

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERBERT KIZZIEE and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 03-640; Submitted on the Record;
Issued April 23, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has greater than a 20 percent permanent impairment of each upper extremity, for which he has received a schedule award.

On May 3, 1990 appellant, then a 45-year-old mail handler filed an occupational disease claim asserting that on March 15, 1990 he learned that a nerve in his spine had pressed against his spinal cord causing him pain, which he attributed to the physical requirements of his federal employment. The Office of Workers' Compensation Programs accepted the claim for aggravation of cervical degenerative disc disease and authorized a cervical laminectomy of C3-7 on May 3, 1990. Appellant was last exposed to the accepted employment factors on May 4, 1990. He returned to light duty in July 1990. The Office accepted a recurrence of appellant's condition beginning on October 20, 1992 and appellant was determined temporarily totally disabled shortly thereafter. Appellant was paid periodic compensation beginning December 15, 1992.

On November 6, 2001 appellant filed a claim for a schedule award. The Office thereafter referred appellant to Dr. Marko Bodor, a Board-certified physician in physical medicine and rehabilitation for an impairment rating. In a report dated January 23, 2002, Dr. Bodor discussed appellant's chief complaints of neck pain radiating to the arms and back; provided his range-of-motion measurements and strength testing results. Dr. Bodor later stated:

“[Appellant] ... appeared to have global impairment of strength secondary to pain or voluntary inhibition. There was some atrophy and greater weakness noted in the right biceps muscle, however, consistent with a chronic C5 or C6 radiculopathy. Given the history of laminectomies, it would not be surprising that [appellant] would present with neck pain from ongoing disk degeneration and instability at and adjacent to the operated levels. This would tend to impair use of his upper extremities by at least 50 percent relative to his potential work capacity. There is no evidence of cervical myelopathy and his lower extremity symptoms appear to be unrelated to the neck problem.”

* * *

“[W]ith regard to the upper extremities the date of maximum medical improvement is March 15, 1991. Neurological involvement is present affecting the C5 or C6 nerve roots and branches of the musculocutaneous nerve. Pain and discomfort is present of a moderate intensity 4 Grade weakness is noted in the biceps muscle in particular and in all upper extremity muscles in general, although as noted previously, this impairment of strength appears to be secondary to pain or voluntary inhibition. There is evidence of atrophy in the right arm, with measurement of 27.5 centimeter as compared to 28.0 centimeter for the contralateral nondominant arm.”

Dr. Bodor concluded the report with a discussion of impairment to appellant’s lower extremities.

In a report dated March 11, 2002, Dr. Ellen Pichey, an Office medical adviser, reviewed Dr. Bodor’s report dated January 23, 2002 and calculated that appellant had a 20 percent permanent impairment of each upper extremity in accordance with the A.M.A., *Guides*. Dr. Pichey reported that appellant had no impairment due to loss of range of motion and noted appellant’s impairment due to loss of strength and sensory deficit or pain as follows: “level of symptoms as Grade 4, 25 percent (Tables 16-10 and 16-11, pages 482 and 484). Maximum combined impairment based on the C5-6 nerve roots is 81 percent (Table 16-14, page 490). 25 percent x 81 percent = 20 percent.” Dr. Pichey concluded that the total impairment for the right and left upper extremity equals 20 percent.¹

By decision May 21, 2002, the Office issued appellant a schedule award for 20 percent loss of use of each arm due to his accepted disc condition for the period May 19, 2002 to October 8, 2004, a total of 124.80 weeks of compensation. The Office indicated that the schedule award was calculated according to the Fifth Edition of the American Medical Association (A.M.A., *Guides*), *Guides to the Evaluation of Permanent Impairment*, based on the medical findings provided by appellant’s physician, Dr. Marko Bodor, a Board-certified physician in Physical Medicine and Rehabilitation. The Office noted that the physician addressed appellant’s leg impairment due to his lower back condition and an evaluation of appellant leg impairment was mistakenly conducted due to clerical error in the scheduling paperwork. The Office determined however that appellant’s lower back condition was not an accepted work injury and no schedule award was payable for the impairment to his legs.

In a letter dated June 12, 2002, appellant disagreed with the schedule award and submitted additional evidence. In a letter dated June 20, 2002, the Office informed appellant that

¹ The Board notes that the Office medical adviser also evaluated impairment of the lower extremity based on the information provided in Dr. Bodor’s report, however appellant’s lower back condition is not an accepted condition and therefore impairment to appellant’s lower extremity can not be considered for schedule award purposes.

he needed to specify which process of appeal he wished to exercise and advised him to review the appeal rights attached to the May 21, 2002 schedule award. Appellant filed the instant appeal.²

The Board finds that appellant has no greater than a 20 percent permanent impairment of both upper extremities, for which he has received a schedule award.

The Federal Employees' Compensation Act³ provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.⁴ In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.⁵ As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.⁶

The schedule award provisions of the Act and its implementing regulation⁷ 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.

In 1960, amendments to the Federal Employees' Compensation 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 unscheduled member such as the back.⁸ As the schedule award provisions of the

² Appellant submitted evidence with his June 12, 2002 letter and on appeal that he had not previously submitted to the Office prior to the issuance of its May 21, 2002 decision. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its last decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c). This does not preclude appellant from submitting such evidence with a request for reconsideration.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁵ 5 U.S.C. § 8107(a); see *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

⁶ See *Raymond E. Gwynn*, 35 ECAB 247 (1983).

⁷ 20 C.F.R. § 10.404 (1999).

⁸ See *George E. Williams*, 44 ECAB 530 (1993).

Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an upper extremity even though the cause of the impairment originated in the spine.⁹ As appellant has upper extremity impairment due to his accepted cervical conditions, he is therefore entitled to bilateral schedule awards on that basis.

The A.M.A., *Guides* has standards for evaluating the impairment of extremities, which are based primarily on loss of range of motion and also on loss of strength and sensory deficit. In this case appellant's impairment is based solely on loss of strength and sensory deficit or pain.

In her March 11, 2002 report, Dr. Ellen Pichey, an Office medical adviser, reviewed Dr. Bodor's January 23, 2002 report and noted normal ranges of motion but impairment due to loss of strength and sensory deficit or pain due to the cervical injury. The Office medical adviser calculated, in accordance with the A.M.A., *Guides*, that appellant had a 20 percent permanent impairment of both upper extremities. She determined that the severity of appellant's sensory deficit or pain¹⁰ and also loss of strength¹¹ was identified as a Grade 4, which is 25 percent and that the maximum combined impairment¹² based on the C5-6 nerve roots is 81 percent. Dr. Pichey then multiplied the 25 percent calculated above by 81 percent to reach an impairment of 20 percent of the upper extremity. Appellant was granted a schedule award accordingly, for a 20 percent permanent impairment for both upper extremities. As this report was based upon the A.M.A., *Guides*, it is entitled to great probative value.

It is appellant's burden to establish by evidence that he is entitled to an increased schedule award. However, appellant has not submitted medical evidence prior to the issuance of the May 21, 2002 decision, which establishes that he has any greater bilateral upper extremity impairment.

⁹ See *Rozella L. Skinner*, 37 ECAB 398 (1986) (cervical spine injury).

¹⁰ A.M.A., *Guides* at 482, Table 16-10a.

¹¹ *Id.* at 484, Table 16-11a.

¹² *Id.* at 490, Table 16-14.

The decision of the Office of Workers' Compensation Programs dated May 21, 2002 is affirmed.

Dated, Washington, DC
April 23, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member