

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGIA L. VANTINE and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

*Docket No. 03-1906; Submitted on the Record;
Issued November 7, 2003*

DECISION and ORDER

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

The issue is whether appellant has more than a four percent permanent impairment of the right lower extremity.

On December 22, 1997 appellant, then a 29-year-old mailhandler, filed a claim for compensation asserting that on December 6, 1997 she injured her back while operating power equipment at work. She stated that while she was stopped to allow a forklift to drive by another employee hit her in the back, when he was unable to stop the golf cart he was driving. The Office accepted the claim for temporary aggravation of preexisting spondylosis and later expanded the claim to include the condition of lumbar decompression and fusion. Following her injury, appellant lost intermittent time from work and suffered a recurrence of total disability on May 1, 1998, at which time she stopped work completely. Appellant briefly returned to work in June 1998, but stopped again on June 29, 1998. The Office authorized a lumbar decompression and fusion at L4-S1, which appellant underwent on August 7, 1998. In a nonwork-related incident, she again injured her back on January 7, 1999. Appellant returned to limited duty on March 29, 1999 and, on September 30, 1999 the employing establishment issued a notice of removal for failure to follow instructions and being absent without leave since May 20, 1999. On July 20, 2001 appellant underwent a left L5 nerve root exploration and decompression, removal of instrumentation, reinsertion and repair of pseudoarthrosis and anterior L5-S1 fusion with fibular allograft, which the Office had authorized.

On July 3, 2001 the Office requested that appellant's treating physician, Dr. Vincent J. Silvaggio, a Board-certified orthopedic surgeon, submit an impairment rating for one or both of her lower extremities as a result of her accepted low back condition.¹ In a letter dated August 22, 2002, he advised that, as he did not perform impairment rating assessments, he referred appellant to Dr. Selim F. El-Attrache, an orthopedic surgeon.

¹ A telephone memorandum dated June 29, 2001 indicates that appellant's attorney expressed her wish to file a schedule award claim.

In an October 1, 2002 report, Dr. El-Attrache noted the history of injury and reviewed some medical records and objective tests. Examination findings were provided. The diagnoses were subjective low back pain; bilateral hip pain; decreased sensation along the lateral aspect of the right leg; no paralysis or atrophy of the lower limbs; preexistent Grade II spondylolisthesis L5-S1; and sensation of urinary urgency with no evidence of sphincter loss on rectal examination. Dr. El-Attrache stated: “[Appellant’s] impairment rating will be graded upon her post-injury radiculopathy radiating to her right lower limb and originating from a nerve root compression about the L5 root on the right.” The physician stated: “[Appellant] meets the criteria for Category II of the DRE model for the lumbar spine because of her post-traumatic radiculopathy on the right side of the L5 root level causing the right lower limb symptoms, secondary to the lower back trauma with right lateral leg symptoms from the L5 dermatome.” Utilizing Table 15-3, page 384 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*).² Dr. El-Attrache opined that appellant’s permanent impairment related to her lower extremities was graded at eight percent whole person impairment. In a December 3, 2002 supplementary report, he stated that he evaluated appellant’s lower extremity impairment based upon the spine, utilizing Table 15-3 on page 384 of the A.M.A., *Guides*.

On December 16, 2002 an Office medical adviser reviewed the medical record at the request of the Office. Using the examination findings from the October 1, 2002 report from Dr. El-Attrache, the Office medical adviser concluded that appellant’s impairment was four percent for the right leg, with a date of maximum medical improvement of October 1, 2002. The Office medical adviser noted that the Federal Employees’ Compensation Act excluded the back from schedule awards. As Dr. El-Attrache noted that appellant had no muscle wasting, the Office medical adviser recommended grading the lower extremity subjective complaints of pain under Table 15-15 of the A.M.A., *Guides*, at Grade 2, as the pain prevented some, but not most activity, which resulted in an 80 percent sensory deficit. As only the right lower extremity was affected, utilizing Table 15-18 on page 424, the Office medical adviser noted that the identified nerve root was L5 and assessed a maximal five percent loss of function due to sensory deficit or pain. The impairment due to sensory loss was obtained by multiplying 80 percent by 5 percent which equated to a 4 percent sensory impairment. The Office medical adviser noted that Dr. El-Attrache indicated that although appellant had symptoms along the L5 root onto right leg, but found no loss of range of motion of the joints of the leg; accordingly, the Office medical adviser assigned a zero percent impairment value. The Office medical adviser further found that, as Dr. El-Attrache stated that there was no muscle atrophy or motor impairment, a zero percent impairment was provided for atrophy/weakness. Utilizing the Combined Values Chart, the four percent impairment for subjective complaints of sensory loss, combined with the zero percent impairment for loss of motion, combined with the zero percent impairment for atrophy/weakness equated to a four percent impairment of the right lower extremity or leg.

By decision dated January 22, 2003, the Office issued a schedule award for a four percent permanent impairment of the right leg. The award was based on the Office medical adviser’s report of December 16, 2002.

² A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

Appellant, through her attorney, disagreed with the amount of the award and requested an oral hearing. The attorney argued that as a result of the 8 percent whole person impairment rating provided by Dr. El-Attrache, appellant should have gotten a rating of 19 to 21 percent for the right lower extremity under Table 17-3, at page 527 of the A.M.A., *Guides*.

By decision dated July 23, 2003, an Office hearing representative affirmed the prior decision of January 22, 2003. It was noted that the attorney's argument was not an appropriate use of the A.M.A., *Guides* and that the Office medical adviser's impairment determination conformed to the A.M.A., *Guides* and established that appellant had no more than a four percent permanent impairment of the right lower extremity.

The Board finds that appellant has no more than a four percent permanent impairment of the right lower extremity and, thus, is not entitled to an additional schedule award.

The schedule award provisions of the Act³ and its implementing regulation⁴ 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*⁵ has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶

Dr. El-Attrache, in his reports, based his eight percent impairment finding on criteria used for rating impairment due to lumbar spine injury. The Act, however, does not allow a schedule award for the back.⁷ Moreover, Dr. El-Attrache reported an impairment of the spine and lower extremities which was given as an impairment of the whole person.⁸ Although appellant's attorney argued that appellant should have received a rating of 19 to 21 percent for impairment to the right lower extremity under Table 17-3 page 527 of the A.M.A., *Guides* as a result of the whole person rating submitted by Dr. El-Attrache, this argument is without merit as Dr. El-Attrache's reports calculated an impairment rating based on the back. When the medical evaluator improperly uses the A.M.A., *Guides*, the Office may follow the advice of the Office medical adviser if he or she has properly used the A.M.A., *Guides*.⁹ In this case, the Office

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ A.M.A., *Guides*, *supra* note 2.

⁶ *Ronald R. Kraynak*, 53 ECAB ____ (Docket No. 00-1541, issued October 2, 2001).

⁷ 5 U.S.C. §§ 8101(20); 8107(c)(22).

⁸ The Act specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award. *Francesco C. Veneziani*, 48 ECAB 572 (1997). However, while a schedule award is not payable under the Act for an impairment of the back, a schedule award is payable for a permanent impairment of the legs that is due to a work-related back condition. *Denise D. Cason*, 48 ECAB 530 (1997).

⁹ *See Carolyn E. Sellers*, 50 ECAB 393 (1999).

medical adviser, based on the physical findings made by Dr. El-Attrache, found that appellant's sensory loss or pain to the right lower extremity involved the L5 nerve root and calculated that appellant had a four percent permanent impairment of the right leg. The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* in determining the extent of appellant's permanent impairment and, as the Office medical adviser's report is the only evaluation that conforms to Office procedures, it constitutes the weight of the medical evidence. Appellant is, therefore, not entitled to an increased schedule award.

The July 23 and January 22, 2003 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member