumbosacral radiculopathy on the left were caused by his January 13, 1999 employment injury.

The Office received a January 14, 2002 report from Dr. Lamid. In this report, Dr. Lamid provided a history of appellant's accepted employment injury. On physical examination, he found appellant alert and well oriented, a normal heart rhythm, normal S1, S2 and no murmurs. He also found clear lungs, a normal abdomen and cervical spine. The thoracolumbar spine showed flexion of 90 degrees with slight tender pain and spasm on paralumbar muscles. Pain radiated to the left thigh and left lower leg, straight leg raising was abnormal, decreased pinprick sensation on the left leg and decreased motor strength on the left knee extensors and left plantar flexors. Dr. Lamid diagnosed left sciatica and multilevel lower lumbosacral radiculopathy on the

left. Based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Lamid stated:

“1. Left L3 radiculopathy: Loss of motor function due to loss of strength: 20 percent impairment of [the] [l]ower [e]xtremity ([T]able 15-18, page 424) or 8 percent impairment of [w]hole [p]erson ([T]able 17-3, page 527).

“2. Left L5 radiculopathy. Loss of motor function due to loss of strength: 20 percent impairment of the [l]ower [e]xtremity ([T]able 15-18, page 424) or 8 percent impairment of [w]hole [p]erson (Table 17-3, page 527).

“3. Left S1 radiculopathy. Loss of motor function due to loss of strength: 20 percent impairment of [the] [l]ower [e]xtremity ([T]able 15-18, page 424) or 8 percent impairment of [w]hole [p]erson ([T]able 17-3, page 527).

“4. Myopathy of left vastus medialis and left gastrocnemius, resulting in difficulty of walking with elevation, stairs and long distances: nine percent impairment of the [w]hole [p]erson ([T]able 13-15, page 336).

“Using the Combined Values Chart (page 604), [appellant’s] disability is 29 percent of the [w]hole [p]erson.”

On March 4, 2002 an Office medical adviser reviewed appellant’s medical records including, Dr. Lamid’s January 14, 2002 report and stated that Dr. Lamid’s impairment rating had no probative value because he did not properly apply the tables in the A.M.A., *Guides*. The Office medical adviser recommended that appellant be evaluated by an examiner who was familiar with the Office’s procedures and the fifth edition of the A.M.A., *Guides*.

By letter dated July 11, 2002, the Office referred appellant, along with medical records, a list of specific questions and a statement of accepted facts to Dr. Stephen Kishner, a Board-certified physiatrist, for a second opinion medical examination. Dr. Kishner submitted a September 6, 2002 report revealing a history of appellant’s employment injury and medical treatment. On physical examination Dr. Kishner found a normal gait pattern, full range of motion of the lumbar spine with no significant pain with motion, some tinnitus in the left lower lumbosacral paraspinals with no muscle spasm. He also found straight leg raising on the left which caused pain at 45 degrees, decreased sensation in the lateral foot in the S1 distribution, an absence of left ankle jerk based on deep tendon reflexes and normal strength in the lower extremities. He diagnosed left S1 radiculopathy that appeared to be related to appellant’s work. Dr. Kishner stated that this condition had not affected his clinic motor function of strength but, it had affected sensation and pain. Utilizing Table 15-18, page 424 of the fifth edition of the A.M.A., *Guides*, Dr. Kishner determined that appellant had a maximum loss of function due to sensory deficit or pain of the S1 nerve root of five percent. Dr. Kishner explained that he gave appellant the maximum of five percent because he had significant pain and loss of sensation.

On January 23, 2003 an Office medical adviser reviewed Dr. Kishner’s report. He determined that appellant reached maximum medical improvement on September 6, 2002. He noted Dr. Kishner’s finding that appellant had moderate pain in the S1 distribution on the left with decreased sensation on the lateral aspect of the left foot and that he had a 5 percent

permanent impairment of the left lower extremity, which was the maximum available using Table 15-18, page 424 of the A.M.A., *Guides*. The Office medical adviser stated that the description of moderate pain did not warrant a rating of 100 percent based on Grade 0, Table 15-15, page 424, whereby severe pain prevented all activity. He concluded that it was more appropriate to use Grade 3, reflecting a 60 percent sensory deficit, which resulted in a 3 percent permanent impairment of the left lower extremity.

By decision dated June 10, 2003, the Office granted appellant a schedule award for a three percent permanent impairment for the loss of use of his left lower extremity covering the period September 6 through November 5, 2002.

The Board finds that the case is not in posture for decision.

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. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.³ 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*, fifth edition, has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴

Section 8107(c)(2) of the Act provides that for total loss of the leg an employee is entitled to 288 weeks of compensation.⁵

In the instant case, appellant's treating physician, Dr. Lamid, determined that appellant had motor and strength impairments of the left lower extremity, while the second opinion physician, Dr. Kishner, reported normal range of motion and strength of the left lower extremity. Dr. Lamid found that the left lower extremity impairment due to radiculopathy and loss of motor function due to loss of strength was 20 percent each at L3, L5 and S1 totaling a 29 percent impairment of the whole person while Dr. Kishner determined that appellant had normal strength

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ 5 U.S.C. § 8107(c)(19).

⁴ 20 C.F.R. § 10.404. FECA Transmittal No. 02-12 (issued August 30, 2002) explains that all permanent impairment awards determined on or after February 1, 2001 should be based on the fifth edition of the A.M.A., *Guides*. The fifth edition was first published in 2001.

⁵ 5 U.S.C. § 8107(c)(2). In this case, the Office medical adviser determined that appellant had a three percent permanent impairment of the left lower extremity. The Office properly granted appellant a schedule award for 8.64 weeks of compensation, a calculation based on the multiplication of 3 percent, the permanent impairment of the left leg, times 288 weeks, the number of weeks of compensation to which an employee is entitled for a total of 100 percent loss of the leg.

in the lower extremities and that radiculopathy at S1 was not affected by his motor function of strength resulting in a 5 percent impairment of the left lower extremity. Because the medical reports of Dr. Lamid and Dr. Kishner disagree with respect to appellant's range of motion and strength of the left lower extremity and resultant impairment, a conflict exists in the medical evidence.

Section 8123(a) of the Act provides in pertinent part: "If there is a 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."⁶ Therefore, appellant, the case record, together with a statement of accepted facts, must be referred to an impartial physician to resolve the conflict as to the degree of appellant's impairment of his left lower extremity under the fifth edition of the A.M.A., *Guides*. After such further development as the Office deems necessary, the Office shall issue a *de novo* decision.

The June 10, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
November 13, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ 5 U.S.C. § 8123(a).