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

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| **K.H., Appellant** | ) | |
| **and** | ) | **Docket No. 07-717** |
| | ) | **Issued: July 24, 2007** |
| **DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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, 2007 appellant filed a timely appeal from a November 9, 2006 merit decision of the Office of Workers' Compensation Programs that denied her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

### ***ISSUE***

The issue is whether appellant met her burden of proof in establishing that she was entitled to a schedule award for permanent impairment of her lower extremities.

### ***FACTUAL HISTORY***

On January 13, 2004 appellant, then a 53-year-old industrial hygienist, filed a traumatic injury claim stating that she sustained a compression fracture to her lower back and right hip when she slipped on ice while exiting her vehicle in the employing establishment's parking lot. She did not initially stop work but later stopped work to undergo and recover from a

kyphoplasty. After appropriate development, the Office accepted appellant's claim for a lumbar spine compression fracture at the L5 level. The Office later expanded its acceptance to include the following accepted conditions: L5 compression fracture, post-traumatic and related to the industrial injury of January 9, 2004, status post kyphoplasty of L5 compression fracture, a rapid increase in the L1-2 disc disease with a marked increase in the kyphotic deformity over a four-month period and aggravation of osteoporosis.

Appellant's medical history was significant for a spinal injury when she was run over by a car at age 13 months. In a preinjury January 2, 2001 report, Dr. Christopher C. Kain, a Board-certified orthopedic surgeon, noted appellant's history and explained that she was unable to walk after she had "an unknown procedure done to her back" at the age of four. He diagnosed status post mixed cauda equine lesion with apparent complete motor paralysis from about L1 down but intact bowel and bladder function and intact sensation, chronic, low back pain and increasing shoulder difficulty. Dr. Kain also noted that appellant complained of lower limb spasticity. In a January 15, 2004 report, he noted that appellant ambulated using Canadian crutches, but her January 9, 2004 employment injury aggravated her condition, causing her pain and weakness in her lower extremities. Dr. Kain performed a kyphoplasty on March 29, 2004. The procedure was not authorized by the Office.

In a September 28, 2004 report of a lumbar spine magnetic resonance imaging scan, Dr. Steven A. Bell, a Board-certified radiologist, diagnosed degenerative disc disease at L1-2 with kyphosis and noted that appellant had undergone an L5 kyphoplasty.

On October 1, 2004 appellant claimed a schedule award. In a September 30, 2004 treatment note, a treating physician's assistant noted that appellant was "filing for disability." In an October 25, 2004 report, Dr. Donna E. Moore, a Board-certified physiatrist, diagnosed L5 compression fracture, chronic back pain, chronic neck pain, kyphoscoliosis, paraparesis, recurrent sacral decubitis ulcer, migraine headaches and sleep disorder with probable narcolepsy. She reported:

> "[Appellant's] medical condition is deteriorating. It is not expected to improve in terms of degenerative changes in her spine and the lower extremity weakness. She is approaching maximum medical improvement from her L5 kyphoplasty and it is a combination of the other issues that are necessitating her to consider medical retirement."

The Office of Personnel Management approved appellant's disability retirement application on January 12, 2005.

On December 2, 2004 the Office referred appellant to Dr. Joan Sullivan, a Board-certified orthopedic surgeon, for a second opinion examination regarding the extent of any work-related residuals and impairment. In a March 4, 2005 report, Dr. Sullivan concluded that appellant's January 9, 2004 employment injury aggravated certain of her preexisting conditions. She found that the aggravation was "temporary at this time. It may well be permanent if not addressed appropriately." Dr. Sullivan noted that appellant's overall condition had not resolved and recommended that she undergo diagnostic testing for osteoporosis. She opined that, "while her surgical treatment definitely increased [appellant's] functional abilities, she has still not returned

to a prefunctional level of activities, although, at this point in time … she is not totally disabled." Dr. Sullivan concluded that appellant had continuing residuals of her employment injury and had not reached maximum medical improvement. Accordingly, she determined that an impairment rating was not yet warranted. In a May 9, 2005 work capacity evaluation, Dr. Sullivan reiterated that appellant had not yet reached maximum medical improvement.

By correspondence dated March 3, 2006, the Office acknowledged appellant's schedule award claim and requested that she ask her attending physician to prepare an impairment rating. On April 20 and May 9, 2006 Dr. Peter V. Ciani, a Board-certified family practitioner, requested authorization for diagnostic testing and requested instruction concerning the focus of his proposed impairment rating. He inquired whether he should consider "only primary effects of this compression fracture or the secondary but more involved secondary effects" such as pain and weakness.

Dr. Ciani examined appellant and provided an impairment rating on June 1, 2006. He discussed appellant's complaints of pain and weakness and noted her medical history. Dr. Ciani explained that appellant reported that she had two chronic pain areas: the base of her neck, for which she reported a pain level of "4-5/10" and her low back, for which she reported a pain level of "5-6/10." He explained that appellant characterized her pain as constant in the low back area and radiating intermittently into both lower extremities at a pain level of "2-3/10." Upon examination, Dr. Ciani measured appellant's lower extremity range of motion as follows: 90 degrees of left passive hip flexion, 70 degrees of right passive hip flexion, 30 degrees of left knee flexion, 30 degrees of right knee flexion, 0 degrees of left ankle flexion and 5 degrees of right ankle flexion. He stated that he used the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[1] (A.M.A., *Guides*) in evaluating appellant's impairment level. Dr. Ciani determined that appellant would "fit a [c]ategory [2] based on her complaints" of pain under Table 18-3.[2] He stated: "weakness in all the hip muscles would be considered a Grade 0 and would involve 12 percent for the bilateral flexion deficit, 30 percent for the bilateral extensor deficit and 50 percent for the bilateral abductor deficit." Regarding range of motion, Dr. Ciani stated: "Passive range of motion in the hips revealed no loss, in the knees, severe loss with a total of 28 percent. In her ankles it would be considered a severe loss bilaterally of 24 percent." He also referred to Table 17-37 of the A.M.A., *Guides* and determined that appellant "would be considered to have a partial sensory loss of all the nerves of the lower extremities (.5 x 18 percent) which would equal 9 percent deficit."[3] Dr. Ciani stated: "After reviewing the section on pain, [appellant's] estimate of whole person impairment is given as five percent." Using the Combined Values Chart, Dr. Ciani concluded that appellant's "total whole person impairment from secondary causes would be 86 percent."

On June 16, 2006 appellant requested a schedule award.

[1] A.M.A., *Guides* (5th ed. 2001).

[2] *Id.* at 575, Table 18-3.

[3] *Id.* at 552, Table 17-37.

On August 28, 2006 the Office medical adviser reviewed Dr. Ciani's report. The medical adviser also referred to Dr. Kain's January 2, 2001 report, which documented appellant's condition before her employment injury. He explained:

> "The simplest way to assess lower extremity permanent partial impairment related to this claim is to note that [appellant's] documented preinjury lower extremity impairment based on Dr. Kain's exam[ination] of January 2, 2001 was 96 percent of each lower extremity.[4] This is based on nearly complete paralysis of lower extremity muscles and consistent with Table 17-8, page 532 of the A.M.A., *Guides*, (5th ed. 2001).[5] Even that rating is conservative as it does not include documented preexisting equines contractures of both ankles. Even if one assumes that she now has 100 percent impairment of both lower extremities, that leaves only four percent related to this claim. I would recommend giving her the four percent."

The Office medical adviser determined that appellant reached maximum medical improvement on June 1, 2006, the date of Dr. Ciani's examination.

On September 26, 2006 the Office informed the medical adviser that his report did not contain "an explanation of how the four percent lower extremity permanent partial impairment was determined, according to the A.M.A., *Guides*." The Office also requested that the medical adviser "cite the evidence which supports that the January 9, 2004 accepted work injury" was a cause of permanent impairment.

In an October 10, 2006 addendum, the medical adviser stated:

> "After speaking personally with the claims examiner and the supervisor regarding the issues in this claim, it appears that there would be no ratable impairment to either lower extremity due to this injury since there was no specific injury to the lower extremities (except for a hip contusion that has healed without any impairment) and no accepted condition of the spine that would affect the lower extremities (for examine, there is no diagnosed radiculopathy). All of the impairment specifically related to this injury … appears to be limited to the lumbosacral spine."

Accordingly, the medical adviser concluded that there was no ratable impairment for either lower extremity due to appellant's January 9, 2004 employment injury.

By decision dated November 9, 2006, the Office denied appellant's schedule award claim.

[4] The record reflects that Dr. Kain's January 2, 2001 report does not provide an impairment rating for appellant's lower extremities.

[5] A.M.A., *Guides*, 532, Table 17-8.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulation[7] 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 regulation as the appropriate standard for evaluating schedule losses.[8]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof in establishing that she was entitled to a schedule award for permanent impairment of the bilateral lower extremities. The Office accepted appellant's claim for lumbar spine compression fracture at L5 and later expanded its acceptance to include the following conditions: L5 compression fracture, post-traumatic and related to the industrial injury of January 9, 2004, status post kyphoplasty of L5 compression fracture, a rapid increase in the L1-2 disc disease, with a marked increase in the kyphotic deformity over a four-month period and aggravation of osteoporosis. All of the accepted conditions related to the injury to appellant's low back.

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[9] As neither the Act nor the regulation provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[10] Accordingly, appellant is not entitled to a schedule award for permanent partial impairment that is restricted to her back. However, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to the lower extremities even though the cause of the impairment originates in the spine.[11]

The Board finds that the Office properly did not find ratable permanent impairment of the legs based upon Dr. Ciani's June 1, 2006 report. Dr. Ciani opined that appellant's "total whole person impairment from secondary causes would be 86 percent." He used various sections of the A.M.A., *Guides* but did not provide sufficient explanation to support his impairment rating based on the "secondary effects" of pain and sensory deficit. As noted above, the Act provides for a

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

[8] *See id.*

[9] *Vanessa Young*, 55 ECAB 575, 577 (2004).

[10] *George E. Williams*, 44 ECAB 530, 533 (1993). The Act also does not provide for whole person impairments. *Marilyn S. Freeland*, 57 ECAB ___ (Docket No. 06-563, issued June 7, 2006).

[11] *Id.*

schedule award for impairments originating in the spine but affecting one or more extremities. Appellant's accepted conditions originated in her spine, but Dr. Ciani did not sufficiently explain how her spinal injuries caused impairment in any of her extremities. He stated that appellant had nerve damage in the lower extremities but did not identify the specific nerves affected. Dr. Ciani referred to the A.M.A., *Guides*, Table 17-37 for nerve deficit[12] but did not explain how he performed his calculations or discuss how the medical evidence supported his conclusions. He also did not explain how he reached his conclusion that appellant "would fit a [c]ategory [2]" based upon her pain complaints. Although Dr. Ciani stated that he used the A.M.A., *Guides*, Table 18-3[13] in evaluating appellant's pain-based impairment, the Board has previously held that examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[14] Dr. Ciani did not explain why his decision to use Chapter 18 to rate pain-related impairment was warranted or necessary or specifically why other, more objective, methods of rating impairment under the A.M.A., *Guides* were inadequate. There is no basis for an impairment rating under Chapter 18 of the A.M.A., *Guides*. Because Dr. Ciani did not provide sufficient rationale or explanation to support his calculations on various aspects of his impairment rating, he did not establish ratable impairment pursuant to the A.M.A., *Guides*.

The Board finds that the Office medical adviser's first report, dated August 28, 2006, improperly concluded that appellant was entitled to a schedule award for four percent impairment of the lower extremities. The medical adviser stated that, pursuant to Dr. Kain's January 2, 2001 report, appellant's preinjury level of impairment was 96 percent of the lower extremities. The medical adviser stated that he based this conclusion on Dr. Kain's characterization of appellant as nearly completely paralyzed and on Table 17-8 on page 532 of the A.M.A., *Guides*. However, the medical adviser did not clearly explain how, pursuant to the A.M.A., *Guides*, any additional leg impairment appellant sustained after Dr. Kain's report would be considered to be due to her employment injury which involved the back. Accordingly, the Office properly requested clarification from its medical adviser. In his October 5, 2006 addendum, the Office medical adviser found that appellant did not have a ratable impairment to the bilateral lower extremities. He noted that none of the accepted conditions involved a specific injury directly to the lower extremities and that Dr. Ciani's report did not establish that appellant's accepted spinal injuries caused permanent impairment to the lower extremities. As an example, he noted that Dr. Ciani did not diagnose any spinal radiculopathy affecting the lower extremities. He concluded that the only accepted condition directly affecting a lower extremity was a hip contusion which healed without any impairment and that the medical evidence showed that all impairment resulting from appellant's accepted conditions was restricted to her lumbosacral spine.

[12] A.M.A., *Guides*, 552, Table 17-37.

[13] *Id.* at 575, Table 18-3.

[14] *Linda Beale*, 57 ECAB __ (Docket No. 05-1536, Issued February 15, 2006), *citing* FECA Bulletin No. 01-01 (issued January 31, 2001); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b).

Accordingly, the Board finds that the Office properly determined that appellant had not met her burden of proof in establishing that she had a ratable permanent impairment to either of her legs due to her accepted lumbar spine injuries.

## ***CONCLUSION***

The Board finds that appellant did not meet her burden of proof in establishing that she had a ratable permanent impairment to her lower extremities due to her lumbar spine injuries and accordingly she was not entitled to a schedule award.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 9, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2007
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