

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANIS F. DYGERT and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Asheville, NC

*Docket No. 02-2008; Submitted on the Record;
Issued December 24, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to a schedule award.

On May 1, 1997 appellant, then a 45-year-old licensed practical nurse, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on April 14, 1997 she sustained an injury to her cervical area, radiating down to her arm and shoulders, when transferring a patient from a bed to a wheelchair, wheelchair to commode and back to the wheelchair and bed. On May 19, 1997 appellant's claim was approved for cervico-thoracic strain and anterior cervical discectomy and fusion. Subsequently, appellant underwent two surgeries. She returned to a light-duty position on July 24, 1998 for four hours a day. On August 17, 1998 appellant increased her work schedule to six hours a day and on August 21, 1998 she increased it to eight hours a day.

On June 14, 2001 appellant filed a request for a schedule award (Form CA-7). In support thereof, she submitted a May 1, 2001 letter by Dr. Larry A. Schulhof, a Board-certified neurosurgeon, wherein he indicated that appellant had a 13 percent permanent impairment of the whole person. By letter to Dr. Schulhof dated June 18, 2001, the Office requested that he provide further information, including a rating of appellant under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th ed. (hereinafter A.M.A., *Guides*). By letter dated July 3, 2001, Dr. Schulhof responded. He indicated that appellant reached maximum medical improvement at the date of her examination on April 17, 2001. Dr. Schulhof then stated:

"Pursuant to section 15.2 page 379 [appellant's] evaluation is done using the diagnosis-related estimate "DRE" method. That method encompasses in my view the loss of motion one would ordinarily expect from a surgical fusion.

"Under the direction of section 15.6 page 392, [appellant] falls into category 4 which entitles her to 25 percent permanent disability of the whole person.

Pursuant to section 15.13 page 427 the conversion to a regional impairment estimate is reached by dividing 25 percent x 0.35 which calculates to 71.42 percent impairment of the cervical spine. The category four encompasses not only the range of motion but extremity function, therefore, a separate extremity function estimate or calculation is not indicated.

“The fact that federal law does not recognize impairment of the back or spine is in direct conflict with the A.M.A., *Guides*, impairment system and it is incongruous. [Appellant] has no objective motor or sensory deficits given her giveaway weakness with lack of follow through and the subjective nature of numbness which is in a distribution which is ulnar in nature and does not fit with her cervical disc disorder in my view. I cannot relate her dermatomal pattern of abnormality in the lower extremity or her lower back disorder to the cervical spine. There is no peripheral neuropathy or extremity range of motion disorder, which is the emphasis in extremity impairment estimations in the A.M.A., *Guides*. No amputation is present nor is there a reflex sympathetic dystrophy.”

By decision dated July 11, 2001, the Office found that appellant was not entitled to a schedule award of compensation.

By letter dated July 19, 2001, appellant requested a hearing. A hearing was held on February 22, 2002, at which time the hearing representative indicated that she would keep the record open for 30 days for appellant to have her physician submit a medical opinion as to whether she had any ratable impairment to her arm.

In response, appellant submitted a March 8, 2002 opinion by Dr. Schulhof, wherein he indicated that he carefully reviewed the fifth edition of the A.M.A., *Guides*. He concluded:

“As mentioned, I went back and reviewed the 600-page A.M.A., *Guides* extensively. There is no where that I can appropriately give an impairment rating that addresses the loss of an arm or leg function related to a cervical spine disorder. The ratings for the extremities in the A.M.A., *Guides* involve amputations and peripheral nerve injuries but not cord and spinal injuries or disorders. Further, her impairment relates to her arthrodesis and her myelopathy (spinal cord compression) that eventually affected function in her arms and legs. This also is covered nicely under the spine section.”

By decision dated April 19, 2002, the hearing representative denied appellant’s request for a schedule award, as she found that no medical evidence had been presented to document any impairment to an included body part causally related to the injury or the subsequent surgeries.

The Board finds that the Office properly denied appellant’s claim for a schedule award.

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,

¹ 5 U.S.C. §§ 8101-8193.

probative and substantial evidence,² including that she sustained an injury in the performance of duty as alleged and that her disability, if any, was causally related to the employment injury.³

The schedule award provisions of the Act⁴ and its implementing regulation⁵ 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 regulation as the appropriate standard for evaluating schedule losses.

A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.⁶ Appellant's physician reviewed her case under the A.M.A., *Guides*, but was unable to determine that she had any disability to any body part. He specifically noted that he could not relate her dermatomal pattern of abnormality in the lower extremity of her low back disorder to the cervical spine and that there was no peripheral neuropathy, nor extremity range of motion disorder. As the medical evidence of record did not establish that appellant had any permanent impairment to a part of the body or body function covered by the Act causally related to the April 14, 1997 employment injury, the Office properly denied her claim for a schedule award.

² See *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

³ See *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215 (1991).

The decisions of the Office of Workers' Compensation Programs dated April 19, 2002 and July 11, 2001 are hereby affirmed.

Dated, Washington, DC
December 24, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member