

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLARENCE M. SIMMS and DEPARTMENT OF VETERANS AFFAIRS,
LEAVENWORTH VETERANS CENTER, Leavenworth, Kans.

*Docket No. 97-2048; Submitted on the Record;
Issued May 21, 1999*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant sustained greater than a 15 percent permanent impairment of the lower extremities for which he received a schedule award.

The Board has duly reviewed the case record and concludes that appellant has no greater than a 15 percent permanent impairment of the lower extremities.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (hereinafter A.M.A., *Guides*) have been adopted by the Office of Workers' Compensation Programs, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴

On August 7, 1991 appellant, then a fire fighter, twisted his back while getting down from a fire truck. The Office accepted the claim for the conditions of lumbar strain and a herniated nucleus pulposus at L4-5. Appellant returned to light duty on June 8, 1992, but

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

⁴ See *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

voluntarily chose to accept disability retirement through the Office of Personnel Management effective July 31, 1992. Appellant has not worked since.

Appellant filed a claim for compensation for the period July 30, 1992 and continuing. In a February 29, 1996 decision, the Office denied appellant's claim for benefits as the medical evidence of record did not establish that the disability during the period claimed was caused by his work injury of August 7, 1991.⁵ The Office had previously informed appellant that he would be eligible for compensation benefits if his condition had physically worsened to the extent that he would be unable to even perform his light-duty position.

In an April 8, 1996 letter, the Office requested that appellant's treating orthopedic surgeon determine the extent of permanent impairment of the lower extremities due to the August 7, 1991 employment injury. In an April 19, 1996 letter, Dr. Mark D. Bernhard, an osteopath, stated that the date of maximum medical improvement had not been achieved and thus the percentage of permanent impairment could not be determined.

In a CA-1303 questionnaire dated November 22, 1996, Dr. Bernhard stated that appellant reached maximum medical improvement on November 22, 1996, that the left L5 and S1 nerve roots and branches were affected, there was a 40 percent degree of permanent impairment of the lower extremity due to the loss of function from sensory deficit, pain or discomfort; and a 30 percent degree of permanent impairment of the lower extremity due to loss of function from decreased strength. Dr. Bernhard set forth his examination findings and the impairment findings as stated on the CA-1303 questionnaire in a report dated December 16, 1996. Dr. Bernhard did not indicate whether he used the A.M.A., *Guides* or how he arrived at the impairment findings.

The Office requested an Office medical adviser to review the December 16, 1996 report of Dr. Bernhard. In a February 13, 1997 report, an Office medical adviser reviewed the medical evidence of file and stated:

"This reviewing orthopedist would interpret that this individual's affected nerve root would be the L5 nerve root on the left. The surgical procedure and the MRI [magnetic resonance imaging] scans would confirm that the pathology [is] at the L5 nerve root. Utilizing the fourth edition of the *Guides to the Evaluation of Permanent Impairment*, Table 83 on page 130, the maximal award for the L5 nerve root for sensory loss or pain would be five percent. One would grade this as per the Grading Scheme. This individual has pain that may certainly interfere with activity that would be graded quite high, *i.e.*, a grade IV or an 80 percent grade of this, or 80 percent of a maximal 5 percent, for a 4 percent lower extremity impairment. The maximum percentage loss of function due to strength deficit for the L5 nerve root would be 37 percent as per the same Table 83. One would have to grade the muscle weakness. The physician appears to indicate a 30

⁵ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on June 4, 1997, the Board does not have jurisdiction over the Office's February 29, 1996 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

percent weakness (if one interprets the statement: ‘A degree of permanent impairment of the lower extremities and loss of function with decreased strength was 30 percent.’[)] 30 percent of 37 percent would be an 11 percent lower extremity impairment. The records do not document any loss of left lower extremity joint range of motion for a 0 percent impairment. Utilizing the Combined Evaluation Chart, the 11 percent for weakness, combined with the 4 percent for pain factors, combined with the 0 for loss of motion, would be equivalent to a 15 percent impairment of the left lower extremity or leg.

“The records would indicate a 0 percent impairment of the right lower extremity due to the back condition, with no ongoing radicular symptoms or objective findings. Date of maximum medical improvement would be November 22, 1996.”

On March 21, 1997 the Office issued appellant a schedule award for a 15 percent permanent impairment of his lower extremities.

The Board finds that the Office medical adviser properly used the fourth edition of the A.M.A., *Guides* to rate appellant’s permanent impairment.

Dr. Bernhard, an osteopath and appellant’s treating physician recommended a 40 percent degree of permanent impairment of the lower extremity due to the loss of function from sensory deficit, pain or discomfort and a 30 percent degree of permanent impairment of the lower extremity due to loss of function from decreased strength. Despite the Office’s notice in its April 8, 1996 letter that the A.M.A., *Guides* was to be used to rate appellant’s permanent impairment, Dr. Bernhard did not indicate whether, in arriving at his recommended percentage of impairments, he applied the A.M.A., *Guides*. If Dr. Bernhard did use the A.M.A., *Guides*, he did not explain how it was applied to arrive at his recommended percentages. It was therefore proper for an Office medical adviser to apply the criteria of the A.M.A., *Guides* to Dr. Bernhard’s findings on examination.⁶

It was also proper for this Office medical adviser to use Chapter 3.3, titled “The Spine” and the accompanying Table 83 from the fourth edition of the A.M.A., *Guides* to rate appellant’s permanent impairment. The Office medical adviser noted that the surgical procedure and the MRI scans confirm the pathology at the L5 nerve root and opined that appellant’s affected nerve root would be the L5 nerve root on the left side. The Office medical adviser properly assigned a four percent impairment for appellant’s L5 nerve root loss of function due to sensory deficit or pain. Table 83 of the *Guides* provides for a five percent impairment as the maximum award for loss of function due to sensory deficit or pain arising from an impaired L5 nerve root. It was appropriate for the Office medical adviser to then follow the procedures described in Tables 11 and 12, section 3.1k (pp. 47 and 48) to calculate the sensory or motor impairment percent. As the record supports that appellant has pain which may prevent activity, the Office medical adviser appropriately could classify appellant’s pain as a Grade IV pursuant to Table 11, page 48. As the maximum loss of function due to sensory deficit or pain was 80 percent, the Office

⁶ See Michael C. Norman, 42 ECAB 768 (1991).

medical adviser properly multiplied this value with the sensory impairment of the L5 nerve root (five percent) to derive at a four percent lower extremity impairment. It was also proper for the Office medical adviser to find an 11 percent loss of function due to strength defect. Utilizing the values set forth in Table 83, page 130, the Office medical adviser properly rated a 37 percent maximum percentage loss of function due to strength deficit for the L5 nerve root. Taking Dr. Bernhard's assessment of a 30 percent loss of function with decreased strength, the Office medical adviser properly calculated the motor impairment percent by multiplying Dr. Bernhard's 30 percent assessment of decreased strength with the 37 percent maximum percentage loss of function due to strength deficit for the L5 nerve root, which equated to an 11 percent lower extremity impairment. Combining the sensory and motor impairments, the Office medical adviser derived at a 15 percent impairment of the left lower extremities.⁷

The decision of the Office of Workers' Compensation Programs dated March 21, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 21, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ See *Luis Chapa, Jr.*, 41 ECAB 159 (1989).