

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DWAYNE E. ELLIS and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, Ga.

*Docket No. 95-2264; Submitted on the Record;
Issued February 3, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether appellant has more than a three percent impairment of his left upper extremity for which he received a schedule award.

On July 6, 1988 appellant, then a 30-year-old clerk, filed a traumatic injury claim for pain in his left shoulder and neck which occurred on that date while he was pulling mail. The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain, cervical stenosis, a herniated nucleus pulposus at C5-6 and C4-7 and authorized a cervical corpectomy and fusion.

By letter dated February 3, 1994, the Office acknowledged receipt of appellant's claim for a schedule award and advised appellant that the Federal Employees' Compensation Act did not provide a schedule award for the back but provided for the loss of use of a member, function or organ of the body.

In another letter dated February 3, 1994, the Office requested that Dr. Lance H. Perling, a Board-certified orthopedic surgeon and appellant's attending physician, conduct an examination to determine the extent of any permanent partial impairment due to appellant's July 6, 1988 employment injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

In response to the Office's request, Dr. Perling requested authorization for a functional capacity evaluation, which, after Office approval, was conducted on April 7, 1994.

In reports dated April 26 and June 10, 1994, Dr. Perling noted appellant's history of a posterior cervical laminectomy and multilevel anterior cervical corpectomy and fusion. Dr. Perling opined that appellant had a 25 percent permanent impairment due to his neck abnormality. In an addendum to the June 10, 1994 report, Dr. Perling indicated that he did "not

perform individual percentage disabilities” and suggested that the Office refer appellant to another physician.

By letter dated June 24, 1994, the Office referred appellant to Dr. Thomas R. Cadier, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of any permanent disability due to his employment injury.

By letter dated June 28, 1994, the Office requested that Dr. Cadier evaluate appellant to determine the extent of any permanent impairment of his lower extremity in accordance with the A.M.A., *Guides*.

In a report dated July 20, 1994, Dr. Ned B. Armstrong, a Board-certified orthopedic surgeon,¹ discussed appellant’s history of injury and complaints of continued pain in his left shoulder but no numbness or tingling. Dr. Armstrong found that appellant had a 60 percent range of motion of his neck and a “90 [percent] range of motion of the left shoulder, with restriction on the last 10 [degrees] of full abduction because of shoulder pain.” Dr. Armstrong further found that appellant had a normal neurologic examination of his upper extremities with no atrophy, paresthesias or decreased sensation. Dr. Armstrong opined that appellant had reached maximum medical improvement in 1988 and that he had a four percent impairment of the whole person due to his loss of cervical range of motion. Dr. Armstrong expressed doubt that appellant’s left shoulder problems were due to his employment injury.

In a report dated August 9, 1994, an Office medical adviser reviewed Dr. Armstrong’s findings in his July 20, 1994 report and noted that the Act did not provide an award for loss of cervical range of motion. The Office medical adviser further noted that appellant had pain in his left shoulder which caused a “restriction of the last 10 [degrees] of full abduction.”² The Office medical adviser found that, according to Table 15 on page 54 of the A.M.A., *Guides*, the maximum impairment of the axillary nerve due to pain was 5 percent. The Office medical adviser multiplied the 5 percent impairment due to pain by 60 percent according to the graded scale at Table 11 on page 48 which yielded a 3 percent impairment of the left upper extremity.

By decision dated September 8, 1994, the Office granted appellant a schedule award for a three percent impairment of the left upper extremity. The period of the award ran for 9.36 weeks from July 20 to September 23, 1994.

By letter dated September 19, 1994, appellant requested a hearing before an Office hearing representative.

At the hearing held on January 31, 1995, the Office hearing representative informed appellant that the Act did not provide a schedule award for impairments of the whole person or for an impairment to his neck. The Office hearing representative indicated that he would hold

¹ Dr. Armstrong is an associate of Dr. Cadier.

² The loss of 10 percent range of motion of the shoulder on abduction constitutes a 0 percent impairment. A.M.A., *Guides*, 44, Figure 41.

the record open for 30 days in order for appellant to submit additional medical evidence which conformed to the A.M.A., *Guides*.

By decision dated March 15, 1995, the Office hearing representative affirmed the Office's September 8, 1994 decision. The hearing representative noted that he had advised appellant of the type of evidence needed to support an additional schedule award but that appellant had not submitted the necessary medical evidence.

By letter dated March 28, 1995, appellant requested reconsideration of his claim. In support of his request, appellant submitted a report dated March 1, 1995 from Dr. Burton McDaniel. In his report, Dr. McDaniel noted appellant's complaints of left arm pain and left lateral neck pain both of which increased with activity and cervical headaches. Dr. McDaniel found "full independent isolated movements of bilateral upper extremities" and obtained measurements of appellant's cervical range of motion. Dr. McDaniel concluded that appellant had a 19 percent impairment of the whole person based on loss of cervical range of motion, spinal decompression and neck surgeries.

In a report dated May 2, 1995, an Office medical adviser reviewed Dr. McDaniel's March 1, 1995 report and found that it did "not establish the presence of a radicular weakness nor altered sensation in either upper extremity." The Office medical adviser noted that Dr. McDaniel did not attribute any part of appellant's impairment to a nerve root in the neck but rather to problems in the cervical spine.

By decision dated May 17, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

The Board finds that appellant has no more than a three percent permanent impairment of the left upper extremity for which he received a schedule award.

Under section 8107 of the Act³ and section 10.304 of the implementing federal regulations,⁴ 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 A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁵

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.304.

⁵ *James J. Hjort*, 45 ECAB 595 (1994).

Appellant's attending physician, Dr. Perling, a Board-certified orthopedic surgeon, did not submit a report of the type necessary for a schedule award. The Office, therefore, properly referred appellant to Dr. Armstrong, a Board-certified orthopedic surgeon, for a second opinion examination.⁶

In a report dated July 20, 1994, Dr. Armstrong noted appellant's complaints of continued pain in his left shoulder but no numbness or tingling and found that appellant had a 60 percent range of motion of his neck and a "90 [percent] range of motion of the left shoulder, with restriction on the last 10 [degrees] of full abduction because of shoulder pain." Dr. Armstrong further found that appellant had a normal neurologic examination of his upper extremities with no atrophy, paresthesias or decreased sensation. Dr. Armstrong opined that appellant had a four percent impairment of the whole person due to his loss of cervical range of motion. The Act, however, does not provide a schedule award for whole person impairments or impairments to the back or spine.⁷ Dr. Armstrong, therefore, improperly utilized the A.M.A., *Guides* to find that appellant had an impairment of the upper back which he evaluated as a "whole person" impairment, rather than determining whether appellant had an impairment of the upper extremity.

The Office medical adviser properly applied the A.M.A., *Guides* to Dr. Armstrong's findings. The Office medical adviser found that appellant had a five percent impairment of the axillary nerve in his left shoulder due to pain.⁸ The Office medical adviser provided appellant with the maximum percentage for pain which interferes with activity, 60 percent⁹ and multiplied this by the maximum impairment for pain of the axillary nerve, 5 percent, to reach a 3 percent impairment of the left upper extremity.

Appellant submitted a report from Dr. McDaniel, who found that appellant had a full range of motion of the upper extremities and obtained measurements of his cervical range of motion. Dr. McDaniel concluded that appellant had a 19 percent impairment of the whole person based on loss of cervical range of motion, spinal decompression and neck surgeries. However, as discussed above, the Act does not provide for an award for a whole person impairment or for an impairment of the back.¹⁰ The report of the Office medical adviser is the only medical report which evaluated appellant's permanent impairment properly utilizing the A.M.A., *Guides* and thus constitutes the weight of the medical evidence.¹¹

⁶ *Joseph Santaniello*, 42 ECAB 710, 716 (1991).

⁷ 5 U.S.C. § 8107(c).

⁸ A.M.A., *Guides* 54, Table 15.

⁹ *Id.* 48, Table 11.

¹⁰ 5 U.S.C. § 8107(c).

¹¹ *Joseph Santaniello*, *supra* note 6.

The decisions of the Office of Workers' Compensation Programs dated May 17 and March 15, 1995 are hereby affirmed.

Dated, Washington, D.C.
February 3, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member