

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY E. RUESCH and DEPARTMENT OF THE ARMY,
UTAH NATIONAL GUARD, Draper, Utah

*Docket No. 97-2026; Submitted on the Record;
Issued March 25, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has sustained any permanent impairment to a schedule member of his body causally related to his accepted October 19, 1993 employment injury, thereby entitling him to a schedule award under 5 U.S.C. § 8107.

On October 19, 1993 appellant, a 47-year-old armament foreman, experienced pain in his back and numbness in his legs while jogging. Appellant filed a Form CA-1 claim for compensation based on traumatic injury on November 25, 1993 alleging that these pains were caused or aggravated by his employment.

Appellant was examined on December 1, 1993, by Dr. Lynn M. Gaufin, a Board-certified neurosurgeon, who stated in a report on the date of examination that appellant had a history of a herniated disc at L5-S1 nine years prior associated with an industrial accident and that he had experienced a flare up of pain while jogging three months prior. Dr. Gaufin ruled out a herniated disc and lateral femoral cutaneous neuropathy in his left leg. Dr. Gaufin scheduled appellant for a magnetic resonance imaging (MRI) scan on December 6, 1993 and a lumbar discography on December 8, 1993.

In a report dated December 6, 1993, Dr. Gaufin stated that the MRI scan results demonstrated desiccation and narrowing of the L5-S1 disc, with mild degeneration of the L1-2 and L2-3 discs. In reports dated December 8, 1993, Dr. Gaufin stated that the lumbar discography revealed an abnormal L5-S1 disc with far lateral herniation on the right side. Dr. Gaufin also related appellant's complaints of constant, chronic pain in his back and scheduled him for discectomy/fusion surgery at L5-S1, which he underwent on December 21, 1993.

By letter dated November 10, 1994, the Office of Workers' Compensation Programs accepted the claim for permanent aggravation of preexisting degenerative disc disease, L5-S1, with authorization for surgery. Appellant received appropriate compensation for intermittent

periods of disability due to his accepted employment injury. On March 28, 1996 appellant filed a Form CA-7 claim for a schedule award based on his accepted low back injury.

Appellant submitted a report dated April 15, 1996, from Dr. Gaufin. Dr. Gaufin stated that he examined appellant on April 15, 1996 and that appellant continued to have some back pain and stiffness, which was better than before his surgery but still not normal. Dr. Gaufin stated that appellant had reached maximum medical improvement, that he would always have some stiffness of his back and would always have some numbness intermittently when standing and some aching in the spine. Dr. Gaufin determined that, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition) the A.M.A., *Guides*, with Utah modifications, Table 3, lumbar intervertebral disc, paragraph E, appellant had a herniated disc stabilized with surgery, requiring fusion, with persistent symptoms remaining without signs of radiculopathy. Dr. Gaufin concluded that appellant had a 12 percent impairment.

By letter dated May 9, 1996, the Office advised Dr. Gaufin that the Federal Employees' Compensation Act¹ did not provide for any spinal impairment award, although the A.M.A., *Guides* contained an extensive chapter on the spine. The Office stated that the Act did provide for a scheduled award for impairment of an extremity secondary to neurological deficits arising from affected spinal nerve roots due to the accepted condition. The Office, therefore, advised Dr. Gaufin, in the event that appellant had such sensory and/or motor impairment caused by the accepted condition, to determine appellant's degree of impairment pursuant to the A.M.A., *Guides*.

The Office asked Dr. Gaufin to state whether either lower extremity was impaired and whether that impairment was to the left or right side, or both and to specify the spinal root(s) involved. The Office advised Dr. Gaufin to rely on page 51, Table 13 in determining whether appellant had an impairment of the cervical spine, and page 130, Table 83 in determining whether appellant had an impairment of the lumbar spine. The Office requested that Dr. Gaufin provide the grading of the impairment and reasons for the grading selected. The Office further advised Dr. Gaufin to rely on page 48, Table 11 in determining whether appellant had a sensory impairment and to rely on page 49, Table 12 in determining whether appellant had a motor impairment. Lastly, the Office requested that Dr. Gaufin provide the date on which appellant reached maximum medical improvement. Dr. Gaufin did not respond to this letter.

In order to help determine whether appellant was entitled to a schedule award for permanent partial impairment based on his accepted employment injury, the Office scheduled appellant for a second opinion evaluation by Dr. Robert G. Weiner, a Board-certified orthopedic surgeon, for February 20, 1997.

Dr. Weiner examined appellant on February 20, 1997 and, in a report issued on that date, reviewed appellant's medical history and listed findings on examination. Dr. Weiner stated that the date of maximum medical improvement was December 1994 and found that the nerve root origin and specific nerve branches affected were the S1 nerve roots, right and left. Dr. Weiner

¹ 5 U.S.C. § 8101.

advised that the degree of permanent impairment based on loss of function from sensory deficits, pain, or discomfort would be based on Table 75 [page 113] of the A.M.A., *Guides*. Dr. Weiner noted that appellant underwent a single level spinal fusion with decompression and residual signs or symptoms, resulting in a 12 percent whole person impairment and determined that the degree of permanent impairment of the lower extremity due to loss of function from decreased strength was 0 percent, as there was no evidence of decreased strength. In a March 25, 1997 supplemental report, Dr. Weiner clarified that he had found that appellant had sustained no sensory impairment.

In an Office note dated March 27, 1997, an Office medical adviser reviewed Dr. Weiner's report and concluded that there was no motor or sensory impairment of either leg and, therefore, no basis for a schedule award.

In a decision dated April 16, 1997, the Office denied appellant's claim for a schedule award. The Office noted that the Office medical adviser had concluded based on the medical evidence of record that appellant had no ratable impairment pursuant to the A.M.A., *Guides*.

The Board finds that appellant has not sustained a permanent partial impairment to a schedule member of his body causally related to his accepted October 19, 1993 employment injury, thereby entitling him to a schedule award under 5 U.S.C. § 8107.

The Act² does not specify the manner, in which the percentage loss of a schedule member shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office. 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 schedule award provisions of the Act³ set forth the number of weeks of compensation to be paid for permanent loss of use of the members listed in the schedule. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determinations is a matter which rests in the sound discretion of the Office. However, as a matter of administrative practice and to ensure consistent results to all claimants, the A.M.A., *Guides* have been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁴

In the instant case, Dr. Gauvin assigned appellant a 12 percent permanent impairment to the whole person based on appellant's accepted degenerative disc condition. However, no schedule award is payable for permanent loss of, or loss of use of, anatomical members or functions or organs of the body not specified in the Act or in the implementing

² 5 U.S.C. § 8101 *et seq.*

³ 5 U.S.C. § 8107.

⁴ *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

regulations.⁵ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the spine or the body as a whole,⁶ no claimant is entitled to such an award.⁷ Therefore, the 12 percent permanent impairment rating assigned by Dr. Gaufin does not provide a basis for a schedule award under the Act. Moreover, the physician's impairment rating does not conform with the A.M.A., *Guides*. The Office advised Dr. Gaufin of this fact in its May 9, 1996 letter and advised that he could perform an impairment evaluation, pursuant to the applicable tables in the A.M.A., *Guides*, for a scheduled award for impairment of an extremity secondary to neurological deficits arising from affected spinal nerve roots due to the accepted condition. The Office noted the relevant tables in the A.M.A., *Guides* required for such a determination and requested that Dr. Gaufin respond to specific questions in the event that appellant had such sensory and/or motor impairment. Dr. Gaufin, however, did not respond to this request.

The Office thereafter referred appellant to Dr. Weiner, the second opinion physician, who found based on Table 75 of the A.M.A., *Guides* that appellant had no loss of function from sensory deficits, pain, or discomfort and determined that the degree of permanent impairment of the lower extremity due to loss of function from decreased strength was 0 percent, as there was no evidence of decreased strength; Dr. Weiner clarified in his supplemental report that appellant had sustained no sensory or motor impairment of the lower extremities. Based on Dr. Weiner's opinion, the Office medical adviser determined that there was no impairment of either leg and no basis for a schedule award.

As there is no other medical evidence establishing that appellant sustained any permanent impairment of a schedule member, the Office properly found that appellant was not entitled to a schedule award due to his accepted October 19, 1993 employment injury.

⁵ *William Edwin Muir*, 27 ECAB 579 (1976); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁶ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see also Rozella L. Skinner*, 37 ECAB 398 (1986).

⁷ *George E. Williams*, 44 ECAB 530 (1993).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 16, 1997 is hereby affirmed.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member