

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

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**M.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Newton, PA, Employer**

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**Docket No. 09-715  
Issued: November 20, 2009**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 22, 2009 appellant, through her attorney, filed a timely appeal from the February 26 and September 10, 2008 merit decisions of the Office of Workers' Compensation Programs granting her a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

**ISSUE**

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

**FACTUAL HISTORY**

On December 7, 1995 appellant, then a 55-year-old clerk, filed a claim for an injury to the back of her head, right shoulder and right side of her body occurring on that date when three large lockers fell on top of her. The Office accepted that the claim for a fractured right shoulder, a left eye laceration, a neck sprain and anxiety.

On January 11, 2008 appellant filed a claim for a schedule award.<sup>1</sup> She submitted a report dated September 5, 2006 from Dr. David Weiss, an osteopath who is Board-certified in family practice. Dr. Weiss discussed appellant's complaints of neck pain radiating into her right upper extremity and pain and stiffness in her right shoulder that "waxes and wanes." On physical examination, he determined that she had "a perceived sensory deficit over the C5 and C6 dermatomes involving the right upper extremity." Dr. Weiss measured upper arm circumference as 29 centimeters (cm) on the right and 30 cm on the left and muscle strength as Grade 4/5 for the supraspinatus and deltoid. For the shoulder, he measured 170 to 180 degrees forward elevation, 180 degrees abduction, 75 degrees adduction, 80 to 90 degrees external rotation and 80 to 90 degrees internal rotation. Dr. Weiss diagnosed chronic post-traumatic cervical strain/sprain, radiculitis of the right upper extremity, an aggravation of preexisting cervical discogenic disease, status post surgical neck and tuberosity fracture of the right humerus and post-traumatic acromioclavicular arthropathy of the right shoulder. Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*), he determined that appellant had a four percent impairment for a Grade 2 sensory deficit of the right C5 nerve root,<sup>2</sup> a four percent impairment for a Grade 2 sensory deficit of the right C6 nerve root,<sup>3</sup> a four percent impairment for loss of motor strength of the right supraspinatus<sup>4</sup> and a four percent impairment for loss of motor strength of the right deltoid.<sup>5</sup> Dr. Weiss combined the impairment findings and concluded that appellant had a 20 percent impairment of the right upper extremity. He opined that she reached maximum medical improvement on September 5, 2006.

On January 22, 2008 an Office medical adviser reviewed the evidence of record, including Dr. Weiss' September 5, 2006 report. He stated:

"Examination of the right shoulder showed minimal reduction of range of motion and essentially normal range of motion. [Appellant] has ongoing cervical spine complaints as well as a radicular-type pain of the right upper extremity. The cervical spine examination had a perceived sensory deficit over C5 and C6 dermatomes."

The Office medical adviser noted that appellant had a normal electromyogram and nerve conduction study at the time of her injury and was not diagnosed with cervical radiculopathy. He found that Dr. Weiss did not provide findings to support his determination of a Grade 2 sensory deficit at C5 and C6 or a loss of motor strength in the right supraspinatus and deltoid. The Office medical adviser found that motor weakness should not be rated in the presence of pain. He noted that it was difficult to objectively determine her extent of impairment as her

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<sup>1</sup> Appellant retired from the employing establishment on January 20, 2006 and elected to receive benefits from the Office of Personnel Management.

<sup>2</sup> A.M.A., *Guides* 424, Table 15-15, 15-18.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 484, 492, Table 16-11, 16-15.

<sup>5</sup> *Id.*

complaints were “primarily subjective in nature.” The Office medical adviser stated, “Based upon the description of the findings by Dr. Weiss and utilizing his report, it would be my recommendation that [appellant] receive a schedule award based on pain in the upper extremities on the right based upon C5 and C6 nerve root irritation and associated disc disease.” He graded appellant’s sensory loss as Grade 4 or 25 percent, which he multiplied 5 percent, the maximum loss of function at C5 for sensory deficit or pain, to find a 1.25 percent impairment.<sup>6</sup> The Office medical adviser then multiplied the maximum loss of function due to sensory deficit or pain for the C6 nerve root, 8 percent, by the 25 percent graded sensory loss to find a 2 percent impairment.<sup>7</sup> He added the impairment determinations to find a rounded three percent permanent impairment of the right upper extremity.<sup>8</sup> The Office medical adviser stated:

“There is no evidence of supraspinatus or deltoid weakness and, therefore, motor weakness will not be considered. No loss of nerve root motor strength was noted. [Appellant] has clearly Grade 4 sensory loss rather than Grade 2 described as “Distorted superficial tactile sensibility, diminished light touch with or without minimal abnormal sensations or pain that is forgotten during activity’ as described in Grade 4.”

By decision dated February 26, 2008, the Office granted appellant a schedule award for a three percent permanent impairment of the right upper extremity. The period of the award ran for 65.52 weeks from September 5 to November 9, 2006.

On February 29, 2008 appellant, through her attorney, requested an oral hearing. The attorney submitted medical reports from 1996 showing that she experienced radiating pain from her neck into her arm after her injury. Counsel further submitted an amended report from Dr. Weiss, who changed the percentage of impairment for loss of strength of the deltoid to nine percent and for sensory loss at C6 to six percent.

At the hearing, held on June 19, 2008, appellant’s attorney noted that medical reports as early as 1996 diagnosed cervical radiculopathy. He asserted that decreased strength could be rated in the presence of painful conditions under the A.M.A., *Guides* if the pain did not prevent maximum effort. Counsel thus contended that it was error for the Office medical adviser to disregard Dr. Weiss’ loss of motor strength findings.

By decision dated September 10, 2008, the hearing representative affirmed the February 26, 2008 decision.

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<sup>6</sup> *Id.* at 424, Table 15-15, 15-17.

<sup>7</sup> *Id.*

<sup>8</sup> Impairment percentages are rounded to the nearest whole point. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (June 2003).

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>9</sup> and its implementing federal regulations<sup>10</sup> 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>11</sup> Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.<sup>12</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a fractured right shoulder, a left eye laceration, a neck sprain and anxiety on December 7, 1995 when large lockers fell on top of her. On January 11, 2008 appellant filed a claim for a schedule award. In a September 5, 2006 impairment evaluation, Dr. Weiss diagnosed chronic post-traumatic cervical strain/sprain, radiculitis of the right upper extremity, an aggravation of preexisting cervical discogenic disease, status post surgical neck and tuberosity fracture of the right humerus and post-traumatic acromioclavicular arthropathy of the right shoulder. He found arm circumference as 29 cm on the right and 30 cm on the left and Grade 4/5 muscle strength of the supraspinatus and deltoid. Dr. Weiss measured range of motion as 170 to 180 degrees forward elevation, 180 degrees abduction, 75 degrees adduction, 80 to 90 degrees external rotation and 80 to 90 degrees internal rotation. He advised that appellant had "a perceived sensory deficit over the C5 and C6 dermatomes" and found that she had a four percent impairment for a Grade 2 sensory deficit of the right C5 nerve root and a four percent impairment for a Grade 2 sensory deficit of the right C8 nerve root. Citing Table 16-11 and 16-15 of the A.M.A., *Guides*, Dr. Weiss found a four percent impairment respectively for loss of motor strength of the right supraspinatus and the right deltoid based on manual muscle strength testing. He subsequently modified his sensory findings to reflect that appellant had a nine percent impairment for loss of motor strength of the deltoid and a six percent impairment for sensory loss at C6. A proper application of the A.M.A., *Guides*, however, requires that specific nerves be identified under Table 16-15 in order to determine the maximum impairment for sensory or motor deficit in the identified nerves.<sup>13</sup> The impairment is then graded according to Table 16-11 for motor deficits.<sup>14</sup> Dr. Weiss identified the supraspinatus and deltoid as causing a motor strength deficit but offered no explanation for his rating under the A.M.A., *Guides*. He did not identify an impairment of a peripheral nerve

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<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> *Id.* at § 10.404(a).

<sup>12</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 3.700, Exhibit 4 (June 2003).

<sup>13</sup> *Id.* at 492, Table 16-15.

<sup>14</sup> *Id.* at 484, 482, Table 16-11, 16-10.

and there is no evidence that appellant has a peripheral nerve injury. Additionally, there is no objective evidence of a specific nerve root impairment entitling appellant to an award for a sensory loss at C5 and C6. Consequently, Dr. Weiss' report does not conform to the A.M.A., *Guides*.

An Office medical adviser reviewed Dr. Weiss' report and noted that appellant had no impairment due to loss of range of motion. He further found that she had no objective evidence of cervical radiculopathy but instead had a "perceived sensory deficit over [the] C5 and C6 dermatomes." The Office medical adviser noted that Dr. Weiss did not support his findings of motor strength deficits from the right supraspinatus and deltoid and further determined that motor weakness could not be rated in the presence of pain.<sup>15</sup> He opined that appellant was entitled to a schedule award for pain due to irritation of the C5 and C6 nerve root. The Office medical adviser determined that the maximum impairment of the C5 nerve root due to pain was five percent.<sup>16</sup> He graded appellant's pain as 25 percent of the maximum according to Table 15-15 on page 424 of the A.M.A., *Guides*. The Office medical adviser multiplied the 5 percent impairment of the C5 nerve root by 25 percent, the graded impairment due to sensory loss on Table 15-15 and found a 1.25 percent impairment of each nerve root.<sup>17</sup> He next multiplied the maximum impairment of the C6 nerve root, 8 percent, by a graded 25 percent maximum impairment, to find a 2 percent impairment of the right upper extremity.<sup>18</sup> The Office medical adviser added the impairment findings and concluded, after rounding, that appellant had a three percent impairment of the right upper extremity.<sup>19</sup> He explained that her symptoms corresponded to a Grade 4 sensory loss defined as pain forgotten during activity or diminished light touch or distorted tactile sensibility. As noted by the Office medical adviser, there is no objective evidence of record showing any sensory impairment of either the C5 or C6 nerve root. Appellant has not submitted any medical evidence conforming to the A.M.A., *Guides* showing that she has more than a three percent right upper extremity impairment.

On appeal, appellant's attorney maintains that a conflict exists between Dr. Weiss and the Office medical adviser. As discussed, however, Dr. Weiss' opinion does not conform to the A.M.A., *Guides* and is thus insufficient to create a conflict in opinion.<sup>20</sup>

Counsel also contends that the A.M.A., *Guides* provides that decreased strength can be rated in the presence of pain if the pain does not prohibit the application of maximum effort. Dr. Weiss, however, did not explain how or why appellant's pain did not affect her effort in strength testing. Further, in rating appellant's impairment due to loss of strength, he utilized the

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 424, Table 15-18.

<sup>17</sup> *Id.* at 424.

<sup>18</sup> A.M.A., *Guides* at 424, Table 15-15 and 15-18.

<sup>19</sup> The policy of the Office is to round the calculated percentage of impairment to the nearest whole point. *Robert E. Cullison*, 55 ECAB 570 (2004).

<sup>20</sup> *Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

tables and pages of the A.M.A., *Guides* relevant to peripheral nerve disorders without identifying a specific nerve injury. Section 16.5b of the A.M.A., *Guides* provides that Table 16-11 is not to be used for rating weakness that is not due to a diagnosed injury of a specific nerve or nerves.<sup>21</sup>

### **CONCLUSION**

The Board finds that appellant has no more than a three percent permanent impairment of the right upper extremity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 10 and February 26, 2008 are affirmed.

Issued: November 20, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>21</sup> A.M.A., *Guides* 484, 492.