

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BESSIE SMITH and U.S. POSTAL SERVICE,
POST OFFICE, College Park, GA

*Docket No. 99-638; Submitted on the Record;
Issued March 15, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained more than a three percent permanent impairment of the right upper extremity for which she received a schedule award.

On November 8, 1994 appellant, then a 42-year-old letter carrier, filed a notice of traumatic injury and claim for compensation alleging that, on October 22, 1994, while reaching for a full tray of flats at the bottom of an 80-pound hamper, she sustained an injury to her right side. The Office of Workers' Compensation Programs accepted the claim for a right shoulder strain, cervical strain, and a herniated nucleus pulposus at C5-6, for which surgery was authorized.¹ Appellant received appropriate compensation for intermittent periods of wage loss. She was released to duty effective November 18, 1996 and accepted a limited-duty job on January 18, 1997.

Appellant was initially treated for her work injury by Dr. Bruce Mackay, a Board-certified neurologist, who prescribed a course of physical therapy and placed appellant on light duty, four hours per day, from November 1994 until July 1995. In reports dated September 27 and November 13, 1995, Dr. Mackay noted that appellant was seen for recurrent neck pain. He stated that appellant had a history of large herniated discs at C3-4 and C4-5, with no definite physical findings of radiculopathy. Dr. Mackay's assessment listed cervical disc disease and weight gain with edema.

Appellant subsequently came under the care of Dr. J. Kenneth Burkus, a Board-certified orthopedic surgeon, who continues to be her treating physician. In a report dated June 3, 1996, Dr. Burkus noted appellant's history of injury and her symptoms of neck pain and bilateral upper extremity pain with dysesthesias and weakness. He discussed appellant's x-ray findings of cervical stenosis and opined that she was a candidate for a cervical discectomy with interbody

¹ A magnetic resonance imaging (MRI) scan of the cervical spine performed on December 28, 1994 showed herniated discs at C3-4, C4-5 and C5-6.

fusion at C3-4, C4-5 and C5-6. Dr. Burkus' impression was listed as cervical stenosis with associated cervical radiculopathy.

In a (Form CA-20a) attending physician's report dated June 26, 1996, Dr. Burkus diagnosed a cervical disc herniation. He indicated that the condition was due to appellant's October 22, 1994 work injury. Dr. Burkus also reported that appellant was totally disabled from work from June 26 to November 1, 1996.

On June 27, 1996 appellant underwent a cervical discectomy. The preoperative and postoperative diagnoses were multi-level disc herniations at C3-4, C4-5 and C5-6 due to cervical stenosis.

In a September 9, 1996 treatment note, Dr. Burkus advised that appellant had excellent relief of her neck and arm pain following surgery. He stated that appellant was expected to be at maximum medical improvement in six weeks following a course of physical therapy.

On July 3, 1997 appellant filed a (Form CA-7) claim for a schedule award. She submitted a report of work assessment and readiness dated June 12, 1997 by Dr. Burkus, which noted physical findings of the right and left shoulder including range of motion. Dr. Burkus stated that appellant had three percent impairment of the right upper extremity and four percent impairment of the left upper extremity under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He noted that appellant had 11 percent impairment of the cervical spine for a single-level fusion with related pain due to spinal stenosis. Dr. Burkus concluded that "in converting the cervical spine whole body impairment to the upper extremities as a whole," appellant should be awarded 18.33 percent in addition to the previous percentages for the shoulder limitations.²

At the request of the Office, a district medical adviser reviewed the physical findings of Dr. Burkus listed in the June 12, 1997 report. The district medical adviser agreed with Dr. Burkus that appellant had a three percent impairment of the right upper extremity under the A.M.A., *Guides*. However, in response to a question posed by the Office as to whether appellant had any impairment of the left upper extremity, the district medical adviser wrote "No." The Office medical adviser further noted that there was no allowable method under the A.M.A., *Guides* for "cervical conversion of the whole body to the upper extremities" as stated by Dr. Burkus.

In a decision dated November 5, 1997, the Office issued a schedule award for a three percent permanent impairment of the right upper extremity.

In a letter dated November 14, 1997, appellant requested a review of the written record.

² The Board notes that Dr. Burkus had been asked by appellant's attorney to apply the formula provided in *Gordon G. McNeill*, 42 ECAB 140 (1995).

In a June 5, 1998 report, Dr. Neven A. Popovic, an Office medical adviser, reviewed the medical record in conjunction with the A.M.A., *Guides*. He stated:

“On the basis of physical evaluation data (testing done on June 12, 1997). Dr. Burkus notes decreased range of motion (ROM) of both shoulders. Using the ROM numbers provided by Dr. Burkus and using the [A.M.A., *Guides*] Figures 36 [to] 44 on pages 42 [to] 45, 1 derives 4 percent impairment to the left upper extremity and 3 percent impairment to the right upper extremity.

“No impairment is warranted to the cervical spine on the basis of spinal surgery and no additional impairment can be given to the upper extremities on the basis of any neurologic defects as she is neurologically intact and has no focal defects.”

In a September 10, 1998 decision, an Office hearing representative affirmed the Office’s November 5, 1997 decision and found that appellant was entitled to no more than a three percent schedule award for permanent impairment of the right upper extremity. The Office hearing representative noted; however, that the medical evidence of record supported appellant having a four percent permanent impairment of the left upper extremity incurred as a result of the accepted employment injury of October 22, 1994.

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

Section 8107 of the Federal Employees’ Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁴

In this case, appellant was awarded a schedule award for a three percent permanent impairment of the right upper extremity. She contends on appeal that the Office erred by not issuing a schedule award for permanent partial impairment she sustained in the left upper extremity that was causally related to her accepted back and shoulder conditions. The Board has duly reviewed the case record and finds that a conflict exists in the record as to whether appellant’s upper extremity impairment is due to her work injury or whether it is related to a preexisting degenerative condition known as spinal stenosis. Because there is a conflict in the medical record between Dr. Burkus and the district medical adviser, as to whether appellant has any permanent partial impairment of both shoulders due to her work injury, the Board concludes that the case must be remanded for an impartial medical evaluation relevant to that issue.

³ 5 U.S.C. § 8107(a).

⁴ *James Kennedy, Jr.*, 40 ECAB 620 (1989); *Quincy E. Malone*, 31 ECAB 846 (1980).

It is also appellant's general contention that the Office erred by not calculating her permanent partial extremity impairment in accordance with the formula set forth in *Gordon G. McNeill*, 42 ECAB 140 (1990). She argues that she is entitled to an impairment rating of 21.33 percent in each arm respectively.⁵ The Board, however, finds that the formula advanced by appellant on appeal is not appropriate for calculating her work-related impairment. In *McNeill*, the Office derived a formula whereby there could be a conversion of whole body impairment related to the back, an unscheduled member, to a bodily function affected by the back injury if there was no other way of computing the percentage of permanent partial impairment to the member in question. In the instant case, the A.M.A., *Guides* provide a method to assess permanent partial impairment of appellant's extremities based on loss of function. This method permits an accurate assessment of appellant's permanent impairment rating for purposes of the Act without use of the *McNeill* formula.

Although appellant notes that Dr. Burkus rated her whole body impairment at 11 percent "in addition to" a 4 percent impairment of the left upper extremity and a 3 percent impairment of the right upper extremity, that 11 percent calculation was based on a diagnosis of spinal stenosis and pain related to appellant's herniated disc. The *McNeill* formula was not intended to circumvent the requirement that under the Act and regulations that a claimant is not entitled to a schedule award for permanent partial loss of the use of the back.⁶ It is only when impairment extends into a function of the body specifically listed under the Act or the implementing regulations that eligibility for a schedule award arises.⁷

Consequently, the case will be remanded in order for the Office to obtain an impartial medical evaluation regarding the degree of permanent partial impairment of appellant's shoulders causally related to the work injury.

⁵ These percentages were calculated under the *McNeill* formula where 11 represents the percentage of disability to the body as a whole under the A.M.A., *Guides*. The number 60 is used because under the A.M.A., *Guides*, Table 3, page 3/20, a 100 percent rating to the upper extremity results in a 60 percent rating to the body as a whole. Thus, the formula as applied to appellant's case was calculated to be $11/60 = y/100$, $y = 1100/60$ and therefore $y = 18.33$ percent impairment to both of appellant's arms. For the right arm, appellant's counsel contends that the 18.33 percent is added to the 3 percent for a total of 21.33 percent impairment. For the left arm, the 18.33 percent are added to the 4 percent impairment calculated by appellant's treating physician for a total of 22.33 percent impairment.

⁶ In *McNeill*, the formula was devised for an equitable impairment determination where the work injury involved damage to the spinal cord and the impairment in the extremities involved a central nervous system disorder under section 41.b of the A.M.A., *Guides*.

⁷ See *Terry E. Mills*, 47 ECAB 309 (1996).

The decision of the Office of Workers' Compensation Programs dated September 10, 1998 is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
March 15, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member