

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARSHALL V. SANDUSKY and DEPARTMENT OF VETERANS  
AFFAIRS, REGIONAL OFFICE, Louisville, KY

*Docket No. 02-798; Submitted on the Record;  
Issued August 5, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he is entitled to a schedule award for a permanent impairment of his left lower extremity.

This is the third appeal in the present case.<sup>1</sup> In the first appeal, the Board found that the opinion of the referral physician, Dr. Frank A. Burke, a Board-certified orthopedic surgeon, was incomplete and equivocal and, therefore, set aside the Office of Workers' Compensation Programs' November 24, 1998 decision and remanded the case for the Office to obtain a complete evaluation regarding whether appellant had a permanent impairment of his left lower extremity. In the second appeal, the Board found that the opinion of the referral physician, Dr. Robert L. Keisler, a Board-certified orthopedic surgeon, was unclear and equivocal and, therefore, vacated the Office's August 29, 2000 decision and remanded the case to the Office to obtain clarification from Dr. Keisler or, in the alternative, to refer appellant to another appropriate specialist for evaluation.

On remand, in response to the Office's request to clarify his opinion, Dr. Keisler submitted two reports dated October 24 and November 7, 2001. In his October 24, 2001 report, Dr. Keisler stated, in part:

“Even though the right foot symptoms appear to be originating and associated with a preexisting spinal disorder and surgery, and even though foot symptoms are sensory in nature and therefore have no objective findings, it is realistic to conclude that there is a radiculopathy, originating in the S1 nerve root that had previous surgery. ... There appears to be a partial reduction of sensation in the S1 nerve root and some nagging discomfort in that root. Sensation is not constant[ly] related to weightbearing activities, and it is possibly ratable, using

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<sup>1</sup> Docket No. 99-904 (issued May 22, 2000); Docket No. 01-56 (issued July 26, 2001). The facts and history surrounding the prior appeals are set forth in the initial two decisions and are hereby incorporated by reference.

Table 83 of the A[merican] M[edical] A[ssociation], [*Guides to the Evaluation of Permanent Impairment*], Edition IV.

“Whereas the maximum possible loss of function is 5 percent to the lower extremities, it is reasonable to estimate 2.5 percent impairment to the lower extremities as a result of residual radiculopathy, S1 nerve root light. It should be noted [that] the condition producing the radiculopathy is secondary to foraminal stenosis and possibly the surgical procedure to correct that condition.”

In his report dated November 7, 2001, Dr. Keisler stated that it was “quite difficult” for him to be “absolutely certain” as to the cause of appellant’s condition due to the absence of records prior to 1998. He stated that the “available information suggests that there was significant degenerative process that could produce the symptoms, not related to the fall” and that “the nature of the surgery could not be explained by a “herniated disc.” Dr. Keisler stated:

“Therefore, there could be an indirect relationship, even though the actual condition that was present was not the result of the injury. I will not be able to clarify this further.”

He stated that if the Office assumed the diagnosis of disc herniation and approved surgery, “it [was] not likely” that the Office meant to approve a decompression with foraminotomy and facetectomy which would not be the surgical procedure for a disc herniation. Dr. Keisler stated that “it [was] not likely that the surgical procedure in 1997 was the result of the employment injury.” He stated that “[s]uch an injury can produce symptoms in a preexisting condition, and may even lead to treatment of that preexisting condition, but it would not have been the cause of the condition” but the “cause of a period of symptoms.”

By decision dated December 18, 2001, the Office denied appellant’s claim for a schedule injury, stating that Dr. Keisler’s opinion established that there was no independent impairment rating or impairment of the left lower extremity that could be the result of the lifting injury to the spine in 1977.

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

The schedule award provision of the Federal Employees’ Compensation Act<sup>2</sup> and its implementing regulations<sup>3</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

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<sup>2</sup> 5 U.S.C. § 8107 *et seq.*

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 306, 308 (1986).

Dr. Keisler's October 24 and November 7, 2001 reports are replete with equivocal and speculative language in which he states that there "could" be an indirect relation between appellant's nerve root damage and his fall at work, it "is not likely" the Office should have approved surgery for a disc herniation, and it is possible that appellant has a ratable impairment under the A.M.A., *Guides* (4<sup>th</sup> ed. 1994). In his October 24, 2001 report, he further stated that appellant's "possible" loss of maximum function to his lower extremities was 5 percent but it was reasonable "to estimate" a 2.5 percent impairment to the lower extremities as a result of residual radiculopathy. In his November 7, 2001 report, he reiterated that "it is not likely" that appellant's surgery in 1997 was the result of employment injury and stated an injury like appellant would "cause a period of symptoms" but not cause the condition. Medical reports couched in speculative terms as in "likely," "possible," and "could" are equivocal and speculative and are of diminished probative value.<sup>5</sup> It is unclear from Dr. Keisler's reports whether appellant has a work-related permanent partial impairment pursuant to the A.M.A., *Guides*. The case therefore will be remanded for the Office to obtain a medical opinion from another second opinion physician -- which is necessary since Dr. Keisler stated he could not further clarify his opinion -- regarding whether appellant has any work-related permanent partial impairment. Upon further development that it deems necessary, the Office shall issue a *de novo* decision.

The December 18, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC  
August 5, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member

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<sup>5</sup> See *Patricia M. Mitchell*, 48 ECAB 371, 372 (1997); *William W. Wright*, 45 ECAB 498, 503-04 (1994).