

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA A. FORD and LIBRARY OF CONGRESS,
Washington, DC

*Docket No. 00-1686; Submitted on the Record;
Issued April 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained more than a five percent permanent impairment of the right lower extremity for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied her request for reconsideration.

On September 7, 1986 appellant, then a 25-year-old computer operator, sustained a low back strain and herniated disc while in the performance of duty.

By decision dated December 3, 1999, the Office granted appellant a schedule award for 14.40 weeks from November 15, 1996 to February 23, 1997 based on a five percent permanent impairment of the right lower extremity.

By letter dated December 16, 1999, appellant requested reconsideration and submitted additional evidence.

By decision dated March 28, 2000, the Office denied appellant's request for reconsideration.

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

The Federal Employees' Compensation Act provides at section 8107 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.¹ 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 Office has adopted the American Medical Association, *Guides to the*

¹ 5 U.S.C. § 8107(a).

Evaluation of Permanent Impairment (hereinafter, the A.M.A., *Guides*) as a standard for evaluating schedule losses and the Board has concurred in such adoption.²

Before the A.M.A., *Guides* may be used, however, a description of appellant's impairment must be obtained from appellant's attending physician. The Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment."³ This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.⁴

In a report dated July 23, 1999, Dr. Talaat F. Maximous, appellant's attending orthopedic surgeon, stated that forward flexion was 70 degrees and side tilting to 10 degrees bilaterally. He continued:

"[Appellant's] MRI [magnetic resonance imaging] scan that was done on October 6, 1995 showed herniated lumbar disc at L5-S1 with right lateralization causing impression on the nerve root at this level. I also reviewed her EMGs [electromyograms] ... done on July 31, 1997 which showed radiculopathy to the right lower extremity at L5-S1 nerve roots. By using the [A.M.A., *Guides*] for musculoskeletal and neurological evaluation, table 53 under musculoskeletal, paragraph 2, for subheading C, 7 percent for one lumbar disc disease with symptoms and no surgery. Under neurological evaluation, Table 3A, page 112, paragraph 2, 10 percent for sensory loss at one level. This will total 17 percent of partial permanent disability related to her herniated disc with right lower extremity radiculopathy."

The opinion of Dr. Maximous is of limited probative value because he failed to explain how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.⁵ Although he referenced an unnamed A.M.A., *Guides*, the tables and page he cited do not correspond to the A.M.A., *Guides*.

Dr. Maximous opined that appellant had a seven percent permanent impairment of the back for a herniated disc. However, a schedule award is not payable for the loss, or loss of use,

² *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

³ Federal (FECA) Procedure Manual, Part -- 2 Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6c (March 1995); see *John H. Smith*, 41 ECAB 444, 448 (1990).

⁴ *Alvin C. Lewis*, 36 ECAB 595-96 (1985).

⁵ See *James Kennedy, Jr.*, *supra* note 2 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.⁶ Additionally, Dr. Maximous did not explain, with reference to the A.M.A., *Guides*, his opinion that appellant had a 10 percent permanent impairment of the right lower extremity for sensory loss related to the S1 nerve.

In a memorandum dated August 11, 1999, an Office medical adviser properly determined that appellant had a five percent permanent impairment of the right lower extremity based on sensory nerve loss of the S1 nerve root according to Table 83 at page 130 of the A.M.A., *Guides*. However, he indicated that the date of maximum medical improvement was November 15, 1996 and he did not indicate why he selected this date.

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

In this case, appellant received a schedule award for permanent impairment of the right lower extremity for 14.40 weeks from November 15, 1996 to February 23, 1997. However, the date of maximum medical improvement for the right lower extremity is not supported by the evidence of record. There is no basis in the record for the Office’s determination that appellant had reached maximum medical improvement on November 15, 1996.

In *Marie J. Born*,⁸ the Board noted a reluctance to find a date of maximum medical improvement, which is retroactive to the date of the schedule award as retroactive awards often result in payment of less compensation benefits. The Board, therefore, required persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.⁹

The Board finds that further development of the evidence on the issue of the date of maximum medical improvement is necessary in this case. Upon such further development of the evidence as the Office deems necessary, the Office will issue an amended schedule award for the right lower extremity.

In light of the Board’s resolution of the first issue in this case it is unnecessary to address the second issue.

⁶ See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

⁷ See *James Kennedy, Jr.*, *supra* note 2; *Adela Hernandez-Piris*, 35 ECAB 839, 841-42 (1984).

⁸ *Marie J. Born*, 27 ECAB 623 (1976), *petition for recon. denied*, 28 ECAB 89 (1976); see also *James E. Earle*, 51 ECAB ____ (Docket No. 98-1677, issued June 27, 2000).

⁹ *Id.*

The decisions of the Office of Workers' Compensation Programs dated March 28, 2000 and December 3, 1999 are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
April 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member