

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSHALL V. SANDUSKY and DEPARTMENT OF VETERANS
AFFAIRS, MEDICAL CENTER, Louisville, KY

*Docket No. 99-904; Submitted on the Record;
Issued May 22, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant is not entitled to a schedule award for his left lower extremity.

On September 8, 1997 appellant, then a 49-year-old claims examiner, sustained an employment-related herniated nucleus pulposus at L5-S1 when he bent down to pick up stacks of files at work. He stopped work on September 12, 1997 and later returned to light-duty work; appellant received compensation for periods of disability. On October 14, 1997 he underwent a laminotomy, mesiofacetomy, foraminotomy and disc excision at L5-S1 which was authorized by the Office. In April 1998, appellant alleged that he was entitled to a schedule award due to his September 8, 1997 employment injury. By decision dated November 24, 1998, the Office determined that appellant is not entitled to a schedule award for his left lower extremity.

The Board finds that the case is not in posture for decision.

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 However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁴

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 *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

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.⁵ 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 has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th edition 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁶

In order to determine appellant's entitlement to a schedule award, the Office referred him to Dr. Frank A. Burke, a Board-certified orthopedic surgeon. In a report dated August 14, 1998, Dr. Burke reported the findings of his orthopedic examination. He indicated that appellant had some limited motion in his back; he also reported range of motion findings for appellant's hips, knees and ankles which he indicated were normal. Dr. Burke noted that appellant had decreased sensation of the left foot in the L1 distribution. He indicated that appellant had an L5-S1 herniation with left radiculopathy and noted that he had an impairment rating of 15 percent. Dr. Burke stated, "Additionally he has the residuals of a disc herniation with nerve compression and local damage, possibly also associated scar. This would place him between a category 3 and 4 and 15 percent is appropriate. No additional impairment rating is appropriate for the neurologic findings in the left foot as this is related to his disc herniation." In an attached form report, Dr. Burke indicated that appellant had a zero percent permanent impairment of his lower extremities.

In a report dated August 26, 1998, an Office medical adviser indicated that Dr. Burke did not completely address the impairment rating issues. He noted that a claims examiner needed to evaluate whether the pertinent issues were addressed.

The Board finds that the Office's evaluation of appellant's left lower extremity impairment is incomplete and that the case should be remanded to the Office for further development of the medical evidence. In the present case, appellant sustained an employment-related herniated nucleus pulposus with residuals extending into his left lower extremity. The A.M.A., *Guides* contains specific procedures for evaluating permanent impairment of the lower extremities due to peripheral sensory loss associated with specific nerve roots.⁷ Dr. Burke's evaluation of such peripheral sensory loss is incomplete and equivocal in the present case and the Board is not otherwise able to determine whether his evaluation was performed in accordance with the relevant standards.⁸ He also reported range of motion findings for appellant's lower extremities which he indicated were normal, but it is unclear from the record whether Dr. Burke performed all the relevant range of motion tests described in the A.M.A.,

⁵ 5 U.S.C. § 8107(a).

⁶ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁷ A.M.A., *Guides* 48, 88-93.

⁸ Dr. Burke suggested that appellant had a 15 percent impairment rating due to his radiculopathy but also indicated that appellant had a 0 percent impairment rating.

Guides.⁹ On remand the Office should completely evaluate whether appellant has a permanent impairment of his left lower extremity in accordance with the relevant standards of the A.M.A., *Guides* and, after such development deemed necessary, should issue an appropriate decision regarding such entitlement.

The decision of the Office of Workers' Compensation Programs dated November 24, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
May 22, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ See A.M.A., *Guides* 77-82. Dr. Burke reported limited back motion but neither the Act nor its implementing regulations provides for a schedule award for impairment to the back. *James E. Jenkins*, 39 ECAB 860, 866 (1990).