

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SCOTT A. READ and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 96-996; Submitted on the Record;
Issued April 21, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has greater than a six percent permanent disability of the left lower extremity.

The Board has duly reviewed the case record in the present case and finds that appellant has no greater than a six percent impairment of his left lower extremity.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.³ Section 8107 of the 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.⁴ 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 of Workers' Compensation Programs has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*, 4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107(a).

⁵ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

In this case, the Office accepted that appellant sustained a herniated disc L4-5 and arachnoiditis and authorized a lumbar laminectomy which was performed on February 2, 1990. By award of compensation dated July 1, 1992, the Office awarded him a schedule award for six percent permanent impairment of his left lower extremity. A hearing was held on December 2, 1992 and the hearing representative issued a decision on March 8, 1993, setting aside the July 1, 1992 decision and remanding the case due to a conflict in the medical evidence. By decision dated September 9, 1993, the Office found the evidence failed to establish that appellant has any additional impairment to an extremity, and thus appellant is not entitled to greater than a six percent permanent impairment of his left lower extremity. By decision dated December 21, 1994, the Office denied modification of its September 9, 1993 determination. By decision dated July 3, 1995, the Office denied modification of its December 21, 1994 decision. By decision dated November 20, 1995, the Office denied modification of its July 3, 1995 decision

In support of his claim that he has more than a six percent permanent impairment of his left lower extremity, appellant, in a letter dated April 18, 1995, submitted a report dated March 27, 1995 from Dr. David Weiss, a Board-certified orthopedic surgeon and an office note dated May 11, 1995 from Dr. Marc S. Zimmerman, an attending Board-certified orthopedic surgeon and internist. In the May 11, 1995 office note, Dr. Zimmerman stated that “[e]xamination of the lower extremities reveals no motor or sensory deficits.” Dr. Weiss, in the addendum dated March 27, 1995, opined that appellant had a 24 percent impairment of the right lower extremity based upon a 12 percent impairment for muscle weakness and a 12 percent impairment for hypoesthesia and a 29 percent impairment of the left lower extremity based upon a 17 percent impairment for muscle weakness and a 12 percent impairment for hypoesthesia. Dr. Weiss noted that he based his impairment ratings for the muscle weakness on Table 39, page 77 and the hypoesthesia on Table 68, page 89.

In a memorandum dated June 6, 1995, an Office medical adviser noted that Dr. Zimmerman reported no motor or sensory deficit of the extremities. The Office medical adviser determined, based upon Dr. Zimmerman’s report, that there was no basis for an additional schedule award of compensation.

In a memorandum dated June 15, 1995, an Office medical adviser opined that there was no basis for an increase in appellant’s schedule award. In support of his opinion, the Office medical adviser noted:

“Dr. Weiss, March 27, 1995, cites the tables he used for basis of his calculations for schedule award.

“However, Table 39, p. 77 bases the calculation of impairment on muscle circumference differences. These measurements are not listed in the physical examination section of his June 3, 1994 exam[ination].

“Table 68, p. 89 is for impairment of specific nerves in the lower extremity and is not the correct table for nerve root involvement by the accepted low back problem (which is Table 83, p. 130).

“In summary, Dr. Weiss’ percentage impairment is not in accordance with A.M.A., *Guides*, 4th ed.

“Also of note, Dr. Zimmerman, B/C in orthopedics, May 11, 1995, found no motor or sensory deficits in the lower extremities.

“The functional capacity evaluation, June 2, 1994, WV Verno PT gives his professional opinion, a degree of inconsistency and symptom magnification was also displayed by the client during the evaluation.”

In a letter dated December 6, 1995, appellant submitted a copy of a magnetic resonance imaging (MRI) test dated August 9, 1995 in support of his request for reconsideration. In the MRI dated August 10, 1995, Dr. Robert Bronstein diagnosed central and left herniated disc at L4-5.

In his March 27, 1995 report, Dr. Weiss noted the tables of the fourth edition of the A.M.A., *Guides* he utilized in arriving at his percentage of impairment. Dr. Weiss has failed to provide any explanation of 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.⁶ The Board had reviewed Dr. Weiss’ reports, including the findings upon physical examination and is not otherwise able to determine how Dr. Weiss’ assessment of appellant’s left lower extremity impairment was derived in accordance with the A.M.A., *Guides*.

The Office had based its assessment of appellant’s left lower extremity impairment on the evaluations of the Office medical adviser. On June 6, 1995 the Office medical adviser opined, based upon Dr. Zimmerman’s report, that appellant was not entitled to an additional award of compensation. In support of his opinion, the Office medical adviser noted that Dr. Zimmerman found that appellant had no motor or sensory deficit of the extremities. Regarding Dr. Weiss’ March 27, 1995 report, the Office medical adviser opined that the percentage impairments noted by Dr. Weiss were not in accordance with the A.M.A., *Guides*, 4th ed. Specifically, the Office medical adviser noted that Table 39, p. 77 is based on muscle circumference differences which are not contained in Dr. Weiss’ June 3, 1994 report and Table 68, p. 89 is not the correct table to use for nerve root involvement of the lower back. The Office medical adviser also noted that appellant’s treating physician in a report dated May 11, 1995, report no motor or sensory deficits in the lower extremities. The MRI performed on August 9, 1995 does not address the degree of any impairment and thus is not probative medical evidence.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a six percent permanent impairment of the left lower extremity, for which he has received a schedule award and that appellant has failed to

⁶ See *James Kennedy, Jr.*, *supra* note 5 (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).

provide probative, supportive medical evidence that he has greater than the six percent impairment already awarded.

The decisions of the Office of Workers' Compensation Programs dated November 20 and June 3, 1995 are affirmed.

Dated, Washington, D.C.
April 21, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member