

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE G. BURKINDINE and DEPARTMENT OF HEALTH & HUMAN SERVICES, HEALTH CARE FINANCE ADMINISTRATION, Baltimore, Md.

*Docket No. 98-308; Submitted on the Record;
Issued July 6, 1999*

DECISION and ORDER

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

The issue is whether appellant met her burden of proof to establish that she has more than a 16 percent permanent impairment of her left leg for which she received a schedule award.

The Board finds that appellant did not meet her burden of proof to establish that she has more than a 16 percent permanent impairment of her left leg for which she received a schedule award.

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*

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).

Evaluation of Permanent Impairment (fourth edition 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

In the present case, the Office accepted that on February 15, 1995 appellant sustained left tibia and fibula fractures and peroneal nerve palsy. The Office authorized the performance of reduction surgery with intramedullary hardware, peroneal nerve decompression, and hardware removal surgery. By award of compensation dated August 21, 1997, the Office granted appellant a schedule award for a 16 percent permanent impairment of her left leg. The award ran for 46.08 weeks from December 15, 1996 to November 2, 1997. The award was based on the calculations of the Office medical adviser who applied the standards of the A.M.A., *Guides* to the findings of Dr. John B. Naiman, an attending Board-certified orthopedic surgeon.

In a report dated May 16, 1997, the Office medical adviser properly determined that appellant had a 16 percent permanent impairment of her left leg. The Office medical adviser correctly found that appellant was entitled to a 7 percent impairment rating due to loss of extension of her left ankle⁶ and was entitled to a 10 percent rating due to the 2.5 centimeter atrophy of her left quadriceps.⁷ The Office medical adviser then combined the two values using the Combined Values Chart to calculate a total 16 percent impairment of the left leg.⁸

In a report dated February 12, 1997, Dr. Naiman determined that appellant had a 42 percent permanent impairment of her left leg. However, the opinion of Dr. Naiman is of limited probative value regarding appellant's permanent impairment rating in that Dr. Naiman failed to provide an explanation of how his assessment of impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.⁹

Dr. Naiman indicated that appellant was entitled to an eight percent impairment rating due to loss of ankle motion. However, as described above, appellant is only entitled to a seven percent impairment rating for loss of ankle motion.¹⁰ Dr. Naiman noted that appellant was entitled to a 14 percent impairment rating for loss of left knee motion. He stated that appellant had 115 degrees of left knee motion and no anterior, posterior, varus or valgus instability. However, these findings would not entitle appellant to any rating for loss of knee motion.¹¹ Dr. Naiman indicated that appellant was entitled to a 10 percent impairment rating for left

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

⁶ See A.M.A., *Guides* 78, Table 42. Appellant's ankle flexion of 35 degrees would not entitle her to a rating. *Id.*

⁷ *Id.* at 77, Table 37.

⁸ *Id.* at 322. The Office medical adviser indicated that motor or sensory loss ratings were not warranted.

⁹ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (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).

¹⁰ See *supra* note 6 and accompanying text.

¹¹ See A.M.A., *Guides* 78, Table 41.

quadriceps weakness; a 5 percent rating for left common peroneal dysesthesia and pain; and a 5 percent rating for left deep peroneal weakness. Although Dr. Naiman indicated that appellant had hypesthesia in the common peroneal nerve and noted that appellant reported some weakness with fatigue of her left foot, he did not adequately explain how he obtained objective findings for motor and sensory loss in accordance with the specific testing procedures of the A.M.A., *Guides*. Nor did he adequately explain how he applied the findings to the appropriate standards of the A.M.A., *Guides*.¹² Moreover, in a report dated January 14, 1997, Dr. Naiman had indicated that appellant did not have any peroneal hypesthesia or dysesthesia.¹³

As the report of the Office medical adviser provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.¹⁴ Therefore, the Office properly determined that appellant has a 16 percent permanent impairment of her left leg for which she received a schedule award.

The decision of the Office of Workers' Compensation Programs dated August 21, 1997 is affirmed.

Dated, Washington, D.C.
July 6, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

¹² See *id.* at 48-49, 76-77, 89. For example, Dr. Naiman indicated that appellant was entitled to a 5 percent rating for left common peroneal dysesthesia and pain, but the A.M.A., *Guides* provides for a maximum value of 5 percent for *complete* sensory or dysesthesia deficit of the common peroneal nerve. *Id.* at 89, Table 68.

¹³ In a report dated July 29, 1997, Dr. Frank Nisenfeld, a Board-certified orthopedic surgeon, to whom the Office referred appellant, noted that appellant had normal muscle strength and sensation in her left leg. Dr. Nisenfeld indicated that appellant had a 15 percent permanent impairment of her left leg.

¹⁴ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).