

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. PRITZKER and DEPARTMENT OF VETERANS' AFFAIRS,
EDITH NOURSE ROGERS MEMORIAL VETERANS ADMINISTRATION HOSPITAL,
Bedford, MS

*Docket No. 00-212; Submitted on the Record;
Issued July 11, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than an eight percent impairment of her right leg, for which she received a schedule award.

On September 14, 1979 appellant, then a 23-year-old nurse's aide, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that she injured her back while assisting a patient. The Office of Workers' Compensation Programs accepted appellant's claim for low back strain.

On February 12, 1992 appellant filed a claim for a schedule award (Form CA-7). Appellant submitted a medical report dated November 15, 1991 from her attending Board-certified orthopedic surgeon, Dr. William Sutherland, who noted that he had seen appellant for her knee in the past, but now her visits concerned her back and leg pain. He noted that appellant had a problem with chronic low back pain and that she also had symptoms of right leg pain, including lack of reflex, strength deficit and continuous sensory deficit. Dr. Sutherland applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and calculated appellant's total percent impairment of the lower extremity as 22 percent.

In a report dated April 26, 1993, the Office medical adviser reviewed appellant's record and opined that it did not appear that appellant had sustained any impairment, either to her back or lower extremities, as a consequence of the September 11, 1979 occupational incident. He concluded that all residuals related to appellant's September 11, 1979 back strain resolved within six months of that incident. Finally, he noted his disagreement with Dr. Sutherland's report of November 15, 1991 as he found it inconsistent with his other reports and not persuasive in light of the fact that the alleged injury occurred 12 years before the November 15, 1991 report.

By letter dated October 7, 1993, appellant was referred to Dr. Roy Hepner, a Board-certified orthopedic surgeon, to resolve the conflict in opinions between Dr. Sutherland and the

Office medical adviser. In a medical opinion dated January 31, 1994, Dr. Hepner noted upon examination of appellant, as follows:

“Gait is normal to include heel and toe walking. [Appellant] can flex the trunk only to reach within 16 inches of the floor. Extension is diminished. Bending is normal bilaterally. [Appellant] has slight decreased sensation to light touch over the lateral right foot. She is tender over the midline lumbar spine and across the lumbosacral region. There is no atrophy. Strength is normal. Straight leg raise is negative bilaterally. Hip rotation is normal and painless bilaterally. Knee jerks are 2+ and symmetric. Left ankle jerk is 2+, right is absent. Left posterior tibial tendon jerk is 1+, right is absent. Toes are downgoing bilaterally. There is no pain to axial compression or to pelvic rotation.

Dr. Hepner listed his impression as “chronic lumbar sprain with possible failed fusion.” He did not feel that appellant had any usable work capacity.

By letter dated March 25, 1994, the Office requested that Dr. Hepner submit further information. In a medical report dated April 7, 1994, he responded that he felt that appellant had residual disability due to her initial injury which occurred on September 11, 1979. He noted that, while appellant did have some back symptoms prior to her injury, these symptoms were apparently not disabling and did not require aggressive treatment. With regard to appellant’s impairment, Dr. Hepner stated:

“In review of the [A.M.A.,] *Guides*, with specific reference to [T]ables 71 and 72, I would assess [appellant] as having a 5 percent permanent ... impairment of the whole person with respect to the right lower extremity. In review of [T]ables 75 4E2, 81 and 82, [she] has a 16 percent permanent ... impairment of the whole person with respect to the spine. It is unlikely [appellant] meets the validity criteria for use of [T]able 81 and therefore this is discounted. Using the Combined Values Chart, [she] appears to have a whole person impairment of 20 percent with respect to the spine and right lower extremity.”

By letter dated August 25, 1994, the Office requested an impairment rating from the Office medical adviser. In a September 1, 1994 medical report, the Office medical adviser reviewed Dr. Hepner’s evaluation of appellant’s permanent impairment, noting that appellant suffered from loss of sensation of the right lateral foot, loss of right ankle and posterior tibial reflexes, decreased forward bending, mild loss of trunk extension and persistent pain and stiffness which interferes with all activities. The Office medical adviser agreed that appellant had a 20 percent whole person impairment.

On February 26, 1996 the Office again referred the case to an Office medical adviser to rate appellant’s permanent impairment with respect to her right lower extremity. On March 20, 1996 the Office medical adviser applied the A.M.A., *Guides*, noting that the maximum loss of function due to pain or sensory deficit of the L5 and S1 nerve roots was 10 percent. He then determined that appellant had a class 4 sensory deficit for pain which may prevent activity,

which equated to an 80 percent sensory impairment.¹ The Office medical adviser calculated that 80 percent of 10 percent resulted in an 8 percent impairment of the right lower extremity due to pain and sensory deficit. He stated there was no additional right lower extremity impairment due to weakness or due to abnormal motion. Finally, the Office medical adviser noted that there was no impairment of the left lower extremity. On September 23, 1998 he noted that the date of maximum medical improvement was November 1991, the time appellant's orthopedic surgeon indicated that there was permanent impairment.

By decision dated July 13, 1999, the Office awarded appellant compensation under the schedule for an eight percent impairment of the right leg.

The Board finds that appellant has no more than an eight percent impairment to her right lower extremity.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

In the present case, the Office medical adviser raised various disagreements with the report of appellant's treating physician, Dr. Sutherland. Specifically, the Office medical adviser raised various instances where he found Dr. Sutherland's report of November 15, 1991 to be inconsistent with his other reports. He further questioned Dr. Sutherland's findings in light of the fact that the work-related injury occurred approximately 12 years before his report. Section 8123(a) of the Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁴ In order to resolve the conflict, the Office referred appellant to Dr. Hepner. Dr. Hepner evaluated appellant's impairment under the A.M.A., *Guides* and determined that appellant had a whole person impairment of 20 percent. However, no schedule award is permitted for impairment to the back or to the body as a whole.⁵ Therefore, Dr. Hepner's report was referred to the Office medical adviser, who applied the A.M.A., *Guides* and determined that appellant had an eight percent impairment of the right lower extremity. The Office medical examiner's opinion properly rated appellant as having an 80 percent sensory deficit grade for pain of the L5 and S1 roots. As the maximum amount that can

¹ A.M.A., *Guides*, 151, Table 20.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁵ *See Terry E. Mills*, 47 ECAB 309, 312 (1996); *James E. Mills*, 43 ECAB 215, 219 (1991).

be awarded for loss of function due to sensory pain for the L5 and S1 roots is 10 percent,⁶ Dr. Hepner properly found that 80 percent of 10 percent equaled an 8 percent impairment of the right lower extremity. The Board finds that the Office medical adviser's opinion was based on an accurate factual and medical background and properly applied the A.M.A., *Guides*. His opinion constitutes the weight of the medical opinion evidence in this case. Therefore, the Office properly determined that appellant has no more than an eight percent permanent impairment of her right lower extremity, for which she received a schedule award.

The decision of the Office of Workers' Compensation Programs dated July 13, 1999 is hereby affirmed.⁷

Dated, Washington, DC
July 11, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ A.M.A., *Guides*, 130, Table 83.

⁷ The decision issued November 16, 1999 is null and void, as the Board and the Office may not have jurisdiction over the same case at the same time. *See Arlonia B. Taylor*, 44 ECAB 591 (1993).