

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NELL FOWLER and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE HOUSTON DISTRICT OFFICE,
Houston, Tex.

*Docket No. 96-510; Submitted on the Record;
Issued January 20, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has greater than a two percent permanent impairment of her left lower extremity for which she received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for multiple contusion and lumbar strain. Appellant stopped work on August 29, 1990, the date of her injury, and returned to limited work on March 4, 1991.

On February 9, 1993 appellant filed a claim for a recurrence, Form CA-2a, allegedly occurring on February 18, 1993.

By decision dated July 27, 1993, the Office denied appellant's claim.

By letter dated August 26, 1993, appellant requested reconsideration of the Office's decision and submitted additional medical evidence.

By decision dated December 8, 1993, the Office vacated its July 27, 1993 decision and accepted appellant's claim for a recurrence. The Office stated that appellant had a herniated nucleus pulposus at L4-5.

Appellant subsequently underwent a decompressive lumbar laminectomy and diskectomy at L4-5 bilaterally on September 13, 1993. Appellant returned to light-duty work on November 24, 1993. She stated that her back had improved but she still felt pain in her back and in her left leg.

By letter dated June 20, 1995, the Office asked Dr. Joseph Anthony Walter, a Board-certified orthopedic surgeon, to assess a rating, if any, of appellant's lower extremities due to her back condition using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994). By report dated May 11, 1995, Dr. Walter opined that appellant

reached maximum medical improvement on April 6, 1995 and had a 21 percent whole body impairment pursuant to the A.M.A., *Guides* (3rd ed. Feb. 1989). Dr. Walter documented his impairment rating on attachments showing that appellant had a 10 percent impairment due to her spine for specific disorders using Table 49, II.E., p. 73 a 7 percent impairment to her range of lumbar motion using Table 83c, p. 77 a 2 percent impairment to her neurological system with or without pain and a 3 percent impairment to her upper extremity. He determined that appellant had 19 percent impairment to her spine representing the total of her 10 percent specific disorders impairment, the 7 percent range of motion impairment, and the 2 percent pain impairment. He used the Combined Values Chart to obtain a whole person impairment of 21 percent by correlating the 19 percent spine impairment to the 3 percent upper extremity impairment.

A functional capacity evaluation dated April 25, 1995 performed by work ready apparently at Dr. Walter's request indicated that appellant could return to work with restrictions. In a report dated May 19, 1995, Dr. Walter diagnosed post-laminectomy syndrome, stated that appellant was showing good improvement with the low back and occasional pain when over-exerting, and that she could return to regular-duty work commencing May 22, 1995.

The Office subsequently referred the case to the district medical adviser for a calculation of appellant's impairment rating. In a report dated August 16, 1995, the district medical adviser, using the A.M.A., *Guides* (4th ed. 1994), determined that appellant had a two percent impairment to her left lower extremity and that appellant reached maximum medical improvement on April 6, 1995. He stated that appellant had an L4 nerve root maximum of 5 percent, had a 2 percent pain impairment using Table 11, Grade 2, p. 48, and multiplied 40 percent by 5 percent to obtain 2 percent. The district medical adviser also stated that Dr. Walter did not furnish any information that supported a permanent partial impairment of the right lower extremity. He stated that of Dr. Walter's 21 percent impairment rating of the whole person, 17 percent was for a combination of specific spine disorders and reduced motion of the spine which are not probative under the Federal Employees' Compensation Act. The district medical adviser stated that the three percent upper extremity impairment was not relevant because it was not related to the accepted condition. He therefore concluded that a two percent impairment rating for the whole person based on Dr. Walter's two percent pain impairment was appropriate.

By decision dated August 23, 1995, the Office awarded appellant a schedule award for a two percent impairment to the left lower extremity covering the period from April 6 to May 15, 1995.

By letter dated September 6, 1995, appellant requested reconsideration of the Office's decision. She did not submit any additional medical evidence.

By decision dated November 20, 1995, the Office denied appellant's reconsideration request.

The Board finds that appellant has no greater than a two percent impairment to her left lower extremity.

The schedule award provision of the Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.² 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.³

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁴ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,⁵ no claimant is entitled to such an award.⁶

Moreover, the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.⁷ Maximum medical improvement means when the physical condition of the injured member of the body has stabilized and will not improve further.⁸

In the instant case, the district medical adviser's opinion dated August 16, 1995 constitutes the weight of the evidence. In evaluating the opinion of Dr. Walter, dated June 20, 1995, the district medical adviser properly eliminated the percentage of impairment to appellant's spine, 17 percent, as that is not covered by the Act for a schedule award. Further, since an impairment rating to appellant's upper extremity was not part of this claim, he also properly discarded Dr. Walter's three percent impairment rating to appellant's upper extremity. The district medical adviser therefore concluded that Dr. Walter's finding of a two percent pain impairment was an appropriate rating of an impairment for the whole person. The district medical adviser did not explain the formula he used to obtain a two percent pain impairment but since his conclusion using the A.M.A., *Guides* (4th ed. 1994) is the same as Dr. Walter's pain impairment rating using the A.M.A., *Guides* (3rd ed. Feb. 1989), the evidence consistently supports that appellant had a two percent pain impairment rating. The district medical adviser's rating of two percent impairment to the whole person is sufficiently well rationalized to

¹ 5 U.S.C. § 8107 *et seq.*

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Daniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁴ *George E. Williams*, 44 ECAB 530, 533 (1993); *William Edwin Muir*, 27 ECAB 579, 581 (1976).

⁵ *See* 5 U.S.C. § 8107(c); *George E. Williams*, *supra* note 4.

⁶ *E.g.*, *Timothy J. McGuire*, 34 ECAB 189, 193 (1982).

⁷ *Joseph R. Waples*, 44 ECAB 936, 940 (1993).

⁸ *Id.*; *Maries J. Born*, 27 ECAB 623, 629 (1993).

constitute the weight of the evidence. Moreover, the date of the award properly commenced on April 6, 1995, the date both the district medical adviser and Dr. Walter determined that appellant reached maximum medical improvement. That appellant's condition had stabilized approximately at that time is supported by contemporaneous medical evidence documenting appellant's improvement after her surgery.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 20 and August 23, 1995 are affirmed.

Dated, Washington, D.C.
January 20, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member