

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of J. LEE BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

*Docket No. 03-530; Submitted on the Record;
Issued September 12, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that he is entitled to more than a 50 percent permanent impairment of each upper extremity, for which he received schedule awards.

On February 17, 1979 appellant, then a 49-year-old clerk, filed a traumatic injury claim alleging that on February 16, 1979 he hurt his back when he bent over to pull a tray of mail.

The Office of Workers' Compensation Programs accepted appellant's claim for a lumbar sprain, left elbow fracture and diplopia. Subsequently, the Office expanded the acceptance of appellant's claim to include a consequential right wrist injury and aggravation of multiple sclerosis.

In an August 19, 1987 decision, the Office granted appellant a schedule award for a 70 percent permanent loss of use of his penis, 30 percent permanent loss of use of each leg, 10 percent permanent loss of use of his right arm and a 5 percent permanent loss of use of his left arm. In a May 10, 1995 letter, appellant requested an additional schedule award for his lower and upper extremities.

By decision dated March 11, 1998, the Office granted appellant a schedule award for an additional 40 percent permanent impairment of each lower extremity totaling a 70 percent impairment of each lower extremity. The Office also granted appellant an additional 15 percent permanent impairment of each upper extremity totaling a 25 percent impairment of each upper extremity.¹ The Office's decision was based on the findings of an Office medical adviser. On June 24, 1998 appellant requested an oral hearing before an Office hearing representative.

In a February 18, 1999 decision, the hearing representative affirmed the Office's decision. Appellant requested reconsideration by letter dated April 2, 1999.

¹ It appears that the record indicates that appellant received a schedule award for a total of 20 percent for a permanent impairment of his left upper extremity.

In a decision dated April 13, 1999 and finalized on April 16, 1999, the Office granted appellant a schedule award for an additional 18 percent permanent impairment of each lower extremity totaling an 88 percent impairment of each lower extremity based on the findings of an Office medical adviser. The Office also granted appellant a schedule award for a 25 percent permanent impairment of each upper extremity, which was unchanged from its prior decision and noted that the decision only extended the expiration date of the period, in which appellant would receive compensation for an increased impairment of his lower extremities. Appellant requested reconsideration by letter dated August 18, 1999.

In a September 13, 1999 decision, the Office denied appellant's request for a merit review of his claim on the grounds that appellant failed to submit any new evidence and thus, it was insufficient to warrant modification of its prior decision.

By decisions dated October 14, 1999 and February 10, 2000, the Office denied appellant's September 28 and December 14, 1999 requests for modification based on a merit review of the claim.

The Office received an October 8, 2000 report of Dr. A. Norman Borge, a general practitioner and appellant's treating physician, revealing that appellant had a 100 percent impairment of each upper extremity, which translated into a 60 percent impairment of the whole person.

On November 17, 2000 an Office medical adviser reviewed Dr. Borge's report and determined that appellant had a 22 percent impairment of each upper extremity.

In a December 8, 2000 decision, the Office found the evidence of record insufficient to establish that appellant was entitled to more than a 25 percent impairment of each upper extremity. By letter dated January 3, 2001, appellant requested an oral hearing before an Office hearing representative.

In a January 25, 2002 memorandum, an Office medical adviser reviewed appellant's case record including, Dr. Borge's October 8, 2000 report and determined that appellant had a 50 percent impairment of each upper extremity.

By decision dated January 25, 2002, the hearing representative found the evidence of record sufficient to modify the Office's December 8, 2002 decision to reflect that appellant was entitled to a schedule award for an additional 25 percent permanent impairment of each upper extremity based on the Office medical adviser's application of the standards of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to Dr. Borge's findings.

In a decision finalized on March 18, 2002, the Office granted appellant a schedule award for an additional 25 percent permanent impairment of each upper extremity.

The Board finds that appellant has failed to establish that he has more than a 50 percent permanent impairment of each upper extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, neither the Act nor its regulations specify the manner, in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

The relevant medical evidence in this case includes an October 8, 2000 report, in which Dr. Borge stated:

“Using [T]able 15, page 4/148 of the A.M.A., *Guides*, fourth edition, which states that while a patient can use both upper extremities but has difficulty with self-care activities, [appellant] is disabled and is in the range of 40 [to] 79 percent impairment of the whole person. [Appellant] has upper extremity spasticity. He has constant tremors and his handwriting is undecipherable. His condition has progressed to the stage to where he can *neither dress nor bathe himself*. His ability to feed himself is also limited. Using the aforementioned [T]able 15 and [T]able 3, page 3/20 of established *Guides*, which states that 100 percent of upper extremity impairment equates to 60 percent of the whole person rating, I submit that [appellant] is 60 percent impaired, (whole person).”

Although Dr. Borge provided an opinion that appellant had a 100 percent impairment of each upper extremity, which translated into a 60 percent impairment of the whole person, he failed to explicitly define appellant's impairment in terms of the A.M.A., *Guides*, *i.e.*, whether it was based on findings of pain, loss of range of motion or loss of strength.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.304.

⁴ 5 U.S.C. § 8107(c)(19).

⁵ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

In a January 25, 2002 memorandum, an Office medical adviser reviewed Dr. Borge's findings and stated:

"I recommend an impairment rating, as expressed by Dr. Borge, of 60 percent of the whole person based on Table 15, page 3/148.⁶ Table 15 addresses the criteria for [two] impaired upper extremities. Therefore, the impairment for each extremity is 30 percent whole person. Using Table 3, page 3/20, 30 percent converts to 50 percent of the [sic] each extremity.⁷ Therefore, the claimant is entitled to 50 percent permanent ... impairment of each upper extremity."

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* to the information provided in Dr. Borge's October 8, 2000 report to determine that appellant has a 50 percent permanent impairment of each upper extremity. The medical evidence of record establishes that appellant has no more than a 50 percent impairment of the right and left upper extremity, for which he received schedule awards.

The March 18 and January 25, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁶ The Board notes that the Office medical adviser inadvertently indicated that Table 15 was on page 3/148 rather than page 4/148 of the fourth edition of the A.M.A., *Guides*. Table 15 conforms with Table 13-17, page 340 of fifth edition of the A.M.A., *Guides*.

⁷ Table 3 conforms with Table 16-31, page 439, of the fifth edition of the A.M.A., *Guides*.