United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 06-2046**
	)	**Issued: March 28, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Wilmington, DE, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2006 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated September 21, 2005 and March 28 and June 7, 2006 which 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 merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has an upper extremity impairment caused by her accepted back conditions which would entitle her to a schedule award.

FACTUAL HISTORY

On December 20, 1995 appellant, then a 36-year-old letter carrier, sustained a traumatic injury when she slipped and fell on ice while in the performance of her federal duties. The claim was accepted for lumbosacral sprain/strain, neck sprain/strain, dislocation lumbar vertebral, left intervertebral disc disorders, brachial neuritis or radiculitis and thoracic or lumbosacral neuritis

or radiculitis. Appellant stopped work on December 21, 1995 and returned to a permanent modified-duty position on November 24, 1997. She came under the care of Dr. William R. Atkins, Jr., a physiatrist, who performed electromyography (EMG) of the lower extremities on March 1, August 23 and December 16, 1996 and April 14, 1997. Dr. Atkins interpreted the studies as abnormal, consistent with ongoing left L5 radiculopathy. Magnetic resonance imaging (MRI) scan of the cervical spine on March 14, 1996 was normal. Left upper extremity EMG studies dated March 10 and July 29, 1997, July 19, 1999 and July 17, 2000 were interpreted by Dr. Atkins as abnormal with ongoing left C5 radiculitis and no evidence of peripheral polyneuropathy or myopathy. On March 12, 2003 he advised that appellant had reached maximum medical improvement (MMI) and opined that she could no longer perform the duties of a mail carrier.

On August 30, 2004 appellant filed a schedule award claim. In a June 10, 2004 report, Dr. Nicholas Diamond, an osteopath, noted the history of injury and provided findings on examination. He diagnosed left C5 radiculitis, left L5 radiculitis, lumbar disc syndrome with central herniated discs at L4-5 and L5-S1, chronic cervical and lumbosacral strain and sprain, chronic pain syndrome secondary to above and post-traumatic cephalalgia. Dr. Diamond advised that appellant had reached MMI and, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[1] had a right upper extremity impairment of 2 percent due to loss of shoulder motion and a left upper extremity impairment totaling 28 percent due to loss of grip strength, a left C5 sensory deficit and a pain-related impairment. In an August 30, 2004 report, Dr. Atkins advised that he agreed that appellant had a 2 percent impairment of her right upper extremity and a 28 percent impairment of her left upper extremity. In a September 9, 2004 report, an Office medical adviser reviewed Dr. Diamond's report and opined that, pursuant to the A.M.A., *Guides*, appellant had a six percent right upper extremity impairment. Appellant retired on disability in November 2004.

By letter dated December 21, 2004, the Office referred appellant to Dr. Andrew J. Gelman, a Board-certified orthopedic surgeon.[2] In a January 25, 2005 report, Dr. Gelman noted his review of the medical record, including MRI scans, the history of injury, appellant's complaints of pain extending from her neck into her lower back with episodes of left arm and left leg pain. On examination, he reported mild restrictions in range of motion of the cervical, thoracic and lumbar spine and found that both shoulders exhibited excellent and symmetric ranges of motion without evidence of impingement. Dr. Gelman advised that the upper extremities reflected no objective evidence of strength loss, sensory deficit and/or reflex deficiency. He stated that examination of the cervical and lumbar spine did not identify any objective neurological compromise. Dr. Gelman opined that appellant's symptoms were exaggerated and that, as there was very little underlying pathology, she had no impairment rating with regard to the cervical spine. He opined that she had a seven percent impairment of her lumbar spine based on a normal clinical assessment and the MRI scans.

[1] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[2] The Office initially identified Dr. Gelman as a referee examiner, but the Office later determined that he was a second-opinion physician.

The Office determined that a conflict in medical evidence was created between the opinions of Dr. Diamond and Dr. Gelman. It referred appellant to Dr. John T. Hogan, Board-certified in orthopedic surgery, for an impartial medical evaluation.[3] MRI scan of the cervical spine on June 2, 2005 demonstrated Chiari I malformation with a small syrinx cavity in the distal cervical cord.[4] In a June 16, 2005 report, Dr. Hogan reviewed the history of injury and medical record and noted appellant's complaints of increased pain in her left shoulder girdle area and partial numbness in both hands and her left foot. He noted the June 2, 2005 MRI scan, advising that this was not a traumatic condition. Cervical spine and bilateral shoulder examinations demonstrated full range of motion. Dr. Hogan found tenderness to palpation on the anterior aspect of the left shoulder suggestive of rotator cuff tendinitis and no evidence of muscular weakness in either limb. Examination of the left upper and lower extremities demonstrated diminished sensation in a stocking shape which, he opined, involved all the various dermatomes and was nonanatomical in its distribution. Dr. Hogan diagnosed symptoms suggestive of mild chronic sprain of the cervical and lumbosacral spine with reported radiculopathy down the left upper and left lower extremities without objective physical findings. He concluded that there was no objective evidence for assigning any type of permanent impairment to any portion of her body.

By decision dated September 21, 2005, the Office credited the opinion of Dr. Hogan with the weight of medical opinion and found that appellant was not entitled to a schedule award.

On September 23, 2005 appellant, through counsel, requested a hearing. In a February 7, 2006 report, Dr. David Weiss, an osteopath, noted his review of Dr. Hogan's report and disagreed with his conclusions.[5] Copies of the July 21, 1997 and July 17, 2000 EMGs were also submitted. In a statement dated January 30, 2006, appellant described her complaints of pain and physical limitations. She contended that both Dr. Gelman and Dr. Hogan performed cursory examinations.

At the hearing held on February 7, 2006,[6] counsel advised that appellant was submitting a separate schedule award claim for her left lower extremity as Dr. Diamond had only provided an impairment rating for her upper extremities. It was argued that Dr. Hogan made only conclusory statements and, therefore, his opinion should represent the weight of the medical evidence.

In a March 28, 2006 decision, an Office hearing representative affirmed the September 21, 2005 decision.

[3] Both Dr. Gelman and Dr. Hogan were provided with the medical record, a statement of accepted facts and a set of questions and were specifically asked to provide an impairment analysis utilizing the fifth edition of the A.M.A., *Guides*.

[4] This is defined as a congenital anomaly characterized by prolapse of the cerebellar tonsil into the spinal cord without elongation of the brain stem. *Dorland's Illustrated Medical Dictionary*, 29th edition (2000).

[5] Dr. Atkins continued to submit reports describing appellant's ongoing treatment.

[6] Appellant was represented at the hearing by Carolyn Uliase.

On May 18, 2006 appellant, through her attorney, requested reconsideration and submitted a March 21, 2006 report in which Dr. Atkins noted his agreement with Dr. Diamond, that appellant had a 19 percent left lower extremity impairment. In an April 19, 2006 report, Dr. Shulim Spektor, a Board-certified physiatrist, noted the history of injury and appellant's complaints of radiating neck and low back pain with numbness and headaches. Range of motion of both upper extremities was full. Cervical and thoracolumbar range of motion was limited. In a May 31, 2006 report, an Office medical adviser noted his review of appellant's medical record, including Dr. Hogan's report. He opined that Dr. Hogan performed a thorough medical examination and did not find an objective basis for a ratable impairment. The Office medical adviser concluded that, based upon Dr. Hogan's evaluation, appellant did not have an impairment under the A.M.A., *Guides*. By decision dated June 7, 2006, the Office denied modification of the prior decisions.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[7] and section 10.404 of the implementing federal regulations,[8] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[9] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[10]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[11] In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] A.M.A., *Guides*, *supra* note 1.

[10] *See Joseph Lawrence, Jr.*, supra note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[11] *Pamela J. Darling*, 49 ECAB 286 (1998).

impairment originated in the spine.[12] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[13]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments such as, loss of flexion or extension, should be itemized and stated in terms of percentage loss of use, of the member in accordance with the figures and tables found in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[14]

Section 8123(a) of the Act provides that 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.[15] When 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 on a proper factual background, must be given special weight.[16] Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.[17]

ANALYSIS

The Board finds that appellant has not established that she is entitled to a schedule award for her upper extremities. The Office found that a conflict had been created regarding appellant's degree of impairment between the opinions of appellant's physician Dr. Diamond and Dr. Gelman who provided a second opinion evaluation for the Office and referred appellant to Dr. Hogan for an impartial evaluation.

In situations where 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.[18] The Board finds that

[12] *Thomas J. Engelhart*, 50 ECAB 319 (1999). Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve. A.M.A., *Guide*, *supra* note 2 at 423.

[13] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[14] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[15] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[16] *Manuel Gill*, 52 ECAB 282 (2001).

[17] *See Thomas J. Fragale*, 55 ECAB 619 (2004).

[18] *Manuel Gill*, *supra* note 16.

Dr. Hogan's well-rationalized opinion is entitled to special weight as it was based on a complete and accurate factual and medical background. In his June 16, 2005 report, he reported the history of injury, appellant's complaints and his review of the medical record including MRI scans. Dr. Hogan conducted a thorough physical examination and provided detailed physical and objective findings on examination, advising that bilateral shoulder examinations demonstrated full range of motion and that, while appellant complained of diminished sensation in a stocking shape in her left upper extremity, this did not have an anatomic basis. Appellant submitted a February 7, 2006 report in which Dr. Weiss voiced his disagreement with Dr. Hogan's findings. Dr. Weiss, however, did not examine appellant and generally, findings on examination are needed to justify a physician's opinion.[19] Furthermore, while appellant also submitted reports from Dr. Atkins and Dr. Spektor, before the A.M.A., *Guides*, can be utilized, a description of impairment must be obtained from the claimant's physician. 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.[20] The Board, therefore, finds that the weight of the medical opinion evidence is represented by the well-rationalized opinion of Dr. Hogan.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she is entitled to a schedule award of the upper extremities for her accepted back conditions.

[19] *See generally Laurie S. Swanson*, 53 ECAB 517 (2002).

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 7 and March 28, 2006 be affirmed.

Issued: March 28, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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