# United States Department of Labor
# Employees' Compensation Appeals Board

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| **V.F., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1643** |
| | ) | **Issued: January 8, 2009** |
| **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Washington, DC, Employer** | ) | |

*Appearances:*
*Stephen D. Scavuzzo, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 10, 2007 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated July 11, 2007 and February 25, 2008 denying her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether the Office properly denied appellant's request for a schedule award.

### ***FACTUAL HISTORY***

On November 2, 2003 appellant, then a 46-year-old transportation security screener, filed a traumatic injury claim alleging that she sustained injuries to her left foot and leg and her lower back the day before, while pushing a large, heavy x-ray machine. The Office accepted her claim for lumbar strain and thoracic or lumbosacral neuritis. Appellant returned to part-time, limited-duty employment on November 18, 2004.

Appellant was treated by Dr. Michael Kuo, a Board-certified physiatrist. In a report dated November 29, 2004, Dr. Kuo diagnosed chronic left low back, buttock and lower limb pain; chronic lumbar and gluteal pain; myofascial syndrome; and potential carpal tunnel syndrome. He noted that a magnetic resonance imaging (MRI) scan of the lumbar spine showed mild disc degeneration at L3-4. In an accompanying attending physician's report, Dr. Kuo opined, by placing a checkmark in the "yes" box, that appellant's condition was caused or aggravated by her employment. On January 5, 2005 he indicated that appellant's condition was essentially unchanged. Dr. Kuo provided a diagnosis of left upper limb paresthesias, which he stated appeared to be work related.

The Office referred appellant to Dr. Taghi Kimyai-Asadi, a Board-certified neurologist, for a second opinion examination and an opinion as to whether his accepted conditions had resolved. In a January 20, 2005 report, Dr. Kimyai-Asadi stated that appellant did not show any evidence of organic neurological deficit, and that there were no objective findings related to lumbar strain. Appellant had exact midline sensory loss to all modalities on the left side of the body, which Dr. Kimyai-Asadi attributed to a functional disorder or superimposed malingering. Repetitive movements were normal. Plantar reflexes were down going. Deep tendon reflexes were 2+. Gait was normal. The cervical spine was free in movements and nontender. The lumbar spine was free of spontaneous movements. However, when asked to bend forward, appellant was unable to bend forward more than 10 degrees. There was no spasm of the paraspinalis muscles. Dr. Kimyai-Asadi opined that appellant had a minor temporary disability due to subjective pain, which was not supported with objective findings.

On September 12, 2005 Dr. Kuo stated that appellant continued to experience left lower back and buttock pain, with radicular symptoms down to the foot. He diagnosed chronic left low back, buttock and lower limb pain; chronic lumbar and gluteal pain; myofascial syndrome; and left upper limb paresthesias related to the November 1, 2003 work injury. On October 5, 2005 Dr. Kuo indicated that appellant had reached maximum medical improvement as of September 12, 2005. He provided permanent restrictions, which included lifting a maximum of 20 pounds, and intermittent sitting, walking, lifting and standing.

On November 7, 2005 appellant requested a schedule award.

In a February 16, 2006 report, Dr. Kuo reiterated his September 12, 2005 diagnoses and provided permanent work restrictions, which included pushing and pulling a maximum of 20 pounds occasionally; occasional bending, stooping and twisting; and changing positions every 20 to 25 minutes with stretching. Examination revealed a relatively pain-free cervical range of motion, although passive and active left shoulder range of motion produced pain. Impingement signs were equal. Dr. Kuo found mild weakness involving the left upper extremity generally.[1] He noted that a January 19, 2006 MRI scan of the cervical spine showed multilevel disc bulges, with cord compression and narrowing of the left C6-7 foramen.

In a February 27, 2006 letter, the Office asked Dr. Kuo for an opinion as to whether appellant had a permanent pain, sensory or motor impairment of her lower extremities that was

[1] The report did not include findings on examination of the lower extremities.

causally related to her accepted employment injury and, if so, for an opinion as to the degree of permanent impairment and the date of maximum medical improvement.

Appellant submitted a June 6, 2006 report from Dr. Edward F. Aulisi, a Board-certified neurological surgeon, reflecting continued complaints of back and leg pain. Dr. Aulisi's examination revealed weakness in the left quadriceps muscle (4/5 strength); an absent left knee jerk; diminished sensation along L3 dermatonal distribution on the left side; and normal dorsi and plantar flexion of the feet bilaterally. On September 1, 2006 he noted that the January 19, 2006 MRI scan showed minimal dehydration at the L3-4 disc level, with mild degenerative changes, but no evidence of disc herniation. Otherwise, the study was normal.

On August 18, 2006 Dr. Kuo noted that appellant's symptoms were worsening. On November 10, 2006 he indicated that appellant had severe pain in the left upper and left lower, limbs. Dr. Kuo opined that appellant had reached maximum medical improvement as of that date. On January 12, 2007 he indicated that appellant was experiencing severe pain (8/10 in intensity) in her lower back, buttocks and lower limbs.

The Office referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Robert A. Smith, a Board-certified surgeon, for a second opinion examination. It asked Dr. Smith for an opinion as to whether appellant had a permanent impairment related to her accepted condition and, if so, the degree of the impairment and the date of maximum medical improvement.

In a May 25, 2007 report, Dr. Smith provided a history of injury and findings on examination, and indicated that he had reviewed the entire medical record. He opined that appellant had no permanent impairment to her lower extremities related to the accepted employment injury. Dr. Smith's examination of the lower extremities revealed no evidence of deformity or atrophy, and satisfactory range of motion, with no instability or meniscal signs. Motor strength and motion were essentially normal. Neurological examination was normal. Examination of the back revealed no finding of any spasm, atrophy, trigger points, crepitation or deformity to support appellant's complaints. Range of motion was satisfactory, though self-limiting. Dr. Smith noted that, while diagnostic tests showed some degenerative disease of the spine, appellant's electromyogram (EMG) was normal, and she demonstrated no nonorganic behavior. He opined, to a reasonable degree of medical certainty, that appellant reached maximum medical improvement as to her accepted lumbar strain within three months of the accepted injury. Dr. Smith further stated that there were no objective findings to support a diagnosis of neuritis.

By decision dated July 11, 2007, the Office denied appellant's claim for a schedule award. It found that the evidence was insufficient to establish that she had sustained a permanent impairment to a scheduled member due to the accepted work injury.

On August 3, 2007 appellant requested an oral hearing. She submitted reports from Dr. Kuo dated May 11, July 13 and September 14, 2007, reiterating his diagnoses and indicating that appellant's symptoms continued to worsen.

Appellant submitted an August 10, 2007 report from Jacquelyn Collura, from the George Washington University Medical Faculty Associates. Ms. Collura related appellant's history of injury in 2003 and stated that her pain had worsened over the past year. Appellant also submitted reports from Dr. Kathleen M. Burger, a Board-certified osteopath, specializing in vascular neurology. On October 2, 2007 Dr. Burger stated that appellant was experiencing left lower extremity weakness, which had been worsening over the past year. On November 9, 2007 she indicated that pain and weakness in appellant's back and leg continued to worsen.

At a December 20, 2007 hearing, appellant's representative stated that he intended to submit a report of a November 9, 2007 EMG, which would reflect nerve damage resulting from appellant's accepted condition. Subsequent to the hearing, appellant submitted an October 26, 2007 EMG report reflected evidence of mild left L3-4 lumbar nerve root irritation.

By decision dated February 25, 2008, an Office hearing representative affirmed the July 11, 2007 decision, finding that there was no medical evidence of record supporting that appellant had a permanent impairment resulting from the accepted November 1, 2003 work injury.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 of loss of use.[4] However, neither the Act nor the regulation specifies the manner in which the percentage of impairment 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[5] Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from her physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] *See supra* note 2.

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (November 2002); *see Jesse Mendoza*, 54 ECAB 802 (2003).

member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[7]

## ***ANALYSIS***

The Office accepted that appellant sustained a lumbar strain and thoracic or lumbosacral neuritis due to a November 1, 2003 employment injury. On November 7, 2005 appellant filed a claim for a schedule award. The Office requested that she specify the member or function of the body she believed was permanently impaired and further advised her to obtain an impairment evaluation from her attending physician in accordance with the provisions of the A.M.A., *Guides*. In support of her schedule award request, appellant submitted medical reports from Dr. Kuo, Dr. Burger and Ms. Collura, as well as reports of MRI scans and EMGs and other relevant tests. However, the medical evidence submitted by appellant is not sufficient to establish her entitlement to a schedule award.

Appellant submitted numerous reports from Dr. Kuo reflecting appellant's continuing complaints of experience left lower back and buttock pain, with radicular symptoms down to the foot. On September 12, 2005 Dr. Kuo diagnosed chronic left low back, buttock and lower limb pain; chronic lumbar and gluteal pain; myofascial syndrome; and left upper limb paresthesias related to the November 1, 2003 work injury. On October 5, 2005 he indicated that appellant had reached maximum medical improvement as of September 12, 2005 and provided permanent restrictions. On August 18, 2006 Dr. Kuo noted that appellant's symptoms were worsening. On November 10, 2006 he indicated that appellant had severe pain in the left upper and left lower, limbs and opined that she had reached maximum medical improvement as of that date. On January 12, 2007 Dr. Kuo indicated that appellant was experiencing severe pain (8/10 in intensity) in her lower back, buttocks and lower limbs. However, none of Dr. Kuo's reports contains an opinion as to whether appellant had a permanent impairment due to her accepted injury. Therefore, they are of limited probative value and insufficient to establish appellant's schedule award claim.

The Board notes that permanent restrictions do not equate to a permanent impairment pursuant to the A.M.A., *Guides*. Dr. Kuo failed to identify or describe a permanent impairment upon which the Office could base a schedule award. The Board also notes that, although Dr. Kuo opined that appellant had reached maximum medical improvement on at least two separate occasions, September 12, 2005 and November 10, 2006, his reports are consistent in reflecting his opinion that her condition continued to worsen. The alleged worsening of her condition belies a finding that maximum medical improvement had been reached.

As Dr. Burger failed to provide an opinion as to whether appellant was permanently impaired due to the November 1, 2003 injury, her reports are not relevant to the issue at hand and are of limited probative value. The Board notes that her reports reflect a worsening of appellant's condition, indicating that the case is not in posture for a schedule award. Similarly,

[7] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

Dr. Aulisi's June 6, 2006 report lacks probative value, in that it does not contain an opinion on appellant's permanent impairment. Ms. Collura's report reflected appellant's history of injury in 2003 and stated that her pain had worsened over the past year. As there is no indication that these reports were signed by an individual that qualifies as a "physician" under the Act, the Board finds that they do not constitute probative medical evidence.[8] Further, Ms. Collura did not provide sufficient findings such that a determination of the extent of any permanent impairment could be made in accordance with the provisions of the A.M.A., *Guides*. The remaining medical evidence, including reports of MRI scans and EMGs, which does not contain an opinion on the issue of permanent impairment, is of limited probative value.

None of the medical reports submitted by appellant addressed the issue of whether she sustained any permanent impairment to a scheduled member or function of the body as a result of the November 1, 2003 work injury. On the other hand, the Office's second opinion physician, Dr. Smith, submitted a thorough and well-reasoned report in which he opined that appellant had no permanent impairment to her lower extremities related to the accepted employment injury. He provided and explained his findings on examination and test results, which revealed no nonorganic behavior. Dr. Smith opined, to a reasonable degree of medical certainty, that appellant reached maximum medical improvement as to her accepted lumbar strain within three months of the accepted injury. He further stated that there were no objective findings to support a diagnosis of neuritis. The Board also notes that in his January 20, 2005 report, Dr. Kimyai-Asadi found no evidence of any organic neurological deficit, and no objective findings related to lumbar strain.

Office procedures and the Board precedent require that the record contain a medical report with a detailed description of the impairment.[9] This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[10] Appellant has the burden of proof to submit medical evidence supporting that she has a permanent impairment of a scheduled

[8] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined in 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[9] *See Peter C. Belkind*, 56 ECAB 580; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c)(1) (August 2002).

[10] *See Vanessa Young*, 55 ECAB 575 (2004); *Robert B. Rozelle*, *supra* note 7.

member or function of the body.[11] As such evidence has not been submitted the Office properly denied her request for a schedule award.[12]

## ***CONCLUSION***

The Board finds that the Office properly denied appellant's request for a schedule award.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 25, 2008 and July 11, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 8, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[11] *See Annette M. Dent*, 44 ECAB 403 (1993).

[12] The Board notes that the Office did not forward the case to the district medical adviser for review. The Office procedure manual provides that the claims examiner will ask the district medical adviser to evaluate cases when the case appears to be in posture for a schedule award determination. As the matter was deemed not to be in posture for a schedule award determination, the Office was not required to seek review by the district medical adviser. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700.3 (June 2003).