

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA I. BRECKENRIDGE and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 00-2327; Submitted on the Record;
Issued August 21, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that she is entitled to any schedule award greater than already granted under the schedule award provision of the Federal Employees' Compensation Act.

In the present case, the Office of Workers' Compensation Programs has accepted that appellant, a transitional employee, sustained low back pain while lifting sacks of mail on June 13, 1997. Appellant stopped working for the employing establishment on June 30, 1997.

Appellant subsequently filed a claim for a schedule award. In a report dated January 23, 1999, Dr. Robert C. Corn, a Board-certified surgeon and an impartial medical examiner who evaluated appellant with respect to her underlying claim of low back pain, found that appellant had "some objective findings consistent with an L4-5 left-sided disc herniation. He noted paraspinal low back protective posturing and signs of muscular atrophy and weak dorsiflexors on the left. He reviewed a lumbar magnetic resonance imaging (MRI) scan taken on September 29, 1997 and noted that it revealed a small focal left posterolateral disc herniation at L4-5 with some displacement of the left L5 nerve root. Upon examination, appellant appeared stressed, and walked with a left-sided limp, and demonstrated signs of paraspinal muscle guarding which restricted her forward flexion "just below knee level." Straight leg raising on the left was limited to 45 degrees, and a positive Lasegue's sign was noted. He noted no neurological defects but noted some left foot weakness which he opined was compatible with L5 inflammation.

In a report dated December 29, 1999, Dr. Edward H. Gabelman, appellant's treating physician Board-certified in orthopedic surgery, stated that he had treated appellant for herniated lumbar disc at L4-5 with nerve root inflammation, and that she had made subjective complaints of pain in both legs. Upon examination the doctor noted no localized sensory loss. With respect to loss of strength, the doctor noted that there had been intermittent signs of weakness, and referenced Dr. Corn's evaluation which included weaknesses in appellant's toes. He noted that these findings related to Dr. Corn's independent evaluation, and noted that they were "compatible with inflammation of the L5 nerve on the left." Based on the American Medical

Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Dr. Gabelman rated appellant with a 5 percent impairment of the whole person.¹ Dr. Gabelman also rated appellant with a 20 percent impairment for loss of strength.

In a report dated March 7, 2000, an Office medical adviser and orthopedic surgeon, Kade Huntsman, noted the statement of accepted facts and the reports from Drs. Corn and Gabelman, and applied their findings to the fourth edition of the A.M.A., *Guides* for an impairment rating. He determined that, in accordance with Table 83 of the A.M.A., *Guides*,² appellant had a 12 percent permanent impairment of the left lower extremity due to 37 percent loss of function due to strength deficit, which resulted in a 9 percent loss. When combined with appellant's 5 percent loss due to sensory deficit, which resulted in a 3 percent impairment in combination with Table 11, appellant had a 12 percent permanent impairment of the left lower extremity.³ With respect to appellant's right lower extremity, the Office medical adviser found no loss of strength, but noted a sensory loss of 5 percent which, when multiplied by 60 percent, the highest percent of deficit loss relating to a Grade 3 description of pain, resulted in a 3 percent impairment to appellant's right lower extremity.⁴ He noted appellant's date of maximum medical improvement was December 2, 1999.

On March 22, 2000 the Office issued a schedule award of 12 percent for permanent impairment of appellant's left lower extremity, and 3 percent for permanent impairment of appellant's right lower extremity.

In a report dated June 5, 2000, Dr. Robert D. Zaas, an orthopedic surgeon, stated that because appellant has an:

"L4-5 herniated disc with nerve root inflammation (radiculopathy), it is my opinion that [appellant] has a DRE [Diagnosis-Related Estimates] lumbosacral spine impairment Category V -- radiculopathy and loss of motion segment integrity -- 25 percent impairment of the whole person. This is based on the A.M.A., *Guides* page 110, Table 72."

In a July 10, 2000 merit decision, the Office denied modification of the March 22, 2000 decision finding that the Act⁵ does not include schedule awards to pay for back impairments nor for whole body impairments.⁶

¹ A.M.A., *Guides* (4th ed. 1993) 113, Table 75.

² A.M.A., *Guides* (4th ed. 1993) 130, Table 83.

³ Pursuant to Table 12 of the A.M.A., *Guides*, a Grade 4 impairment is the equivalent of a 1 to 25 percent strength deficit. Twenty-five percent multiplied by the thirty-seven percent maximum allowed for strength loss at the L5 level under Table 83 equals a nine percent impairment. Pursuant to Table 11 of the A.M.A., *Guides*, a Grade 3 impairment is the equivalent of a 26 to 60 percent sensory deficit. Sixty percent multiplied by the five percent maximum allowed for pain and sensory loss at the L5 level under Table 83 equals a three percent impairment.

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193.

The Board finds that appellant sustained no more than a 12 percent impairment of the left lower extremity and a 3 percent impairment of the right lower extremity for which she received a schedule award.

The schedule award provisions of the Act⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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 Office, by implementing regulations, section 10.404, adopted the A.M.A., *Guides* as the standard for evaluating schedule losses.⁹

In the instant case, appellant submitted a June 5, 2000 report from Dr. Zaas. In this opinion, Dr. Zaas reported that appellant had a lumbosacral spine impairment Category V -- radiculopathy and loss of motion segment integrity that resulted in a 25 percent impairment of the whole person. However, no schedule award is payable for a member, function or organ of the body not specified in the Act or the implementing regulations. As neither the Act nor regulations provide for payment of a schedule award for the permanent loss of use of the back or of the whole person, Dr. Zaas' opinion was not probative and insufficient to meet appellant's burden of proof.¹⁰ Appellant submitted no other evidence in support of her reconsideration request.

Appellant has not submitted medical evidence to support her contention that she sustained greater than a 12 percent permanent impairment of her left lower extremity, and 3 percent permanent impairment for her right lower extremity, or presented persuasive argument or evidence that the Office medical adviser's calculations were in error.

Consequently, appellant has not established that she sustained greater than a 12 percent impairment of her left lower extremity, and 3 percent impairment of her right lower extremity.

⁶ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404 (1999).

⁹ *Id.*

¹⁰ *See supra* note 11.

The decisions of the Office of Workers' Compensation Programs dated July 10 and March 22, 2000 are hereby affirmed.

Dated, Washington, DC
August 21, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member