

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELAINE GISH and U.S. POSTAL SERVICE,
POST OFFICE, Humble, TX

*Docket No. 99-1445; Submitted on the Record;
Issued April 17, 2001*

DECISION and ORDER

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

The issue is whether appellant has established that she sustained permanent impairment of the upper or lower extremities.

On February 15, 1996 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim, alleging that on February 12, 1996 while bending over to pick up a tub of flats she injured her lower back. The Office of Workers' Compensation Programs accepted appellant's claim for lumbar strain. Appellant returned to limited duty on February 20, 1996 and regular duty on March 4, 1996.

On May 2, 1996 appellant filed a notice of recurrence of disability alleging that on April 20, 1996 she injured her lower back while picking up bundles of magazines from a hamper.¹ The Office accepted this injury as a lumbar strain, which was later expanded to include herniated nucleus pulposus (HNP) at L4-5. Appellant returned to limited duty on September 3, 1996.

On October 15, 1996 appellant filed a notice of traumatic injury alleging that on September 25, 1996 she injured her shoulder and neck while pulling a tray of letters off a top rack of an "A" frame. The Office accepted appellant's claim for neck and left shoulder strain. Appellant's work restrictions remained the same.

On March 25, 1997 appellant filed a notice of traumatic injury alleging that on March 13, 1997 she injured her low back while reaching to pick up the telephone. The Office accepted her claim for lumbar strain. Appellant returned to limited duty on May 5, 1997.²

On May 26, 1998 appellant requested a schedule award.

¹ In a memorandum dated May 23, 1996, the Office determined that appellant sustained a new injury on April 20, 1996 and not a recurrence of a previously accepted injury.

² The Office combined the four traumatic injury claims numbered 16-278773, 16-288157, 16-274312 and 16-295318 into one case file, No. 16-278773.

By letter dated July 2, 1998, the Office requested that appellant submit additional medical evidence to support her claim, specifically, a medical report from her physician which addressed whether appellant had reached maximum medical improvement, provided findings on examination including a diagnosis of the condition affecting appellant's extremities, and determined an impairment rating, using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (fourth edition 1993).

Appellant submitted an August 20, 1997 report from Dr. Donald G. Eaves, a chiropractor and a March 25, 1998 report from her attending physician, Dr. Octavio Calvillo, a Board-certified anesthesiologist. Dr. Eaves, who also referred appellant for a comprehensive functional capacity evaluation, indicated that she sustained a one percent impairment for cervical right rotation, one percent impairment for cervical left rotation and one percent for cervical left lateral flexion, for a combined whole person impairment of three percent. Dr. Eaves did not reference the A.M.A., *Guides* in his report or explain how he calculated this impairment rating. Dr. Calvillo indicated that he agreed with Dr. Eaves' evaluation of three percent impairment of the whole person.

Dr. Calvillo's report and the case record were referred to the Office's medical adviser who determined a zero percent impairment of appellant's upper extremities. The Office medical adviser noted that Dr. Eaves' impairment rating was based on loss of motion of the spine, but the spine is not considered a scheduled member.

Based on the Office medical adviser's review of Drs. Calvillo and Eaves reports the Office denied appellant's request for a schedule award on October 26, 1998.

In a letter dated November 9, 1998, appellant requested reconsideration and submitted additional medical evidence. Dr. James Ghadially, a Board-certified orthopedic surgeon, determined, using the A.M.A., *Guides*, that appellant sustained a 15 percent impairment of the whole person, but did not provide an impairment for the lower or upper extremities. Dr. Eaves' supplemental report indicated that appellant sustained a 20 percent impairment of the whole person.

By letter dated November 24, 1998, the Office requested that Dr. Ghadially submit within 30 days a medical report which addressed appellant's date of maximum medical improvement, his findings on examination including a diagnosis of the condition affecting appellant's extremities and his calculations for the impairment rating using the A.M.A., *Guides*.

In a decision dated January 4, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence of record was insufficient to warrant modification of the prior decision.

The Board finds that appellant has not established that she sustained permanent impairment of the upper or lower extremities.

Section 8107 of the Federal Employees' Compensation Act³ 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, however, does not specify the manner by which the percentage

³ 5 U.S.C. §§ 8101-8193, § 8107(c).

of loss of a member, function or organ shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office.⁴ For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*, as the standard for determining the percentage of permanent impairment, and the Board has concurred in such adoption.⁵

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁶ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,⁷ no claimant is entitled to such an award.⁸

In 1960, 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 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.⁹

The medical evidence in this case, however, does not support that appellant sustained any permanent impairment of her extremities.

Dr. Ghadially did not determine an impairment rating for either the lower or upper extremities but provided impairment only in relation to the spine. Specifically, Dr. Ghadially noted figures for impairment due to spinal disorders abnormal range of motion and motor, and sensory disorders. He found spine impairment of 15 percent and whole person impairment of 15 percent. Although Dr. Ghadially did provide support for an impairment of the spine, the spine is not a scheduled member as defined in the Act.¹⁰ He did not indicate that appellant sustained any permanent impairment to a scheduled member as required under the Act.¹¹ The Office requested that Dr. Ghadially clarify his impairment ratings but the record does not indicate that Dr. Ghadially responded.

⁴ *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁵ *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961), *Francis John Kilcoyne*, 38 ECAB 168 (1987).

⁶ *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).

⁷ The Act itself specifically excludes the back from the definition of “organ.” 5 U.S.C. § 8101(19).

⁸ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

⁹ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹⁰ *See* 5 U.S.C. § 8107(c).

¹¹ *Id.*

The Board has also considered the 2 reports submitted by Dr. Eaves, a chiropractor, in which he determined an impairment of the whole person of 3 percent and 20 percent respectively.

Section 8101(2) of the Act provides that chiropractors are considered physicians “only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.”¹² Section 10.400(e) of the implementing federal regulations provides:

“The term ‘subluxation’ means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays. A chiropractor may interpret his or her x-rays to the same extent as any other physician defined in this section.”¹³

Thus, where x-rays do not demonstrate a subluxation, a chiropractor is not considered a “physician,” and his or her reports cannot be considered as competent medical evidence under the Act.¹⁴

In this case, the record does not indicate that a subluxation of the spine was diagnosed. Therefore, Dr. Eaves’ reports cannot be considered those of a physician and are of no probative value. Furthermore, Dr. Calvello’s report of March 25, 1998, in which he relied on Dr. Eaves’ findings and determinations regarding appellant’s impairment, provides no findings that would entitle appellant to any schedule award.

The Office medical adviser correlated findings from the reports of Drs. Calvillo and Eaves to specific provisions in the A.M.A., *Guides*. He specifically noted Dr. Eaves’ determination of loss of motion of the spine and recommendation of impairment based on that loss of motion. The Office medical adviser explained that schedule awards for impairment are granted for impairment to a scheduled member. Because the spine is not a scheduled member under the Act, he could not recommend impairment based on determinations of Drs. Calvillo and Eaves.

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant had no permanent impairment of the upper or lower extremities. The weight of the evidence therefore rests with the calculations of the Office medical adviser and appellant is not entitled to a schedule award.¹⁵

¹² 5 U.S.C. § 8101(2).

¹³ *Id.*

¹⁴ See *Susan M. Herman*, 35 ECAB 669 (1984). In any event, the Board has held that a chiropractor is not a physician for the purposes of calculating a schedule award. *George E. Williams*, 44 ECAB 530, 534 (1993).

¹⁵ With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).

The January 4, 1999 and October 26, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 17, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member