

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL P. MIELKE and U.S. POSTAL SERVICE,
POST OFFICE, Carol Stream, IL

*Docket No. 00-217; Submitted on the Record;
Issued April 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has greater than a 13 percent permanent impairment of his right upper extremity and a 13 percent permanent impairment of his left upper extremity, for which he has received a schedule award.

On August 29, 1995 appellant, then a 41-year-old distribution clerk, was shot in the head and the chest in the Palatine branch employing establishment assault. Upon hospital admission, four bullet wounds were noted in the head and neck region. Appellant underwent a left temporal craniectomy with evacuation of hematomas, debridement and removal of bone fragments and, after bleeding was controlled, surgery was terminated with postoperative diagnoses of "gunshot wound of the left temporal area and neck [and] gunshot wound of the right neck and shoulder." Postoperatively, changes in appellant's mentation were noted and he was diagnosed with organic mental disorder due to post-traumatic, nonpsychotic brain injury. Changes were noted as including changes in strength, endurance, mobility, cognitive changes and deficits, memory deficits, cephalgia, shoulder and neck pain and post-traumatic stress disorder. Multiple medical disciplines became involved in appellant's recovery process.

Appellant gradually recovered some of his functional abilities and returned to limited duty two hours per day, two days a week. He continued with neuropsychologic therapy. Appellant's limited-duty work schedule was gradually increased to 12 hours per week total; 4 hours per day, 3 days per week, with a necessary day off between days worked. The need for this work schedule was determined to be permanent.

The Office of Workers' Compensation Programs accepted that appellant sustained an open wound of the head, an open wound of the chest, postconcussion syndrome, hearing loss and post-traumatic stress disorder.

On April 1, 1997 a wage-earning capacity determination was made and appellant was granted compensation for his loss of wage-earning capacity.

On July 14, 1998 appellant filed a Form CA-7 claim for a schedule award.

On July 28, 1998 appellant's treating clinical psychologist, Dr. William E. Nordbrock, noted that permanent systemic effects from appellant's injuries included personality changes, impaired social insight, distractability, impaired judgment and problem solving deficits -- exacerbated significantly by mild stress. He noted that appellant was being treated for post-traumatic stress disorder (PTSD) symptoms -- intrusive thoughts, avoidance behavior, suspiciousness and difficulty sleeping, for affective problems -- depression, anxiety, hyperirritability and blunted affect, for cognitive deficits -- short term memory difficulties, problem solving and impaired insight/judgment and for motivational deficits.

In response to appellant's request for a schedule award, by letter dated August 24, 1998, the Office advised appellant's representative that the Federal Employees' Compensation Act had no provision for making a schedule award for injuries of the chest, head or brain.

A December 20, 1998 neuropsychological evaluation from Dr. Nordbrock reported neuropsychological findings consistent with diffuse traumatic brain injury and indicated sequela as including impaired psychomotor functioning, impaired global memory functioning, impaired abstract reasoning with cognitive inflexibility, impaired insight/judgment, impaired initiation (pathological inertia) with severe perseverative thinking and depression, anxiety, inability to control anger and symptoms of PTSD.

Appellant's representative further submitted a January 27, 1999 report of permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1993) from Dr. Nordbrock. He listed as diagnoses the impairments previously noted in his December 20, 1998 report, annotated each with the activities of daily living affected and opined that appellant had a 40 percent whole-person impairment according to the A.M.A., *Guides*.

On June 28, 1999 the Office referred appellant's record to the district medical adviser for determination of appellant's permanent partial impairment.

By report dated June 29, 1999, the Office medical adviser, Dr. Carlo Bellabarba, an orthopedic surgeon, opined that appellant had a 55 percent permanent impairment of the whole person due to general impairment in psychomotor function (upper extremity dexterity), impairment in all but immediate working memory, impairment in abstract reasoning, impairment in insight and judgment, impairment in initiation and perseveration and emotional disorders including depression, schizophrenia, anxiety, uncontrolled rage and PTSD. Dr. Bellabarba found that, according to Table 2, p.4/143 of the A.M.A., *Guides* appellant had mental status impairment which required "direction and supervision of daily living activities" amounting to a 25 percent permanent whole body impairment, he had emotional/behavioral impairment causing moderate limitation of some but not all social and interpersonal daily living functions" which merited a 29 percent whole body impairment according to Table 3, p. 4/143 of the A.M.A., *Guides* and he had upper extremity impairment due to inability to coordinate/initiate movements with ease, essentially amounting to a lack of dexterity, which according to Table 15, p. 4/148 would be an

additional 15 percent whole body impairment.¹ Using the Combined Values Chart Dr. Bellabarba calculated that these values resulted in a 55 percent whole body impairment, with a date of maximum medical improvement of December 21, 1998.

By letter dated August 9, 1999, the Office advised Dr. Bellabarba that schedule awards were not payable for psychological impairment and were not payable for impairment on a whole body basis.

By report dated July 18, 1999, Dr. Bellabarba provided a follow-up opinion to his June 29, 1999 report noting that, in accordance with Table 3, p. 3/20 of the A.M.A., *Guides* (4th ed. 1993), working backwards from the 15 percent whole person impairment value for appellant's bilateral inability to coordinate movements, which was a 7.5 percent whole body impairment for each extremity, this corresponded with a 13 percent permanent impairment of both his right and left upper extremities, with a date of maximum medical improvement of December 21, 1998.

Appellant had received compensation for loss of wage-earning capacity for the period December 21, 1998 through July 17, 1999. On July 22, 1999 the Office calculated that, less the compensation previously paid for the period December 21, 1998 through July 17, 1999, appellant was entitled to \$4,938.75 additional compensation for that period and compensation at the rate of \$2, 297.00 each four weeks for the remaining period of the schedule award.

On August 6, 1999 the Office granted appellant a schedule award for a 13 percent permanent impairment of his right upper extremity and a 13 percent permanent impairment of his left upper extremity for the period December 21, 1998 to July 10, 2000 for a total award of 81.12 weeks of compensation.

The Board finds that appellant has not established that he is entitled to greater than a 13 percent schedule award for permanent impairment of his bilateral upper extremities.

The Act² provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.³ In such cases the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.⁴

¹ This table gives impairment percentages for bilateral upper extremities in terms of whole person only.

² 5 U.S.C. §§ 8101-8193.

³ *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁴ See *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

The schedule award provisions of the Act⁵ and its implementing federal regulations⁶ provide for payment of compensation for the permanent loss or loss of use of specified members, functions and organs of the body. The Act itself specifies that an award is payable for the following members: arm, leg, hand, foot, thumb and finger. The Act also specifies loss of hearing and loss of vision and provides compensation for the loss of an eye, but does not specify the head, neck or chest. Section 8107(c)(22) of the Act provides for payment of compensation for permanent loss or loss of use of “any other important external or internal organ of the body as determined by the Secretary of Labor.”⁷ On April 1, 1987 the Secretary of Labor made such a determination and pursuant to section 8107(c)(22) of the Act, added the following organs to the compensation schedule: breast, kidney, larynx, lung, penis, testicle and tongue.⁸ The Secretary, however, made no provision in the implementing regulations for the head, neck or chest, or for a schedule award for changes in cognition, mentation or behavior.

No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.⁹ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent cognition, mentation or behavioral changes, or for traumatic injury to the head, neck or chest, no claimant is entitled to such an award.¹⁰ Although the medical evidence in this case supports appellant’s claim that he has a permanent impairment of his cognition, mentation and behavior and sustained impairment due to traumatic wounds to his head, neck and chest, no evidence can establish entitlement to an award not authorized under the Act.

As there is no statutory or regulatory authority for the payment of compensation for impairment of appellant’s cognition, mentation or behavior, or for impairment of his head, neck or chest, the Board finds that the Office properly denied appellant’s claim for a schedule award on this basis.

However, in 1966, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a

⁵ 5 U.S.C. § 8107(a).

⁶ 20 C.F.R. § 10.304.

⁷ 5 U.S.C. § 8107(c)(22).

⁸ 20 C.F.R. § 10.404(a).

⁹ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

¹⁰ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the spine or the head.¹¹

The schedule award provisions of the Act¹² specify the number of weeks of compensation to be paid for permanent loss of use of various members of the body. The Act does not, however, specify the manner in which the percentage loss of use of a member shall be determined. The method used in making such a determination is a matter that rests with the sound discretion of the Office.¹³ 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.¹⁴ The Office has adopted the A.M.A., *Guides* as the standard for evaluating permanent impairment for schedule award purposes and the Board has concurred with the Office's adoption of this standard.¹⁵

The A.M.A., *Guides* standards for evaluating the impairment of extremities are based primarily on loss of range of motion.¹⁶ However, all factors that prevent a member from functioning normally, including pain or discomfort, lack of motor coordination or dexterity, or disruption of station or gait should be considered, in evaluating the degree of permanent impairment.¹⁷ The A.M.A., *Guides* provides a grading scheme and procedure for determining the impairment of the bilateral upper extremities in the basic tasks of everyday living..¹⁸

The Office medical adviser, Dr. Bellabarba applied this section of the A.M.A., *Guides* to the medical findings provided by Dr. Nordbrock and determined, by reference to Table 15, p. 148 and Table 3, p. 20, that appellant had a 13 percent permanent impairment of each upper extremity due to loss of dexterity and psychomotor coordination.

As there is no medical evidence of record to substantiate that appellant has any greater than a 13 percent permanent impairment of each upper extremity, appellant has not proven his entitlement to any greater schedule award.

¹¹ See generally, *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹² 5 U.S.C. § 8107.

¹³ *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

¹⁴ *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324-25 (1961).

¹⁵ *Donald Mueller*, 32 ECAB 324 (1980); *Anne E. Hughes*, 27 ECAB 106 (1975); *Theodore P. Richardson*, 25 ECAB 113 (1973).

¹⁶ See *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

¹⁷ See *Paul A. Toms*, 28 ECAB 403 (1987).

¹⁸ A.M.A., *Guides*, Chapter 4.3(b), Table 15, p. 148 (4th ed. 1993).

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 6, 1999 is hereby affirmed.

Dated, Washington, DC
April 2, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member