U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DREAMA L. BEVERLY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Chillicothe, OH

Docket No. 02-1903; Submitted on the Record;
Issued December 10, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a four percent impairment of her left lower extremity for which she received a schedule award.

The Office of Workers' Compensation Programs determined that on March 4, 1999 appellant, then a 41-year-old food service worker, sustained a left inguinal hernia as she was pushing a food service cart. Her claim was accepted for aggravation of a left inguinal hernia and sprain of the left pelvis with surgical repair of the left inguinal hernia site performed on March 31, 1999.[1] She received appropriate compensation and medical benefits.

On August 14, 2001 appellant filed a Form CA-7, claim for a schedule award.

On August 27, 2001 the Office advised appellant that her attending physician had not provided current medical information about her permanent impairment or a date of maximum medical improvement.

On September 19, 2001 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, for a second opinion evaluation as to the nature and extent of appellant's permanent impairment.

By report dated October 9, 2001, Dr. Rutherford reviewed appellant's factual and medical history, noted her complaints of chronic left groin pain that radiated into her left thigh and ilioinguinal neuropathy, probably secondary to scarring from two previous inguinal hernias. He provided physical examination results and opined that appellant had reached maximum medical improvement, but noted that that should not preclude a third cryoablation. Dr. Rutherford described appellant's subjective complaints causing impairment as "tenderness

[1] Surgery was performed for repair of the mesh from her prior inguinal hernia surgery.

and dysesthesias and paresthesias in the area of the repair of the inguinal hernia along with paresthesias along the medial aspect of the left inner thigh and she feels a thickness and tenderness in the area of the hernia repair, which gives her a fear of pulling the hernia loose, such that she avoids pushing and pulling." He further described appellant's physical activity limitations and noted that she could not sit or stand in one position without increasing pain. Using the Fifth Edition of the A.M.A., *Guides*, Dr. Rutherford opined as follows:

> "[Appellant] has a 17 percent permanent impairment of the whole person.... [S]he has a 15 percent permanent impairment of the whole person as a result of a Class II impairment due to herniation, with reference being Table 6-9 on page 136.[2] In addition, she has a two percent PPI related to some paresthesias and dysesthesias related to an ilioinguinal nerve neuritis, which is a complication of the recurrent hernia. The reference for this is Table 16-10 on page 483 and Table 17-37 on page 552 and 17-8 on page 555. There is no direct reference to the ilioinguinal nerve, but this is somewhat comparable to the femoral cutaneous nerve and I am basing this impairment on a six percent impairment of the ilioinguinal nerve due to paresthesias and dysesthesias and equating the dysesthesias of the ilioinguinal nerve to be comparable to those of the lateral femoral cutaneous nerve, which has a maximum rating of three percent for the whole person. The combined value of the above impairments of 15 percent permanent impairment for a Class II impairment due to herniation and an additional 2 percent forparesthesias and dysesthesias of the ilioinguinal nerve equates to a 17 percent permanent impairment of the whole person."

In an October 30, 2001 supplemental report, Dr. Rutherford restated that appellant had a 17 percent impairment of the whole person based on "aggravation of left inguinal hernia, sprain of the left pelvis and surgical repair of [the] hernia site ... [with] no additional ratable impairment related to the sprain of the left pelvis and no ratable impairment related to either lower extremity. The ilioinguinal nerve impairment is related to the hernia repair and an abdominal problem." Dr. Rutherford noted that his earlier report contained a typographical error noting a "6" rather than the intended "60" percent impairment of the ilioinguinal nerve due to paresthesias and dysesthesias.

On November 16, 2001 the Office requested that the Office medical adviser provide an opinion as to the extent of appellant's permanent impairment, based upon the reports from Dr. Rutherford.

On December 5, 2001 the Office medical adviser, Dr. Nabil F. Angley, a Board-certified orthopedic surgeon, reviewed Dr. Rutherford's reports, noted that the date of maximum medical improvement was October 9, 2001 and indicated that, in accordance with the A.M.A., *Guides*, fifth edition, appellant had a 15 percent whole person impairment due to the hernia, based upon Table 6-9, page 136 and, considering a 60 percent impairment of the ilioinguinal nerve, citing to

[2] "Criteria for Rating Permanent Impairment Due to Herniation."

Table 16-10, page 482, a 4 percent permanent impairment of the left lower extremity based on Table 17-37, page 552. Dr. Angley opined:

> "The A.M.A., *Guides* describes in section 1.3 on page 9 the [o]rgan [s]ystem and [w]hole [b]ody approach to impairments. Regional impairment ratings are described only to the musculoskeletal chapters such as lower extremity. Therefore, the whole person impairment rating of abdominal region of 15 percent is equal to 15 percent lower extremity impairment."

On December 19, 2001 the Office requested clarification from Dr. Angley as to appellant's left lower extremity impairment rating.

By response dated January 3, 2002, Dr. Angley stated that all organ impairments are designated as whole body impairments and as a result the whole body impairment rating is considered equivalent to an extremity impairment. Dr. Angley continued:

> "[T]he ilio-inguinal nerve deficit is equivalent to the femoral cutaneous nerve and as stated in my report, provides four percent impairment of the left lower extremity. This is truly a lower extremity impairment. The 15 percent whole person impairment that I mentioned in my report is an organ impairment due to the left inguinal hernia and is equivalent to 15 percent lower extremity impairment although it is actually an abdominal impairment."

On January 15, 2002 the Office granted appellant a schedule award for four percent impairment of her left lower extremity for the period October 9 to December 28, 2001 for a total of 80.64 days of compensation. Appellant received the schedule award at the 66 2/3 percent rate as she had no eligible dependent at the time period covered by the schedule award.

On appeal appellant, through her representative, contested the amount of the schedule award as well as the rate at which the schedule award was paid, claiming that she had an eligible dependent as her son was enrolled in college.[3]

The Board finds that appellant has no more than a four percent impairment of her left lower extremity.

The schedule award provisions of the Act[4] and the implementing regulations[5] provide for payment of compensation for the permanent loss or loss of use of specified members, functions

[3] The record, however, demonstrates that for the period of the schedule award appellant's son was not enrolled in college, but rather was enrolled only before the period and after the period. As the Office has not issued a formal final decision on this issue it will not now be addressed by the Board. *See* 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. § 8107(a).

[5] 20 C.F.R. § 10.304.

and organs of the body. No schedule award is payable for a member, function or organ of the body that is not specified in the Act or the implementing regulations.[6]

Section 8107(c)(22) of the Act provides for payment of compensation for permanent loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary" of Labor.[7] On April 1, 1987 the Secretary of Labor added the following organs to the compensation schedule: breast, kidney, larynx, lung, penis, testicle and tongue.[8] The Secretary made no provision in the implementing regulations for a hernia, repair of a hernia or residual abdominal symptomatology. The current implementing regulations at 20 C.F.R. § 10.404(a) includes the following members only: breast, kidney, larynx, lung, penis, testicle, tongue, ovary and uterus and vulva/vagina.[9]

Appellant's attorney contends that the A.M.A., *Guides*[10] provide for ratable impairment the hernia, its repair and residuals. The Board finds, however, the Secretary has not made such a determination pursuant to 5 U.S.C. § 8107(c)(22).[11] Consequently, no statutory or regulatory basis for the payment of a schedule award for a hernia, repair of a hernia or related residual abdominal symptomatology.[12]

In 1966, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a

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[6] *Ted W. Dietderich*, 40 ECAB 963 (1989) (gallbladder); *Thomas E. Stubbs*, 40 ECAB 647 (1989) (spleen, ribs, abdomen or liver); *Thomas E. Montgomery*, 28 ECAB 294 (1977) (loss of equilibrium).

[7] 5 U.S.C. § 8107(c)(22).

[8] 20 C.F.R. § 10.304(b) (1987).

[9] 20 C.F.R. § 10.404(a) (2001).

[10] The schedule award provisions of the Act and its implementing regulation, *see* 20 C.F.R. § 10.304, set forth the number of weeks of compensation payable to employees sustaining permanent from loss or loss of use, of scheduled members of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use, *see* 5 U.S.C. § 8107(c)(19). 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses. *See* 20 C.F.R. § 10.404 (1999).

[11] The Act does not provide for the addition of other important organs on a case-by-case basis. The organs that have been added to the compensation schedule are set forth in implementing regulations. *See Dietderich supra* note 5.

[12] *See Thomas J. Engelhart*, 50 ECAB 319 (1999). No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations. This principle applies to body members that are not enumerated in the schedule award provision before the 1974 amendments as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendments.

schedule award for permanent impairment to a lower extremity even though the cause of the impairment originates elsewhere.[13]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[14] All factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment. The element of pain may serve as the sole basis for determining the degree of impairment for schedule compensation purposes.[15]

In this case, appellant has injury-related chronic and persistent pain in the ilioinguinal nerve distribution which radiated into the left lower extremity and, therefore, she is entitled to a schedule award for impairment of the left lower extremity due to ilioinguinal pain. Dr. Rutherford provided a rating of appellant's pain based on paresthesias and dysesthesias and ilioinguinal neuritis of 60 percent of ilioinguinal nerve, which he equated as comparable to the lateral femoral cutaneous nerve under the A.M.A., *Guides* and determined that she had a 3 percent whole person permanent impairment, without citing to a specific resource or explaining how he arrived at that rating. Dr. Angley, however, properly applied the A.M.A., *Guides*, citing to Table 16-10, page 482 and Table 17-37, page 552, "Impairments Due to Nerve Deficits" and determined that this impairment was equal to a four percent permanent impairment of the left lower extremity.

Board precedent is well settled, that when an attending physician's report gives an estimate of impairment but does not indicate that the estimate is based upon the application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[16] In this case, Dr. Angley explained how he properly applied the A.M.A., *Guides* and determined that appellant had no greater than a four percent permanent impairment of the left lower extremity due to ilioinguinal nerve impairment. Therefore, his opinion is entitled to great weight and constitutes the weight of the medical opinion evidence of record. Moreover, appellant has submitted no probative medical evidence supporting that she has any greater left lower extremity impairment and the impairment ratings given by Dr. Rutherford for her hernia and its sequelae and given in terms of whole body impairment, are not cognizable under the Act. Therefore, she is not entitled to any greater schedule award than that already granted.

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[13] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[14] *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[15] *Paul A. Toms*, 38 ECAB 403 (1987); *Robin L. McClain*, 38 ECAB 398 (1987); *see also* A.M.A., *Guides*, fifth edition, Chapter 18, page 565.

[16] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 15, 2002 is hereby affirmed.

Dated, Washington, DC
December 10, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member