U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY S. WALTON and DEPARTMENT OF THE AIR FORCE, OKLAHOMA CITY AIR LOGISTICS CENTER, TINKER AIR FORCE BASE, Okla.

Docket No. 96-1044; Submitted on the Record;
Issued August 6, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she is entitled to a schedule award for permanent impairment of her upper extremities; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration of its November 28, 1994 loss of wage-earning capacity decision on the basis that it was untimely requested.

The Office accepted that on October 1, 1990 appellant sustained a ganglion cyst of the left wrist; her claim was also subsequently accepted for left lateral epicondylitis and bilateral repetitive use syndrome. On February 10, 1993 appellant underwent left elbow surgery with decompression of the radial tunnel, which did not relieve her symptoms. On November 3, 1993 appellant requested a schedule award for continuing impairment of her upper extremities.

In support of her request, appellant submitted an October 9, 1993 report from Dr. Carlos A. Garcia-Moral, a Board-certified orthopedic hand surgeon, who noted that appellant had been followed for treatment of "cumulative disorder," that when last seen on August 24, 1993 she continued to complain of extreme problems in her upper extremity with aching and pain in the elbow, upper arm and shoulder, and that he had advised her that further surgery was not indicated. Dr. Garcia-Moral indicated that appellant underwent an evaluation on the Greenleaf computer, and he opined that she had a 34 percent impairment of the left hand and a 41 permanent impairment of the right hand, based upon the Greenleaf computer evaluation results. The Greenleaf report noted the diagnoses: "Tendon adhesions, Tennis elbow, [and] Carpal tunnel syndrome," and noted on measurement of elbow range of motion that, although appellant was unable to perform within normal limits for elbow range of motion, it was observed that she was able to bend her elbows to scratch behind her head.

On January 28, 1994 a left stellate ganglion block was performed for "possible reflex sympathetic dystrophy, left arm and shoulder," without lasting successful results. Postoperative diagnosis was noted as "none."

On March 11, 1994 appellant was diagnosed as having fibromyalgia, but the examining physician noted that the stellate ganglion block effects lasted about one day, which was an unusual response for fibromyalgia, and he observed that clinically he did not detect findings suggestive of reflex sympathetic dystrophy.

On March 22, 1994 an Office medical adviser reviewed the Greenleaf report and Dr. Garcia-Moral's report and determined that it was not possible to calculate a schedule award due to invalid Greenleaf results, which showed that appellant had inconsistent strength testing results due to inconsistent effort, and because the examiner stated that she did not perform maximally on the range of motion determinations.

Appellant underwent further sympathetic blocks bilaterally on March 31, April 21, May 26 and 31, and June 2, 1994, all without sustained responses or relief.

The Office referred appellant for a second opinion evaluation with Dr. Donald Chadwell, a Board-certified physical medicine specialist.

By report dated May 10, 1994, Dr. Kristi Self, a Board-certified physical medicine specialist, noted that appellant complained her arm was cold, that she had a burning sensation in her arm that was especially bad at night, and that she had pain into her whole hand but that sometimes it was just into her three medial fingers. Dr. Self noted that appellant complained of swelling bilaterally in her clavicular fossa, tenderness in her pectoralis musculature, hot flashes, and pain in her neck and into her low back. Dr. Self diagnosed questionable reflex sympathetic disc disease versus sympathetic mediated pain with significant soft tissue overlay and depression, and she suggested further injections and an antidepressant.

By report dated May 19, 1994, Dr. Chadwell reviewed appellant's history and continuing symptoms, including pain in the upper extremities with any movement, stated that appellant had good range of motion in her neck but tenderness to palpation along the paraspinal muscles, and noted that he felt her complaints of pain to light touch palpation across the trapezius and pectoralis bilaterally were exaggerated. He noted no atrophy in either upper extremity, with range of bilateral elbow motion at 140 degrees flexion with full extension, pronation and supination to 90 degrees. Range of right wrist motion was 70 degrees flexion, 60 degrees extension, radial deviation to 30 degrees and ulnar deviation to 50 degrees. All ranges of motion were found to be within normal limits. He noted full range of motion of all fingers and that appellant could make a good grip. Appellant's grip strength testing measurements were found to be invalid due to inconsistencies in effort, with greater than 20 percent discrepancy in some testing. Neurologic testing was also somewhat inconsistent as full effort was not given apparently secondary to pain. Subjective pain complaints noted were determined not to follow any peripheral nerve distribution or any specific dermatome, and pinprick testing results were inconsistent. Deep tendon reflexes were noted to be 2+ and equal at the biceps, triceps and brachial radialis. Dr. Chadwell opined that appellant achieved maximum medical improvement in August 1993, that she had no restrictions in range of motion, and that in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* there was no permanent impairment of the upper extremities, and he noted that appellant's grip strength testing was invalid due to inconsistent and submaximal effort. No consistent decreased sensation

was found in any dermatome or peripheral distribution, and Dr. Chadwell opined that appellant was magnifying her symptoms.

On July 6, 1994 the Office medical adviser reevaluated the medical evidence of record, noted Dr. Chadwell's findings, and opined that the impairment determined by Dr. Garcia-Moral was not based upon reliable data and lacked validity. The Office medical adviser noted that Dr. Chadwell found inconsistent data, and that he reported no positive findings that could be correlated with medical protocols, and he opined that the medical record did not support a permanent impairment of either upper extremity or hand.

By decision dated August 16, 1994, the Office denied appellant's request for a schedule award, finding that Dr. Chadwell's report constituted the weight of the medical opinion evidence in establishing that appellant had no ratable permanent impairment of her upper extremities.

Appellant requested reconsideration of the August 16, 1994 decision and submitted an August 26, 1994 report from Dr. Self.

Dr. Self stated that appellant had decreased range of cervical motion in all plains by 30 degrees, limited bilateral shoulder ranges of motion with left greater than right, and bilateral upper extremity strength limited by pain on resistance. Dr. Self also found signs of sympathetically mediated pain with temperature and color changes in appellant's hands. Dr. Self opined that in accordance with the A.M.A., *Guides*, Third Edition, appellant had a minor causalgia which related to a 61 percent upper extremity impairment which related to a 37 percent whole person impairment.

On September 21, 1994 the Office referred appellant to Dr. S. Fulton Tompkins, a Board-certified orthopedist, for a second opinion evaluation. By report dated October 31, 1994, Dr. Tompkins reviewed appellant's factual and medical history, and reported her current symptoms. Dr. Tompkins noted that appellant complained that she had fairly constant discomfort in her hands and forearms and that her hands fell asleep with use, that her elbows did not bother her as constantly as they used to but she did frequently have symptoms on the left, that the elbow symptoms were aggravated by activities involving lifting over five pounds, and that her neck and shoulders bothered her. Dr. Tompkins noted that appellant frequently had to "pop" her neck during the day, and that she felt she had a limited range of neck motion. On examination Dr. Tompkins found that appellant indicated that her pain was mostly in the upper spine including the whole neck and the T1-4 levels with radiation to the shoulders, worse on the left, and that appellant had multiple points of tenderness over all areas, which was not entirely consistent at all times. Dr. Tompkins found that appellant had full range of cervical motion with pain, and that she had full ranges of bilateral upper extremity motion except for a little limitation of bilateral medial shoulder rotation and slight limitation of left shoulder supination. On strength testing Dr. Tompkins noted that the amount of variability in the test results suggested that appellant was not making maximal effort, and he opined that therefore there was no satisfactory way to quantify the loss. He opined that appellant's physical symptoms and depressive disorder were mutually aggravating and he opined that appellant had myofasciitis of the neck and shoulders with a little of that problem in the upper extremities. He daignosed repetitive trauma syndrome of the upper extremities complicated by myofasciitis in the upper back and neck. Dr. Tompkins opined that appellant reached maximum medical improvement on February 10,

1994 and noted that he doubted her symptoms were going to change. Dr. Tompkins concurred with Dr. Chadwell that the validity of Dr. Garcia-Moral's testing was considerably impaired, and that a 40 percent whole body impairment was too high. He opined that appellant had some degree of permanent impairment which should be rated as 20 percent of the whole body.

On November 28, 1994 the Office issued a decision on appellant's loss of wage-earning capacity, based upon her reemployment for four hours a day at the employing establishment effective July 11, 1994.[1]

By decision dated May 9, 1995, the Office denied modification of the August 16, 1994 schedule award denial finding that the evidence submitted was not sufficient to warrant modification. The Office noted that Dr. Self's report was of diminished probative value as it did not include measurements of appellant's range of motion losses, that the ranges of motion losses, related to appellant's neck and shoulders were not accepted as being employment related, and that appellant's 61 percent upper extremity impairment rating was due to minor causalgia, also not an accepted condition. The Office found that Dr. Tompkins' report was also of diminished probative value because it did not provide definitive test results, because the majority of the impairment found was due to appellant's neck and shoulders which were not accepted as having been injured in employment, and that his impairment rating was given in terms of a whole body impairment, which is not compensable under the Federal Employees' Compensation Act, and not in accordance with the A.M.A., *Guides*. The Office concluded that appellant had not demonstrated that she had a ratable permanent impairment.

Appellant requested reconsideration and submitted a June 2, 1995 report from Dr. Self. Dr. Self stated that the correct edition of the A.M.A., *Guides* to use in appellant's case was the third edition, that appellant's cervical range of motion was decreased in all planes by 30 to 40 degrees, and that the minor causalgia that she had given appellant the rating for was documented by physical examination secondary to cutaneous changes of temperature, color and swelling.

Also submitted was a September 22, 1995 report from Dr. Self which noted appellant's date of maximum medical improvement was August 1994, that she had subjective decreases in shoulder, elbow and wrist ranges of motion bilaterally, and that her hands continued to be red and swollen with decreased sensation in left greater than right ulnar distribution. Dr. Self opined that appellant's examination was consistent with chronic long-standing reflex sympathetic dystrophy with resultant loss of range of motion, and she provided measurements for the wrists elbows and shoulders. She combined the range of motion losses for the wrists, elbows and shoulders and opined that appellant had a 28 percent impairment of the left upper extremity and a 31 percent impairment of the right upper extremity

By letter dated November 27, 1995, appellant requested reconsideration of the November 28, 1994 wage-earning capacity determination. Appellant alleged that she did not qualify for the position to which she returned as she could not meet the physical requirements, and that she spent her four duty hours sitting in the break room.

[1] This decision of the Office is not now before the Board on appeal on its merits; *see* 20 C.F.R. § 501.3(d)(2).

By decision dated January 2, 1996, the Office denied modification of the prior schedule award decisions finding that the evidence submitted in support was not sufficient to warrant modification. The Office found that Dr. Self's June 2, 1995 report was of little probative value because it provided no new evidence of impairment, but instead referenced a prior report previously considered which addressed a condition not accepted as causally related to the employment injury and used an outdated version of the A.M.A., *Guides*. The Office found that Dr. Self's September 22, 1995 report was also of diminished probative value because it lacked examination results to support the calculations of range of motion losses and because it failed to explain the medical connection of any abnormalities to the accepted work injuries. The Office also noted that the report failed to explain how appellant could have normal range of motion on May 19, 1994 as measured by Dr. Chadwell and yet 16 months later have restrictions related to the October 1, 1990 work injuries. The Office further noted that since the restricted range of motion included rating of shoulder motion, which was not an accepted condition by the Office, this inclusion must be fully explained.

Also by decision dated January 2, 1996 the Office denied appellant's request for review of the November 28, 1994 wage-earning capacity decision as her request was untimely filed and contained no clear evidence of error.

The Board finds that appellant has not established that she is entitled to a schedule award for permanent impairment of her upper extremities.

The schedule award provision of the 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 loss of use.[4] However, neither the Act nor its regulations specify the manner in which the percentage of loss of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (Fourth edition) have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.[5]

Although the standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based primarily on loss of range of motion, all factors that prevent a limb from functioning normally, including pain and loss of strength, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.[6] Chapter 3.1h of the

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

[3] 20 C.F.R. § 10.304.

[4] 5 U.S.C. § 8107(c)(19).

[5] *James J. Hjort*, 45 ECAB 595 (1994); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

[6] *See Paul A. Toms*, 28 ECAB 403 (1987).

A.M.A., *Guides* provides a grading scheme and procedure for determining impairment of the upper extremity due to pain, discomfort, loss of sensation, or loss of strength.[7]

A claimant seeking compensation under the Act[8] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative, and substantial evidence.[9] Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[10] Therefore, a claimant seeking a schedule award for permanent impairment bears the burden of establishing her entitlement. Appellant, however, in this case, did not meet her burden.

In support of her request for a schedule award for permanent impairment of her upper extremities, appellant initially submitted an October 9, 1993 report from Dr. Garcia-Moral, in which he opined, without rationale, that she had a 34 percent impairment of the left hand and a 41 percent impairment of the right hand. Dr. Garcia-Moral based this determination on Greenleaf computer testing results. The Board notes that this report is of diminished probative value because Dr. Garcia-Moral failed to provide his findings upon examination and explain how he calculated these impairments. He failed to provide measurements upon which he based his calculations and he failed to calculate the impairments in accordance with the A.M.A., *Guides*.[11] The Board also notes that this report is of further diminished probative value as the impairment ratings were based upon inconsistent, and therefore, invalid testing results where appellant was noted to have provided inconsistent responses and submaximal effort. Because this report is of diminished probative value, it is insufficient to support appellant's claim.

Appellant also submitted several reports from Dr. Self in support of her schedule award request. Dr. Self's May 10, 1994 report did not support appellant's claim as it merely reported physical findings and did not relate any of these findings to appellant's accepted employment-related conditions. In her August 26, 1994 report, Dr. Self found decreased range of cervical motion in all plains by 30 degrees and limited bilateral shoulder ranges of motion, both findings unrelated to appellant's accepted employment conditions. Dr. Self also found signs of sympathetically mediated pain with temperature and color changes in appellant's hands, but she failed to explain how these findings were related to appellant's accepted employment conditions. Dr. Self determined that appellant had a 61 percent upper extremity impairment related to minor causalgia, which was not an accepted employment-related condition. As this impairment rating

[7] A.M.A., *Guides*, Tables 10 & 11, p. 42 (4th ed. 1993).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[10] 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury; *see Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

[11] *See e.g., Lena P. Huntley*, 46 ECAB 643 (1995).

was attributed to a condition not accepted by the Office, it is not compensable under the Act. Dr. Self's June 2, 1995 report related impairment to a minor causalgia, which was an accepted employment-related condition and not compensable under the Act. Dr. Self's September 22, 1995 report diagnosed appellant as having chronic long-standing reflex sympathetic dystrophy with resultant loss of range of motion, and she provided measurements for that loss of range of motion for the wrists, elbows and shoulders. The Board notes that the loss in ranges of motion due to reflex sympathetic dystrophy would not be compensable under the Act as reflex sympathetic dystrophy has not been accepted as an employment-related condition. Consequently, Dr. Self's calculation of impairment due to loss in range of motion in this report is of diminished probative value and is not sufficient to establish that appellant has a ratable permanent impairment causally related to her accepted employment conditions.

Also submitted in support of a permanent impairment was Dr. Tompkins October 31, 1994 report in which he opined, without rationale, that appellant had a 20 percent whole body impairment. No specific upper extremity impairment rating was provided, and no explanation of what the impairment rating was based upon was given. The Board notes that neither the Act nor its implementing regulations provide for a schedule award for impairment to the body as a whole.[12] Consequently, a 20 percent whole body impairment is not a compensable impairment rating under the Act. The Board further notes that, since Dr. Tompkins did not give an impairment rating for appellant's upper extremities related to her accepted employment conditions, and did not explain upon what he based his determination of permanent impairment, his report does not support her claim for a schedule award.

No further rationalized medical opinion evidence supporting that appellant had a permanent impairment ratable under the Act and according to the A.M.A., *Guides*, was submitted to the record. Accordingly, appellant has failed to establish that she is entitled to a schedule award for permanent impairment due to her accepted employment-related conditions of left wrist ganglion cyst, left lateral epicondylitis, or bilateral repetitive use syndrome.

However, the Board finds that the Office abused its discretion by refusing to reopen appellant's claim for merit reconsideration of the November 28, 1994 loss of wage-earning capacity decision.

The reason given by the Office for its refusal to reconsider the November 28, 1994 decision on its merits was that the request was untimely filed and contained no clear evidence of error. The Office erroneously based this determination on the date it received the request. The Board notes that, in accordance with the Office's procedure manual, Chapter 2.1602.3(b)(1), timeliness for a reconsideration request is determined, not by the date the Office receives the

[12] *See James E. Mills*, 43 ECAB 215 (1991).

request, but by the postmark on the envelope. The Board notes that the procedure manual states: "Timeliness is thus determined by the postmark on the envelope, if available. *Otherwise, the date of the letter itself should be used*." (Emphasis added.)

.0] The Board notes that the envelope containing the request was not retained in the record and the letter requesting reconsideration was dated November 27, 1995. For this reason the request was timely. Therefore, the Office abused its discretion by finding the reconsideration request untimely.

Accordingly, the decision of the Office dated January 2, 1996 regarding appellant's request for a schedule award is hereby affirmed. The decision of the Office dated January 2, 1996 is hereby set aside, and the case is remanded for further action in accordance with this decision and order of the Board.

Dated, Washington, D.C.
August 6, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member