

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARLENE HODIK and DEPARTMENT OF THE AIR FORCE,
OFFUTT AIR FORCE BASE, Omaha, NE

*Docket No. 99-1651; Submitted on the Record;
Issued August 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has more than an eight percent permanent impairment of her left upper extremity for which she received a schedule award.

The Board has duly reviewed the case on appeal and finds that appellant has no more than an eight percent permanent impairment of her left upper extremity, 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 or her claim by the weight of the reliable, probative and substantial evidence,² including that he or she sustained an injury in the performance of duty as alleged and that his or her 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 Evaluation of Permanent Impairment* (A.M.A., *Guides*, 4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

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).

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

In this case, the Office accepted that as a result of an incident on December 19, 1989 appellant, then a 40-year-old housing management assistant, sustained an aggravation of a preexisting cervical strain requiring cervical fusion at C5-6. By award of compensation dated January 11, 1999, the Office awarded appellant a schedule award for an eight percent permanent impairment of her left upper extremity.

In support of her claim that she has more than an eight percent permanent impairment of her left upper extremity, appellant submitted a medical report dated January 12, 1998 from her treating physician, Dr. Nosrat A. Massih, an internist, who stated that appellant had reached maximum medical improvement and that there were no other treatment options available to her at the time. He further stated that he felt appellant was medically disabled and was unable to lift or carry objects over five pounds, was not able to sit, stand or walk for long periods and could not stretch overhead or crane her neck toward either shoulder. Dr. Massih concluded that, as a result of these restrictions, appellant has a 30 percent disability of the body as a whole. He did not reference the A.M.A., *Guides* in his report or otherwise explain how he arrived at the 30 percent rating.

On November 20, 1998 on the advice of the Office medical adviser, the Office arranged for appellant to be examined by Dr. Kip A. Burkman, a Board-certified physiatrist and second opinion physician. In a report dated December 8, 1998, Dr. Burkman diagnosed status post failed C5-6 fusion for disc herniation and left upper extremity radiculopathy most consistent with a C6 distribution. After performing a complete physical examination, he noted that appellant had a positive left Surling's sign and that, using the Jamar gripper over three consecutive trials, the right side was 60, 54 and 57 pounds, while the left side was 29, 31 and 30 pound. Appellant also had no "RSD" and no Hoffman signs and "DTR's" were 2+/4+ at the bilateral biceps, and 1+/4+ at the bilateral triceps and achioradialis. Appellant demonstrated no spasticity, rigidity, bradykinesiam, or cogwheeling in the arms and no upper motor neuron signs were noted. Dr. Burkman further noted, however, that sensation was decreased in the C6 distribution on the left and there was slightly decreased C7 distribution on the left, but all sensation on the right was normal. He added that vibratory sense was intact in both arms and that strength of the biceps, deltoid and grip were approximately 4/5, with the triceps 5/5 on the left. Finally, Dr. Burkman noted that appellant was tender to palpation of the neck and the left upper trapezius. No myofascial trigger points were noted, but appellant had some increased tension at the C5-6 area on the left but not on the right. Applying these findings to the fourth edition of the A.M.A., *Guides*, he indicated that, pursuant to Table 11, page 48, appellant's pain and decreased sensation could be graded as 40 percent, the middle of the range for Grade three, which is classified as pain or decreased sensation which interferes with activity. Utilizing Table 13, page 51, Dr. Burkman determined that the maximum allowable percentage for pain due to impairment of the C6 spinal nerve was 8 percent, which when multiplied by 40 percent as outlined in the procedures at Table 11, page 48, resulted in a 3 percent impairment, rounded to the nearest percentage. With respect to appellant's decreased strength, he indicated that, pursuant to Table 12, page 49, appellant's loss of strength could be graded as 15 percent, or the middle of the range for Grade four, classified as active movement against gravity with some resistance. Utilizing Table 13, page 51, Dr. Burkman determined that the maximum allowable percentage for motor deficit due to impairment of the C6 spinal nerve was 35 percent, which, when multiplied by 15 percent as outlined in the procedures at Table 12, page 49, resulted in a 5

percent impairment, rounded to the nearest percentage. Finally, using the Combined Values Chart at pages 322 to 324 of the A.M.A., *Guides*, 3 percent for pain combined with 5 percent for decreased strength yields an 8 percent permanent impairment of the left upper extremity.

On January 4, 1999 Dr. Daniel D. Zimmerman, an Office medical adviser and Board-certified internist, reviewed the report of Dr. Burkman and concurred with his findings and conclusions.

It is appellant's burden to submit sufficient evidence to establish her claim.⁶ In the instant case, despite a December 30, 1997 letter from the Office to appellant explaining that any medical opinion estimating impairment should utilize the A.M.A., *Guides*, in his report dated January 12, 1998, Dr. Messih did not apply the A.M.A., *Guides*, or otherwise explain the calculations behind his conclusion. Therefore, his opinion is of limited probative value.⁷ In contrast, Dr. Burkman, the Office second opinion physician, properly applied the relevant portions of the A.M.A., *Guides* to his physical findings and provided full rationale for his conclusions. As the Office medical examiner concurred with Dr. Burkman's conclusions and there is no rationalized medical evidence in the record, based on a proper application of the A.M.A., *Guides*, supporting more than an eight percent permanent impairment of appellant's left upper extremity, the Board finds that appellant has no more than an eight percent permanent impairment of her left upper extremity.

⁶ See *Annette M. Dent*, 44 ECAB 403 (1993).

⁷ Inasmuch as Dr. Messih did not provide an impairment rating utilizing the A.M.A., *Guides* (fourth edition 1993), his opinion is of little probative value in determining the extent of appellant's permanent impairment; see *Paul R. Evans, Jr.*, 44 ECAB 646, 651 (1993).

The decision of the Office of Workers' Compensation Programs dated January 11, 1999 is affirmed.

Dated, Washington, D.C.
August 2, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member