

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERRY E. CHILDERS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Omaha, NE

*Docket No. 02-2345; Submitted on the Record;
Issued February 13, 2003*

DECISION and ORDER

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

The issue is whether appellant has established that she has greater than a four percent permanent impairment of her left upper extremity for which she received a schedule award.

The Office of Workers' Compensation Programs accepted that on March 2, 2000, appellant, then a 56-year-old secretary, sustained cervical radiculopathy when she crawled under a desk to retrieve a box of batteries. She underwent anterior cervical discectomies and fusions with iliac crest bone grafts at C5-6 and C6-7 on May 2, 2000.

On April 18, 2002 the Office referred appellant for a second opinion examination to determine the extent of any permanent impairment.

By report dated May 6, 2002, Dr. Andrew S. Lee, a physician of unlisted specialty, reviewed appellant's factual and medical history, presented physical examination results and noted that she reported ongoing neck pain and pain that radiated down the posterior aspect of her left arm and into her second and third fingers, which she described as having a numbness sensation. He noted that appellant's pain was constant, that she had give away weakness secondary to discomfort in the shoulder area, that she had decreased pinprick sensation in the left second finger on the palmar and dorsal aspect and in the third finger and a 50 percent pinprick sensation in the medial forearm. Dr. Lee further detailed her left arm sensory deficits and provided measurements of her left shoulder range of motion for flexion, extension, internal and external rotation, adduction and abduction, which were all diminished on the left side when compared to measurements with her unaffected right side. He opined:

"The findings are consistent with spondylosis of C5-6 and C6-7, with radicular signs of the C7 dermatome, if one were to reference the dermatomes of the upper limb in Figure 16-49, page 490 in the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*, [f]ifth [e]dition. There does n[o]t appear to be any findings that would confirm a motor deficit of this nerve root. Specifically, [appellant's] triceps was near normal strength. She also

appeared to be limited by pain and the physical exam[ination] findings were estimated minimum upper extremity strength.”

Dr. Lee opined that the date of maximum medical improvement and neurological recovery would be May 2, 2002, considering axonal loss from her radicular symptoms and that anoxia regrowth would take one inch a month. He noted that since impairment of the spine is based only upon radicular symptoms, Table 16-10, page 482 was used to determine that appellant had a Grade 2 classification in that she reported not being able to look over her left shoulder when driving and lifting difficulties. Dr. Lee estimated that appellant’s sensory deficit was 80 percent which, when cross-referenced with Table 16-13, page 489 and considered with the maximum upper extremity impairment rating for C7 radiculopathy, which was 5 percent, resulted in a 4 percent upper extremity impairment rating. No motor impairment was discerned.

On May 6, 2002 the Office medical adviser, Dr. David D. Zimmerman, reviewed Dr. Lee’s findings and conclusions and agreed with the four percent impairment rating, concluding that he had properly applied the A.M.A., *Guides* in reaching his conclusions.

On June 11, 2002 the Office granted appellant an award for a four percent impairment of her left upper extremity for the period May 6 to August 1, 2002 for a total of 12.48 weeks of compensation.

On appeal appellant’s representative argued that she had a whole body impairment which entitled her to compensation under 5 U.S.C. § 8115 for wage-earning capacity loss.

The Board finds that appellant has no greater than a four percent impairment of her left upper extremity for which she has received a schedule award.

The schedule award provisions of the Federal Employees’ Compensation Act¹ and the implementing regulation² provide for payment of compensation for the permanent loss or loss of use of specified members, functions 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.³ The Act itself specifies the following members: arm, leg, hand, foot, thumb and finger. The Act also specifies loss of hearing and loss of vision and provides compensation for the loss of an eye.

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.⁴ On April 1, 1987 the Secretary of Labor added the following organs to the

¹ 5 U.S.C. § 8107(a).

² 20 C.F.R. § 10.304.

³ *Ted W. Dieterich*, 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).

⁴ 5 U.S.C. § 8107(c)(22).

compensation schedule: breast, kidney, larynx, lung, penis, testicle and tongue.⁵ The current implementing regulations specify at 20 C.F.R. § 10.404(a) that the list of schedule members has been supplemented to include the following members only: breast, kidney, larynx, lung, penis, testicle, tongue, ovary and uterus and vulva/vagina.⁶ The Secretary made no provision for impairments of the neck or spine or for whole body impairments.⁷

Appellant's attorney contends that the A.M.A., *Guides*⁸ provide for ratable impairment of her body as a whole. The Board finds, however, that the Secretary has not made such a determination pursuant to 5 U.S.C. § 8107(c)(22).⁹ Consequently, there is no statutory or regulatory basis for the payment of a schedule award for the back, the neck or the body as a whole.¹⁰

In 1966, amendments to the Act modified the schedule award provisions to provide for an award for 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 schedule award for impairment to an upper extremity even though the cause of the impairment originates elsewhere.¹¹ In the present case, although the impairment originates in appellant's neck, a schedule award is payable for any resulting left upper extremity impairment.

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

⁵ 20 C.F.R. § 10.304(b) (1987).

⁶ 20 C.F.R. § 10.404(a) (2001).

⁷ See *Jay K. Tomokiyo*, 51 ECAB 361 (2000) (no award for back or body as a whole); *Thomas J. Engelhart*, 50 ECAB 319 (1999) (section 8101(19) specifically excludes back from definition of "organ"); *Ann L. Tague*, 49 ECAB 453 (1998) (not payable for the body as a whole).

⁸ 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 impairment 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 A.M.A., *Guides* (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).

⁹ The Act does not provide for the addition of other important organs on a case-by-case basis. The organs that has been added to the compensation schedule are set forth in implementing regulations. See *Dieterich supra* note 3.

¹⁰ 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 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.

¹¹ *Rozella L. Skinner*, 37 ECAB 398 (1986).

tables in the A.M.A., *Guides*.¹² 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.¹³

In this case, appellant has injury-related chronic and persistent pain radiating to her left upper extremity, with diminished range of left shoulder motion and dermatomal sensory impairment and, therefore, she is entitled under the Act to a schedule award for impairment of the left upper extremity due to pain and sensory changes and motion impairments. Dr. Lee noted that since impairment of the spine is based only upon radicular symptoms, Table 16-10, page 482 was used to determine that appellant had a Grade 2 classification and he estimated that her sensory deficit was 80 percent which, when cross-referenced with Table 16-13, page 489 and considered with the maximum upper extremity impairment rating for C7 radiculopathy, which was 5 percent, resulted in a 4 percent upper extremity impairment rating. Dr. Zimmerman, the Office medical adviser agreed with Dr. Lee's application of the A.M.A., *Guides* and affirmed this determination.

In this case, Dr. Lee explained how he properly applied the A.M.A., *Guides* and determined that appellant had no greater than a four percent impairment of the left upper extremity. Therefore, his opinion is entitled to great weight and constitutes the weight of the medical opinion evidence of record. Additionally, Dr. Zimmerman concurred with the findings and conclusions of Dr. Lee. Moreover, appellant has submitted no probative medical evidence supporting that she has any greater left upper extremity impairment and her argument that she is entitled to a rating for impairment of whole body impairment is not cognizable under the Act.¹⁴ Therefore she is not entitled to any greater schedule award than that already granted.

¹² *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

¹³ *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.

¹⁴ Appellant's assertion that she is entitled to a loss of wage-earning capacity determination under 5 U.S.C. § 8115 is not supported by the record, as she is currently receiving pay at a higher step than the present pay for her date-of-injury step. Moreover, no formal final decision on this issue has been made by the Office, such that the issue is not before the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 11, 2002 is hereby affirmed.

Dated, Washington, DC
February 13, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member