

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**S.M., Appellant** )  
 )  
**and** ) **Docket No. 08-2446**  
 ) **Issued: July 7, 2009**  
 )  
**DEPARTMENT OF JUSTICE, FEDERAL** )  
**CORRECTIONAL FACILITY, Fairton, NJ,** )  
**Employer** )

---

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 12, 2008 appellant, through his representative, filed a timely appeal from the December 7, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed his schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether appellant has more than a 12 percent permanent impairment of his right lower extremity. On appeal, he argues that the opinion of the impartial medical specialist cannot carry the weight of the medical evidence, as his addendum report offered no further explanation for the rating given.

**FACTUAL HISTORY**

On September 3, 2000 appellant, then a 49-year-old correctional officer, sustained an injury in the performance of duty when he slipped and fell. The Office accepted his claim for

aggravation of a herniated disc at L5-S1. Appellant underwent a hemilaminectomy with excision of a large extruded L5-S1 disc fragment on September 15, 2000. On February 4, 2002 he filed a claim for a schedule award.

A conflict in medical opinion arose between appellant's family practitioner, who found a 42 percent impairment of the right lower extremity due to sensory nerve deficits and manual muscle testing and an Office medical adviser, who found a 29 percent impairment. The Office referred appellant, together with the medical record and a statement of accepted facts to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation.

On May 26, 2005 Dr. Glenn reviewed the statement of accepted facts, related appellant's history, and reviewed the medical evidence. He described appellant's current complaints and his findings on physical and neurological examination. Dr. Glenn determined that appellant had 12 percent impairment due to sensory loss in four unilateral spinal nerve roots. He noted that a rating of 17 percent could be obtained if one used the procedure for evaluating impairment due to peripheral nerve injuries, which he was inclined to accept as a more realistic figure.

Because Dr. Glenn gave two possible ways to evaluate appellant's impairment, the Office asked a second medical adviser to contrast the two. On November 1, 2006 the Office medical adviser reported that the more accurate way to determine the deficit was with a nerve root loss and not for the entire nerve, since the entire nerve was not affected.

On November 14, 2006 the Office issued a schedule award for a 12 percent permanent impairment of appellant's right lower extremity.

On April 25, 2007 Dr. Glenn clarified that the entire nerve was not involved and concluded that appellant had a 12 percent impairment of the right lower extremity due to sensory deficits in four unilateral spinal nerve roots.

In a decision dated May 11, 2007, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. It found that the impartial medical specialist had explained that appellant had no more than a 12 percent impairment of his right lower extremity.

On December 7, 2007 an Office hearing representative affirmed the May 11, 2007 decision. The hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Glenn, the impartial medical specialist.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>1</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of

---

<sup>1</sup> 5 U.S.C. § 8107.

permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>2</sup>

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.<sup>3</sup> When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>4</sup>

### ANALYSIS

To resolve the conflict between appellant's physician and the Office medical adviser as to the extent of permanent impairment to appellant's right leg, the Office properly referred appellant to Dr. Glenn, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The Office provided Dr. Glenn with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper medical and factual history. He examined appellant and found sensory deficits in four spinal nerve roots: L4-5 and S1-2.

Table 15-18, page 424 of the A.M.A., *Guides* indicates that each of the nerve roots from L3 through S1 has a five percent maximum loss of function due to sensory deficit. Dr. Glenn extrapolated that the S2 nerve root would have the same maximum loss. He graded the severity of appellant's sensory loss under Table 15-15, page 424, as Grade 3, "Distorted superficial tactile sensibility (diminished light touch and two-point discrimination), with some abnormal sensations or slight pain, that interferes with some activities." Dr. Glenn selected the largest percentage loss available in that grade or 60 percent. Following the procedure in Table 15-15, he multiplied the severity of the sensory loss by the maximum impairment value for each spinal nerve root involved, resulting in a rating of 3 percent for each (60 percent sensory deficit x 5 percent maximum loss of function), for a total lower extremity impairment of 12 percent.

A question arose whether appellant should be rated under another method, one for peripheral nerve injuries, but a second Office medical adviser explained that the more accurate way to determine the deficit was with a spinal nerve root loss and not the entire nerve, since the entire nerve was not affected. Thereafter, Dr. Glenn submitted a supplemental report reiterating an impairment rating of 12 percent based on the value for each spinal nerve root involved. It is not the case, as appellant's representative argues on appeal, that he offered no further explanation as to why the impairment was 12 percent. Dr. Glenn stated that the spinal nerve roots should be used because the entire nerve was not affected.

The Board finds that the opinion of the impartial medical specialist is based on a proper background and is sufficiently well reasoned that it is entitled to special weight in resolving the

---

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

<sup>3</sup> 5 U.S.C. § 8123(a).

<sup>4</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

conflict on the extent of appellant's permanent impairment. The Board will affirm the Office hearing representative's December 7, 2007 decision.

**CONCLUSION**

The Board finds that the weight of the medical evidence establishes that appellant has no more than a 12 percent permanent impairment of his right lower extremity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 7, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board