

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMELYN T. MAYS, claiming as widow of GARLAND MAYS, JR. and
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA

*Docket No. 98-2061; Submitted on the Record;
Issued August 10, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the employee had more than an 18 percent permanent impairment of his left upper extremity for which he received a schedule award.¹

The Board had duly reviewed the case on appeal and finds that the employee had no more than an 18 percent permanent impairment of his left upper extremity for which he received a schedule award.

The employee filed a claim alleging that on January 8, 1993 he injured his left shoulder and neck while lifting a tray of mail in the performance of duty. The Office of Workers' Compensation Programs accepted the employee's claim for a left shoulder sprain and for herniated nucleus pulposus at C5-6 and C6-7. On June 27, 1996 the employee, through counsel, filed a claim for a schedule award. On January 7, 1997 the Office granted the employee a schedule award for an 18 percent permanent impairment of left upper extremity.

Under section 8107 of the Federal Employees' Compensation Act² and section 10.304 of the implementing federal regulations,³ 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 for all claimants, the Office adopted the American Medical

¹ Appellant died unexpectedly on June 30, 1996. However, as appellant, through counsel, filed his claim for a schedule award prior to his death, the right to claim compensation survives the injured employee; *see* 20 C.F.R. § 10.105(e); *Mary H. Martin*, 46 ECAB 295 (1994).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.304.

Association, *Guides to the Evaluation of Permanent Impairment* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

In support of his claim for a schedule award, the employee, through counsel, submitted medical reports from his treating physician, Dr. Lee A. Kelley, a Board-certified orthopedic surgeon. In his first report relevant to the employee's claim for a schedule award, dated January 25, 1996, Dr. Kelley stated that the employee had reached maximum medical improvement, following cervical fusion surgery and that, while the employee's upper extremity motor and sensory functions were intact, the employee did have chronic pain which radiated into his left arm. Dr. Kelley assigned the employee a 20 percent permanent impairment rating, pursuant to the A.M.A., *Guides*. In a follow-up narrative report dated January 31, 1996, he clarified his prior report, stating, in that the employee's 20 percent impairment rating was based on the entire person.

By letter dated March 29, 1996, the Office explained to Dr. Kelley that it did not issue schedule awards based on whole person impairment ratings and requested that he provide an opinion in terms of the total percentage of impairment to the employee's upper extremity.

In a response dated April 19, 1996, Dr. Kelley stated, in pertinent part:

“[The employee] has limited motion of his neck and ongoing pain resultant from his injury and fusion. The A.M.A., *Guides* calls for assignment of permanent impairment to the entire person in such a case. He does not have neurologic deficit in his upper extremities nor does he have a measurable permanent partial impairment rating on the basis of extremity dysfunction. [The employee's] problem is in the spine, specifically the cervical spine. I am totally unable to understand the restrictions of your Office when the A.M.A., *Guides* call for issuance of impairment on this basis. I have not ever encountered an incident of work[-]related injury where impairment to the spine was disregarded.”

Following his receipt of further explanation of the impairment rating method used by the Office, Dr. Kelley submitted a follow-up report dated June 19, 1996, in which he stated:

“I have reviewed the table in the A.M.A., *Guides* which gives the relationship of impairment of the upper extremities to impairment of the whole person. A 34 percent impairment to [the employee's] left upper extremity would translate to a 20 percent impairment to the entire person. At this time I will assign him a 34 percent permanent ... impairment rating to the left upper extremity.”

The Board has held that if an examining physician does not use the A.M.A., *Guides* to calculate the degree of permanent impairment, it is proper for an Office medical adviser to review the record and apply the A.M.A., *Guides* to the examination findings reported by the examining physician.⁵ Dr. Kelley referred to the A.M.A., *Guides* in reports dated January 25,

⁴ James A. England, 47 ECAB 115 (1995).

⁵ Lena P. Huntley, 46 ECAB 643 (1995).

January 31, April 19 and June 19, 1996, but did not explain fully the calculations behind the conclusion that the employee had a 20 percent permanent impairment of the whole person, or a 34 percent impairment of the left upper extremity, with specific reference to the A.M.A., *Guides* for each calculation.

An Office medical adviser reviewed Dr. Kelley's reports on August 22, 1996 and applied the A.M.A., *Guides*.⁶ He noted Dr. Kelley's finding that the employee had no sensory or motor deficit and no evidence of significant neurologic compromise, but continued to have chronic upper extremity pain. The Office medical adviser then allowed the employee the maximum rating for pain pursuant to the A.M.A., *Guides*, which equated to 5 percent at C4-5, 8 percent at C5-6 and 5 percent at C6-7 and concluded that the employee had an 18 percent impairment of the left upper extremity due to pain.⁷

By letter dated October 24, 1996, the Office informed appellant's counsel that a conflict of medical opinion existed between Dr. Kelley and the Office medical adviser and that the case would be referred to an impartial medical specialist to resolve this conflict. Accordingly, by letter dated October 30, 1996, the Office forwarded the medical files, a statement of accepted facts and a list of questions to be resolved, to Dr. William Cabot, a Board-certified orthopedic surgeon.

In his report dated November 23, 1996, Dr. Cabot reviewed Dr. Kelley's specific findings that the employee had no motor, sensory or neurologic deficits, and stated:

"I agree with Dr. Kelley in his initial assessment that [the employee] had a twenty percent permanent partial impairment to the body as a whole as a result of the injuries he sustained. I see no rationale whatsoever for converting this whole person impairment into an impairment of the upper extremity when in actuality [he] did not have an impairment of the upper extremity, but had an impairment of the body as a whole as a result of his spine impairment. This is in accordance with the Fourth Edition, A.M.A., *Guides*."

By letter dated December 17, 1996, the Office forwarded a copy of Dr. Cabot's report to appellant's counsel and informed counsel that, although Dr. Cabot specifically found that the employee "did not have an impairment of the upper extremity," as the physician did not appear to have considered the employee's pain in making his determination and as the Office medical adviser had determined that the employee was entitled to the full percentage of impairment allowable for pain under the A.M.A., *Guides*, the Office would make its award based on the findings of the Office medical examiner. Consequently, on January 7, 1997, the Office awarded the employee a schedule award for an 18 percent permanent impairment of the left upper extremity.

By letter dated April 10, 1997, appellant's counsel requested reconsideration of the Office decision, asserting that, as Dr. Cabot agreed with the employee's treating physician that

⁶ A.M.A., *Guides* (4th ed. 1993).

⁷ A.M.A., *Guides*, Table 13, page 51.

the employee had a 20 percent permanent impairment of the whole body, the employee should be granted an award for the equivalent 34 percent permanent impairment of the left upper extremity.

In a decision dated June 20, 1997, the Office found that counsel's arguments were insufficient to warrant modification of its prior decision. The Office again noted that, while Dr. Kelley assigned the employee a 34 percent permanent impairment rating for the left upper extremity, he did not provide any medical rationale for this finding, but rather had conversely stated that the employee had no sensory or motor impairments of his upper extremities. The Office further noted that Dr. Cabot, the impartial physician, also found that the employee did not have any impairment of the upper extremities and explained that rather than rely on Dr. Cabot's opinion, the Office had weighed the medical evidence and found that the record supported the Office medical adviser's opinion that the employee had an 18 percent permanent impairment of the left upper extremity due to pain.

By letter dated April 21, 1998, appellant's counsel again requested reconsideration of the Office's prior decision and asserted that, in addition to pain, the employee's impairment rating should have taken into account any atrophy, discomfort or loss of sensation present.

On May 19, 1998 the Office again referred the employee's medical files to an Office medical adviser for review. In a report dated May 20, 1998, the Office medical adviser stated that, taking all factors into account, the employee did not have greater than an 18 percent permanent impairment of his left upper extremity.

In a decision dated May 28, 1998, the Office found counsel's arguments insufficient to warrant modification of its prior decision.

The Board has reviewed the calculations of the Office medical adviser and finds that the Office medical adviser properly calculated each of the employee's impairments pursuant to the A.M.A., *Guides* and properly concluded that the employee had an 18 percent impairment of the left upper extremity. While both Drs. Kelley and Cabot opined that the employee had a 20 percent impairment of the whole person, the Office does not issue schedule awards based on whole person impairment ratings. In addition, both Drs. Kelley and Cabot specifically stated that the employee did not have any sensory or motor deficits of the upper extremities. Although Dr. Kelley subsequently opined that the employee had a 34 percent permanent impairment of the left upper extremity, he did not provide any calculations in support of his conclusion. Therefore, the Office properly relied on the reports of its Office medical adviser, who, after reviewing Dr. Kelley's description of the employee's left arm pain, allotted the employee the maximum allowable percentages for pain under the A.M.A., *Guides*.

The decisions of the Office of Workers' Compensation Programs dated May 28, 1998 and June 20, 1997 are hereby affirmed.

Dated, Washington, D.C.
August 10, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member