

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE E. WILBUR and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Poplar Bluff, Mo.

*Docket No. 97-973; Submitted on the Record;
Issued January 25, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On March 16, 1989 appellant, then a 42-year-old painter, filed a notice of traumatic injury alleging that on March 8, 1989 he slipped on ice and fell in the parking lot while coming into work. Appellant did not miss any work and eventually sought medical treatment for his injury on March 16, 1989. The Office of Workers' Compensation Programs accepted the claim for a strained right hip. Appellant's temporary employment ended on March 17, 1989 and he has not worked since his termination.

By letter dated November 12, 1991, appellant, through his attorney, requested that the claim be reopened. Appellant submitted a Form CA-20 attending physician's report dated December 6, 1990 from Dr. T.T. Warren, a family practitioner. Dr. Warren diagnosed herniated nucleus pulposus L5-S1, with left sciatic nerve root compression related to appellant's work injury. The Office treated the request as a claim for recurrence of disability.

In reports dated February 20 and December 29, 1992, Dr. Robert W. George, a family practitioner, noted that appellant's work injury in 1989 caused a prominent narrowing of the disc space, possible edema with a rotation of the L5 vertebrae, which ultimately developed into a complete herniation. Dr. George opined that appellant had at least a 50 percent permanent disability.

After an Office medical adviser disputed causal relationship between appellant's current condition and his 1989 work injury, the Office found a conflict in the medical evidence. The Office referred appellant to Dr. R.A. Ritter, a Board-certified orthopedic surgeon, to resolve the conflict regarding whether appellant's continuing condition was due to his 1989 work injury. In a July 12, 1993 report, he confirmed that appellant had a herniated disc at L5-S1 with progressive deterioration of the disc related to his March 8, 1989 employment injury. Dr. Ritter

opined that appellant had a 30 percent whole body impairment based on the residuals of the employment injury.

The Office approved the claim for herniated disc, L5-S1 on August 17, 1993. Appellant filed a Form CA-7 on December 1, 1993 claiming compensation for lost wages from March 16, 1989 through December 1, 1993.

By letter dated November 18, 1994, appellant's attorney requested a schedule award.

Appellant submitted a report from Dr. Maurice H. Miller, an orthopedic surgeon, dated May 17, 1994. Dr. Miller indicated that he had treated appellant for pain in the lumbosacral junction with a line coursing down the right gluteal area, high, calf and into the foot. He noted that appellant had a history of back pain and symptoms which crossed over into both lower extremities or the left lower extremity, but that at the time of his examination appellant had no symptoms on the left side. Dr. Miller diagnosed herniated nucleus polyposus, L5-S1 with neurologic impingement and degenerative joint disease of the cervical spine. He noted that appellant can toe walk and heel walk, that straight leg raise was marginally positive on the right side in a seated position but negative on the left side and that right or left tilt and extension caused increased back pain. Dr. Miller recommend that appellant lose weight, continue anti-inflammatory medication and continue activity, including a walking program.

In an October 31, 1994 report, Dr. Miller indicated that appellant's unilateral spinal nerve root impairment affecting the lower extremity was computed as 35 percent of extremity involvement and that multiplying "by the .04" appellant had a whole person impairment rating of 14 percent. He advised that his calculations were based on the fourth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a report dated December 19, 1994, an Office medical adviser found Dr. Miller's computation of 35 percent impairment to be incorrect, noting that appellant was found to be able to heel and toe walk which suggested that appellant did not have substantial weakness affecting his lower extremity. He noted that under the fourth edition of the A.M.A., *Guides*, "at best, if [appellant] had a grade for chronic pain, sensory deficit and discomfort that was 100 percent, [appellant] would be eligible for a five percent impairment of the lower extremity secondary to residuals of pain, sensory deficit and discomfort."

The Office referred appellant for a second opinion evaluation by Dr. Martin Wice, a Board-certified physician in physical medicine and rehabilitation. In a March 24, 1995 report, Dr. Wice detailed appellant's work injury and his histories of chronic low back pain, myofascial pain syndrome and L5-S1 protruding disc. He noted findings and opined that it was difficult to define neurovascular abnormalities as appellant's pain behavior was out of proportion to his clinical examination. To more objectively look for evidence of radiculopathy, he performed nerve conduction studies and electromyographic studies on both legs. Dr. Wice reported that appellant's right lower extremity sensory deficits were not in a clear radicular pattern as there was no definite evidence of right lumbosacral root irritation on physical examination. He noted that the right lower extremity electrodiagnostic evaluation was within normal limits and that there was no evidence of a herniated disc impinging on the right lumbosacral nerves. Consequently, Dr. Wice concluded that the lower right extremity did not warrant a disability

rating. With respect to the lower left extremity, he diagnosed a very subtle left S1 radiculopathy. He concluded, based on Table 20 of the A.M.A., *Guides*, that appellant had a 61 percent sensory impairment and, based on Table 83, that appellant had a maximum of 5 percent loss of function due to sensory deficits or pain in the S1 distribution, which he translated into a 3 percent impairment of the left lower extremity. Based on a review of the medical record, Dr. Wice considered December 3, 1991 to be appellant's date of maximum medical improvement.

In an Office memorandum dated May 2, 1995, an Office medical adviser concurred with Dr. Wice's rating of a three percent impairment of the left lower extremity as it would be consistent with appellant's accepted injury of L5-S1 herniated disc.

In a decision dated October 31, 1995, the Office awarded appellant a schedule award for a three percent impairment of the left lower extremity.

Appellant requested a hearing. During a hearing held on September 16, 1996, the Office hearing representative advised appellant that he needed to submit a medical opinion which evaluated his percentage of impairment with detailed references to the A.M.A., *Guides*.

Appellant subsequently submitted a September 19, 1996 report from Dr. George which noted that appellant's obesity alone prevented him from working full time, but that given the spinal stenosis and herniated disc, appellant was in constant pain when moving or sitting in a static state for short periods of time. He stated that his estimate of disability was based on the A.M.A., *Guides* criteria for the back as a whole and yielded 70 percent of the whole body.

In an October 11, 1996 report, Dr. Ritter noted that his 30 percent disability rating was based on a number of factors including appellant's lower back pain and "CT documentation of a disc rupture as referred to in Table 53, part II, [A.M.A., *Guides*]." He also stated that appellant had "some numbness in his right foot and the dorsum of the left foot which is felt to be neurological dysfunction with impairments that are mentioned in table 51, of the [A.M.A., *Guides*]."

In a decision dated December 2, 1996, the Office hearing representative determined that appellant had no more than a three percent impairment of the left lower extremity and therefore affirmed the Office's October 31, 1995 decision.

The Board finds that the evidence is insufficient to establish that appellant has more than a three percent impairment of the left lower extremity for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation 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.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 Board has authorized the use of a single set of tables so that there

¹ 5 U.S.C. § 8107(a).

may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.²

Dr. Miller reported that appellant's unilateral spinal nerve root impairment affecting the left lower extremity was 35 percent based on the A.M.A., *Guides*. He, however, failed to reference the appropriate tables and pages in the A.M.A., *Guides* to support his diagnosis and gave no explanation for the basis of his rating. It is well settled that when an attending physician's report gives an estimate of permanent impairment but does not indicate that the estimate is based on the application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*. Board cases are clear that if an attending physician does not utilize the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. For this reason, the Board finds that Dr. Miller's October 31, 1994 report, finding that appellant has a 35 percent permanent impairment of the left lower extremity, is of diminished probative value.³

Dr. Wice, on the other hand, reviewed appellant's medical history, examined appellant and performed diagnostic tests. He compared his clinical findings to the appropriate tables and pages in the A.M.A., *Guides* and properly calculated a three percent permanent impairment of the left lower extremity. Dr. Wice is the only physician of record who has provided an evaluation in conformance with the proper edition of the A.M.A., *Guides*. Accordingly, as reports of Dr. Miller and two other physicians fail to explain why under the A.M.A., *Guides* that appellant has more than a three percent permanent impairment of the left lower extremity for which he received a schedule award,⁴ the Board finds that the Office properly denied modification of its prior decision.⁵

The decision of the Office of Workers' Compensation Programs dated December 2, 1996 is affirmed.

Dated, Washington, D.C.
January 25, 1999

² *James Kennedy, Jr.*, 40 ECAB 620 (1989); *Quincy E. Malone*, 31 ECAB 846 (1980).

³ Dr. Ritter's opinion is also of diminished probative value for this reason. He opined that appellant had foot pain and referenced Table 51 of the A.M.A., *Guides*, but Table 51 of the fourth edition of the A.M.A., *Guides*, relates to impairment from knee ankylosis in flexion and is not relevant to foot pain. To the extent that Dr. Ritter may have referred to an earlier edition of the A.M.A., *Guides*, the Board notes that the Office began using the fourth edition effective November 11, 1993; see FECA Bulletin No. 94-4.

⁴ Dr. George rated appellant as having a 70 percent whole man disability due to back pain and Dr. Ritter rated appellant with a 30 percent whole man impairment. Schedule awards, however, are not payable for whole person impairment or for nonschedule members of the body such as the back; see *George E. Williams*, 44 ECAB 530 (1993). Dr. George did not address whether appellant had an impairment in his lower extremities.

⁵ Appellant has an outstanding claim for wage loss beginning March 16, 1989 through December 3, 1991 which has not been addressed by the Office. Appellant's schedule award was awarded for the period of December 3, 1991 through February 1, 1992.

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member