

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

L.K., Appellant)
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)
and)
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U.S. POSTAL SERVICE, POST OFFICE,)
Philadelphia, PA, Employer)

)

**Docket Nos. 10-1144; 11-265
Issued: February 18, 2011**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 18, 2010 appellant filed timely appeals from the December 1 and 9, 2009 merit decisions of the Office of Workers' Compensation Programs granting her a schedule award and terminating her medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.¹

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she has more than a 12 percent permanent impairment of her left arm and a 2 percent permanent impairment of her right arm, for which she received a schedule award; and (2) whether the Office properly terminated appellant's medical benefits effective May 5, 2009 on the grounds that she ceased to have residuals of her employment injuries.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

The Office accepted that on March 26, 2005 appellant, then a 38-year-old letter carrier, sustained a traumatic injury when she was involved in a motor vehicle accident in the performance of her duty. It accepted lumbar strain/sprain, cervical strain/sprain, thoracic strain/sprain, bilateral knee contusion, chest wall contusion, right shoulder and trapezius sprain/strain, exacerbation of left trapezius strain/sprain, left ankle sprain/strain, jaw strain/sprain and postconcussion syndrome. Appellant missed time from work as a result of her injuries and returned to work with limitations.

Appellant sustained a prior work injury on January 5, 2001 which was accepted for cervical sprain, contusion of the left elbow and forearm and left shoulder surgical repair. She sustained a second traumatic injury on November 21, 2002 while reaching to retrieve mail which was accepted for cervical and left shoulder sprains. On June 23, 2004 appellant sustained a traumatic injury which was accepted for contusion and open wound of the left foot.

Appellant was initially treated in the emergency room following the 2005 motor vehicle accident. Dr. Neil Mallis, a Board-certified internist, treated her on March 28, 2005 for cervical sprain, thoracic sprain, lumbar sprain, bilateral knee contusion and chest wall contusion. Appellant received conservative treatment from several physicians, including Dr. Christopher Belletieri, an osteopath and Board-certified family practitioner. She was eventually released to return to work with restrictions. Appellant continued to receive physical therapy, trigger point injections and massage therapy.

On February 20, 2007 appellant was examined by Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon serving as an Office referral physician. Dr. Hanley noted the history of injury and treatment, discussed his findings on examination, and concluded that appellant continued to have chronic cervical and lumbar strains without signs of radicular involvement. He determined that appellant's left shoulder injury had resolved and recommended an active functional rehabilitative program. Dr. Hanley determined that she should continue to work with restrictions.

The Office found a conflict in medical opinion between Dr. Hanley, the Office referral physician, and appellant's attending physicians as to whether she continued to have residuals of her work-related conditions. Appellant was referred for an impartial evaluation with Dr. Robert Liebenberg, a Board-certified orthopedic surgeon, to resolve this conflict.

Dr. Liebenberg examined appellant on October 23, 2007 and provided a diagnosis of chronic complaints of the cervical and lumbar pain, chronic complaints of left upper extremity pain and numbness, contusion of the right knee resolved and sprain of the left ankle, resolved. He found no objective abnormalities on examination of the lower back and that magnetic resonance imaging (MRI) scan testing was normal. Dr. Liebenberg noted that the physical examination of appellant's right knee was also normal and that the bone contusion demonstrated on MRI scan had resolved. He advised that there was no symptomatology related to a chest wall injury or a jaw injury. Dr. Liebenberg stated, "While an objective diagnosis for specific work-related injury is not available, it is my judgment as a physician that some lifting restriction is reasonable for this patient who does have chronic complaints of neck and back pain." He opined

that it was reasonable to continue appellant's medication but also stated that it was not entirely clear that the use of anti-inflammatory medication was specifically related to the work injury. Dr. Liebenberg opined that injections were not indicated as appellant had a normal imaging study of the spine. While a cervical MRI scan revealed a herniated disc, this was on the right and appellant's symptoms were on the left. Dr. Liebenberg concluded that appellant was not symptomatic from the disc herniation nor was there any conclusive evidence that this was related to the work injury. He opined that, while injections for this condition were appropriate, he did not feel that the condition was work related.

In an August 6, 2008 letter, the Office advised appellant that it proposed to terminate her compensation as the weight of the medical opinion rested with Dr. Liebenberg and supported that she no longer had residuals of the accepted work injuries.

On October 16, 2008 Dr. Belletieri discussed the mechanism of injury, summarized his prior treatment and concluded that appellant continued to have C5-6 disc herniation, median neuropathy on the left, lumbar sprain/strain, right trapezius sprain/strain, right shoulder sprain/strain, right upper extremity radiculitis, thoracic sprain/strain, exacerbation of left trapezius sprain/strain, post-traumatic cephalgia, bilateral knee sprain/strain, right jaw sprain/strain, right anterior chest wall contusion, left ankle sprain/strain, cervical sprain/strain, left lower extremity radiculitis, right knee effusion, left ankle effusion and post-traumatic stress disorder. He reviewed the report of Dr. Liebenberg but disagreed with his conclusions. Dr. Belletieri opined that appellant remained "quite symptomatic" and required continued chiropractic and medical treatment.

In an October 8, 2008 decision, the Office terminated appellant's compensation benefits, finding that the weight of medical evidence rested with Dr. Liebenberg as the impartial specialist whose opinion supported that appellant's accepted work-related conditions had resolved.

In a January 7, 2009 decision, an Office hearing representative set aside the October 8, 2008 decision and remanded the case for further medical development. She found that there was no conflict in medical opinion prior to Dr. Liebenberg's examination as to whether appellant continued to have work-related conditions. Rather the evidence involved the necessary and appropriate treatment of her accepted conditions. The hearing representative found that Dr. Liebenberg's report created a conflict with the opinion of Dr. Belletieri as to whether appellant's work-related conditions had resolved. The case was remanded to the Office for referral of appellant to an impartial medical specialist for an examination and an opinion on this matter.

Appellant was examined on January 20, 2009 by Dr. David Weiss, an attending osteopath, at the request of counsel. Dr. Weiss concluded that she continued to have residuals of the work injury but had reached maximum medical improvement. He opined that appellant had a 15 percent left upper extremity impairment based on motor and sensory deficit and a 2 percent right upper extremity impairment for sensory deficit under the standards of the fifth edition of

the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).²

On February 22, 2009 appellant filed a claim for a schedule award due to her accepted work injuries.

To resolve the conflict as to whether appellant continued to have residuals of her accepted work-related conditions, the Office referred appellant for an impartial evaluation with Dr. Eric Leppy, a Board-certified orthopedic surgeon, who examined appellant on February 25, 2009, reported an accurate history of injury and treatment and summarized his findings. Dr. Leppy explained that appellant sustained multiple injuries from the March 26, 2005 motor vehicle accident that included a cervical disc herniation; however, she had healed from these injuries. He stated that appellant had numerous sprains and contusions as well as postconcussion syndrome but had received appropriate treatment. Dr. Leppy opined that continued physical therapy would not benefit appellant and that continued medication was problematic as it was addictive and did not treat the problem. He opined that epidural injections would not be of benefit and noted that, while the MRI scan demonstrated a herniated cervical disc, the herniation was on the right and appellant had symptoms on the left side with no weakness, decreased strength or other objective findings. Dr. Leppy concluded that appellant no longer continued to have disabling residuals of the work-related injuries. He noted that there had been sufficient time for the strains/sprains/contusions to heal since the March 2005 injury, almost four years in the past. Further, Dr. Leppy noted that appellant had no objective findings on examination to support her subjective complaints. He opined that she had reached maximum medical improvement.

In a March 31, 2009 letter, the Office advised appellant that it proposed to terminate her medical benefits finding that Dr. Leppy represented the weight of medical opinion and supported that she no longer had any residuals of the accepted work injuries requiring medical treatment. Appellant was allowed 30 days to provide evidence and argument challenging the proposed action. The Office also advised appellant that it had expanded the accepted conditions to include cervical herniated disc.

In an April 20, 2009 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, serving as an Office medical adviser, concurred with Dr. Weiss' rating of a two percent right upper extremity impairment for a Grade 4 sensory deficit in the right C6 nerve root.³ He calculated the left upper extremity impairment as 12 percent. Dr. Berman explained that Dr. Weiss incorrectly stated the rating for abduction of the left shoulder by noting that 110 degrees of abduction equaled a three percent rating rather than a six percent rating in accordance with Figure 16-43 on page 477.⁴ He further indicated that the total range of motion for the left shoulder equaled 8 percent versus the 11 percent cited by Dr. Weiss. Using Dr. Weiss' findings,

² Dr. Weiss also found a five percent right knee impairment for pain/crepitation; and a three percent left lower extremity impairment for pain. However, these matters are not the subject of the present appeal.

³ A.M.A., *Guides* 424, Tables 15-15 and 15-17.

⁴ *Id.* at 477, Figure 16-43.

Dr. Berman calculated that appellant's total left upper extremity impairment was 12 percent noting that the 8 percent rating for limited range of motion would be combined with the 4 percent rating for sensory loss.⁵ His opinion on sensory loss associated with the C5, C6 and C7 nerve roots was in accordance with Dr. Weiss' opinion on this matter.⁶

In an April 23, 2009 decision, the Office granted appellant schedule awards for a 12 percent impairment of her left arm and a 2 percent impairment of her right arm.⁷

In a May 5, 2009 decision, the Office terminated appellant's medical benefits effective May 5, 2009 finding that the weight of the medical opinion rested with Dr. Leiby as the impartial medical specialist and supported that appellant no longer had residuals of the accepted work-related conditions requiring medical treatment.

Appellant requested a hearing before an Office hearing representative regarding her schedule award. At the April 23, 2009 hearing, counsel argued that the statement of accepted facts was deficient as it did not reflect appellant's January 2001 or March 2005 injuries. He explained that schedule award claims were filed in each of the appellant's injury claims, however, the award was questionably finalized under the claim that did not involve the March 2005 injury. Therefore, appellant received schedule award compensation at a lower pay rate. Counsel also argued that the difference in opinion regarding the rating value for abduction (8 percent versus 11 percent) warranted a referee evaluation.

Appellant requested a hearing before an Office hearing representative regarding the termination of her compensation. At the October 15, 2009 hearing, counsel noted that appellant was working in a limited-duty capacity with restrictions and had no wage loss. He argued that the case should remain open for continued medical treatment. Counsel asserted that Dr. Leiby acknowledged that appellant still had medical conditions caused by the March 2005 motor vehicle accident to include a herniated disc and therefore he continued to support work-related residuals. He further argued that Dr. Leiby opined that appellant would benefit from an exercise program so this would support the need for further medical treatment for continued residuals of the work injuries.

In a December 1, 2009 decision, an Office hearing representative affirmed the April 23, 2009 schedule award determination.

In a December 9, 2009 decision, an Office hearing representative affirmed the May 5, 2009 decision terminating appellant's medical benefits.

⁵ *Id.* at 606, Combined Values Chart.

⁶ *Id.* at 424, Table 15-15 and Table 15-17.

⁷ It was appropriate to apply the standards of the fifth edition of the A.M.A., *Guides* as the decision was issued prior to the May 1, 2009 effective date of the sixth edition.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act⁸ and its implementing regulations⁹ 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* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰ For Office decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.¹¹

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the elbow, the relevant portion of the arm for the present case, reference is made to Table 15-4 (Elbow Regional Grid) beginning on page 399. Then the associated class is determined from the Elbow Regional Grid and the adjustment grid and grade modifiers (including functional history, physical examination and clinical studies) are used to determine what grade of associated impairment should be chosen within the class defined by the regional grid. The evaluator then uses the regional grid to identify the appropriate impairment rating value for the impairment class, modified by the adjustments as calculated.¹²

ANALYSIS -- ISSUE 1

The Office accepted that on March 26, 2005 appellant had a work-related motor vehicle accident which caused a lumbar strain/sprain, cervical strain/sprain, thoracic strain/sprain, bilateral knee contusion, chest wall contusion, right shoulder and trapezius sprain/strain, exacerbation of left trapezius strain/sprain, left ankle sprain/strain, jaw strain/sprain and postconcussion syndrome. Appellant sustained a prior work injury on January 5, 2001 which was accepted for cervical sprain, contusion of the left elbow and forearm and left shoulder surgical repair; a second traumatic injury on November 21, 2002 which was accepted for cervical and left shoulder sprains; and another traumatic injury on June 23, 2004 which was accepted for contusion and open wound of the left foot.

On February 22, 2009 appellant filed a claim for a schedule award due to her accepted work injuries. In an April 23, 2009 decision, the Office granted appellant a schedule award for a

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

¹⁰ *Id.*

¹¹ See FECA Bulletin No. 9-03 (issued March 15, 2009). For Office decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

¹² See A.M.A., *Guides* (6th ed. 2009) 398-400.

12 percent permanent impairment of her left arm and a 2 percent permanent impairment of her right arm.¹³

The Board finds that appellant has not submitted sufficient evidence to establish more than a 12 percent impairment of her left arm and a 2 percent impairment of her right arm. The April 23, 2009 schedule award was properly based on the April 20, 2009 calculations of Dr. Berman, a Board-certified orthopedic surgeon who served as an Office medical adviser. Dr. Berman evaluated the January 20, 2009 findings by Dr. Weiss, an attending osteopath, under the relevant standards of the fifth edition of the A.M.A., *Guides*.

On January 20, 2009 Dr. Weiss reported examination findings and opined that the findings supported that appellant had a 15 percent left upper extremity impairment for motor and sensory deficit and a 2 percent right upper extremity impairment for sensory deficit.

On April 20, 2009 Dr. Berman concurred with Dr. Weiss' rating of a two percent right upper extremity impairment for a Grade 4 sensory deficit in the right C6 nerve root.¹⁴ He correctly calculated that appellant had a 12 percent (rather than a 15 percent) impairment of the left upper extremity. Dr. Berman explained that Dr. Weiss incorrectly stated the rating for abduction of the left shoulder by noting that 110 degrees of abduction equaled a three percent rating rather than a six percent rating in accordance with Figure 16-43 on page 477.¹⁵ He further indicated that the total range of motion for the left shoulder equaled 8 percent rather than the 11 percent cited by Dr. Weiss. Dr. Berman obtained the 12 percent rating on the left by combining the 8 percent rating for limited range of motion with the 4 percent rating for sensory loss.¹⁶

On appeal, counsel argued that there was a conflict in the medical opinion between Dr. Weiss and Dr. Berman. In reaching a different impairment rating, Dr. Berman merely corrected errors in Dr. Weiss' application of the A.M.A., *Guides*.¹⁷ On appeal, counsel also argued that the schedule award should have been finalized in connection with the file for her March 2005 injury, thereby ensuring that the award would be paid at a higher pay rate; however, the file for appellant's March 2005 injury is separate from that pertaining to his other injuries. There is no indication that her schedule award was developed under an inappropriate file.

¹³ It was appropriate to apply the standards of the fifth edition of the A.M.A., *Guides* as the decision was issued prior to the May 1, 2009 effective date of the sixth edition.

¹⁴ A.M.A., *Guides* 424, Tables 15-15 and 15-17.

¹⁵ *Id.* at 477, Figure 16-43.

¹⁶ *Id.* at 606, Combined Values Chart. Dr. Berman's opinion on sensory loss associated with the C5, C6, and C7 nerve roots was in accordance with Dr. Weiss' opinion on this matter. A.M.A., *Guides* 424, Tables 15-15 and 15-17.

¹⁷ Counsel argued that the statement of accepted facts provided to Dr. Berman was deficient as it did not reflect appellant's January 2001 or March 2005 injuries. However, the statement of accepted facts did in fact describe these injuries and there is no indication that Dr. Berman did not consider the effects of all the work injuries.

LEGAL PRECEDENT -- ISSUE 2

Under the Act, once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.¹⁸ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹⁹ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²⁰

Section 8123(a) of the Act provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”²¹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.²²

ANALYSIS -- ISSUE 2

The Office properly determined that there was a conflict in the medical opinion between Dr. Belletieri, an attending osteopath and Board-certified family practitioner, and Dr. Liebenberg, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant continued to require medical treatment due to the accepted employment injuries.²³ In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Leby, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.²⁴

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Leby, the impartial medical specialist selected to resolve the conflict in the medical opinion.²⁵ The February 25, 2009 report of Dr. Leby establishes that appellant had no residuals of her employment injuries after May 5, 2009.

¹⁸ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

¹⁹ *Id.*

²⁰ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

²¹ 5 U.S.C. § 8123(a).

²² *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

²³ Dr. Liebenberg was referred to as an impartial medical specialist. However, there was no conflict in the medical opinion regarding work-related residuals at the time of referral and he served as an Office referral physician. The October 23, 2007 report of Dr. Liebenberg conflicted with the October 16, 2008 report of Dr. Belletieri.

²⁴ *See supra* note 22.

²⁵ *See supra* note 23.

Dr. Leby noted an accurate history of injury and prior treatment, discussed his findings on examination in detail and opined that appellant no longer suffered from residuals of the work-related injuries. He noted that there had been sufficient time and treatment to resolve the sprains, strains and contusions that had developed as a result of the March 2006 motor vehicle accident. Dr. Leby further noted that he found no real objective findings on examination and noted that appellant's subjective complaints were out of proportion to the objective findings. He opined that she had a herniated disc as a result of the accident but further noted that she demonstrated no objective findings on examination and stated that she is asymptomatic from this herniation. Dr. Leby stated that continued medical treatment should include home exercise.

The Board has carefully reviewed the opinion of Dr. Leby and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Leby provided a thorough factual and medical history and accurately summarized the relevant medical evidence.²⁶ He provided medical rationale for his opinion by explaining that appellant exhibited limited findings on physical examination and diagnostic testing. On appeal, counsel argued that Dr. Leby's recommendation of home exercise showed that she continued to have residuals of work-related conditions which still required treatment. While Dr. Leby did state that appellant would benefit from home exercise, he did not state that she required any ongoing medical treatment. He clearly stated that she had no objective findings on examination to support that she had residuals of the work injuries requiring treatment.

On appeal, counsel argued that Dr. Leby did not consider all of appellant's work injuries in his determination that she no longer required medical treatment for her work injuries. Although Dr. Leby emphasized the effects of the March 2006 work-related vehicular accident, he provided an extensive history of appellant's prior work injuries and considered whether she continued to have residuals of any of her several work injuries.²⁷

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than a 12 percent permanent impairment of her left arm and a 2 percent permanent impairment of her right arm, for which she received a schedule award. The Board further finds that the Office met its burden of proof to terminate appellant's medical benefits effective May 5, 2009 on the grounds that she no longer had residuals of her employment injuries after that date.

²⁶ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

²⁷ Counsel noted that, after Dr. Leby's evaluation, the Office expanded the accepted conditions to include cervical herniated disc. However, this does not mean that appellant required treatment for this condition. Dr. Leby provided an opinion that she did not require such treatment as the condition was asymptomatic and on the side opposite from that of her subjective complaints.

ORDER

IT IS HEREBY ORDERED THAT the December 9 and 1, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 18, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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