United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 08-993**
	)	**Issued: September 11, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Shaker Heights, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 19, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated June 21, 2007 and January 18, 2008 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 merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained impairment caused by her accepted employment injuries that would entitle her to a schedule award.

FACTUAL HISTORY

On June 19, 2002 appellant, then a 44-year-old letter carrier, slipped and fell on steps while delivering mail. She began working modified duty. On October 7, 2002 the Office accepted that appellant sustained right forearm abrasions and contusions, a strain of the right upper arm, and a contusion of the right chest wall. On July 11, 2003 appellant filed a schedule

award claim. The Office referred her to Dr. Timothy J. Nice, a Board-certified orthopedic surgeon, for a second opinion evaluation. In reports dated October 16, 2003 and April 2 and June 25, 2004, Dr. Nice advised that, while appellant's right upper extremity symptoms had resolved with no impairment, she continued to have complaints regarding the right ribs and recommended a bone scan. He reported the bone scan results with positive findings on the left, and concluded that maximum medical improvement had not been reached. On August 5, 2004 the Office accepted abrasions of the right elbow and wrist, right shoulder strain, and right hip and thigh contusion. It informed appellant that, as she had not reached maximum medical improvement, she was not eligible for a schedule award. On November 1, 2004 the Office also accepted neuralgia of the right chest wall.

Appellant filed a schedule award claim on August 30, 2005. On October 25, 2005 the Office referred her to Dr. Sheldon Kaffen, Board-certified in orthopedic surgery, for a second opinion evaluation. In a November 14, 2005 work capacity evaluation, Dr. Kaffen advised that appellant could return to full duty with no restrictions in two weeks.[1] In a November 21, 2005 report, he noted the history of injury, a review of the medical record, and appellant's report that she no longer had right upper extremity pain but continued to have lower rib pain. Examination of the right upper extremity was unremarkable with full range of motion. Examination of the right rib cage demonstrated slight tenderness over the lower ribs. Dr. Kaffen opined that appellant no longer had residuals of the June 19, 2002 employment injury, finding only subjective tenderness of the right chest wall. He concluded that no further medical treatment was needed.

By letter dated December 22, 2005, the Office asked that Dr. Jeff Kirschman, an attending physician Board-certified in family and occupational medicine, review Dr. Kaffen's report.[2] On March 8, 2006 Dr. Kirschman responded that he had returned appellant to full duty and that beginning April 17, 2006 she could work overtime.

Appellant submitted a May 25, 2006 report in which Dr. Timothy Morley, an osteopath, noted the history of injury and appellant's complaint of right shoulder pain. Dr. Morley advised that appellant had restricted range of motion on the right of the shoulder, elbow and wrist. He concluded that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] she had a 17 percent right upper extremity impairment. In a July 13, 2006 report, Dr. Lutul D. Farrow, an Office medical adviser agreed with Dr. Morley that appellant had a 17 percent impairment of the right upper extremity. On October 24, 2006 Dr. Morley reported that appellant had work-related residuals.

The Office determined that a conflict in medical evidence arose between the opinions of Dr. Kaffen, who found no impairment or employment-related residuals, and Dr. Morley who

[1] At that time appellant was working modified duty, carrying mail only four hours daily.

[2] Appellant submitted numerous form reports from Dr. Kirschman who described findings and treatment recommendations. Dr. Kirschman, however, did not provide medical evidence that could be extrapolated for an impairment rating.

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

advised that appellant had a 17 percent impairment of the right upper extremity. On April 16, 2007 the Office referred appellant to Dr. Kenneth W. Chapman, a Board-certified orthopedic surgeon, for an impartial evaluation. In a May 3, 2007 report, Dr. Chapman noted the history of injury, his review of the medical record and statement of accepted facts. He stated that appellant reported that she had no problems whatsoever with her right upper extremity but continued to have tenderness over the right chest wall. Dr. Chapman advised that on physical examination his findings were similar to those of Dr. Kaffen, finding no limitation of motion or pain in the right shoulder, elbow, wrist or hand. He stated that appellant had no residuals of her work injury with only minimal subjective tenderness beneath the costal margin on the right but nothing objective to document this. Dr. Chapman concluded that maximum medical improvement was reached in 2004, that she had no impairment, and that no further medical treatment was warranted. In an attached work capacity evaluation, he advised that appellant could work eight hours a day without restrictions. In a June 10, 2007 report, Dr. Jason David Eubanks, an Office medical adviser, agreed that appellant had no permanent impairment related to her accepted conditions.

By decision dated June 21, 2007, the Office found that, based on the opinion of Dr. Chapman, appellant was not entitled to a schedule award.

Appellant, through her attorney, requested a hearing that was held on October 29, 2007. At the hearing, counsel contended that the Office exceeded its authority in finding a conflict in medical evidence and should have accepted Dr. Morley's impairment rating as reviewed by Dr. Farrow.

In a January 18, 2008 decision, an Office hearing representative found that a conflict in medical evidence arose between Dr. Kaffen and Dr. Morley and appellant was properly referred to Dr. Chapman. The June 21, 2007 decision was affirmed.

LEGAL PRECEDENT

Pursuant to section 8107 of the Federal Employees' Compensation Act[4] and section 10.404 of the implementing federal regulation,[5] 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*[6] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[7]

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] A.M.A., *Guides*, *supra* note 3.

[7] *See Joseph Lawrence, Jr., supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to the date of the evaluation by the attending physician which is accepted as definitive by the Office.[8] No schedule award is payable for permanent loss of, or loss of use of, anatomical members or functions or organs of the body not specified in the Act or in the implementing regulation.[9]

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.[10] 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.[11]

ANALYSIS

The Board finds that appellant has not established that she sustained permanent impairment due to her accepted conditions. Appellant contended that the Office exceeded its authority in finding a conflict in medical evidence after an Office medical adviser agreed with Dr. Morley's assessment that appellant had a 17 percent right upper extremity impairment. The Board notes that 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.[12] In this case, both Dr. Kaffen and Dr. Morley provided findings following physical examination and reached differing opinions. The Board finds that the Office did not abuse its discretion in finding a conflict in their medical opinions or in referring appellant to Dr. Chapman for an impartial evaluation.[13]

The Board also notes that no schedule award is payable for a member, function or organ of the body not specified in the Act or Office regulations.[14] Neither the Act nor implementing regulations specify the ribs as being members of the body for which a schedule award may be payable.[15] Appellant is not entitled to a schedule award for her rib injury. Regarding her right

[8] *Mark A. Holloway*, 55 ECAB 321 (2004).

[9] 5 U.S.C. § 8107 *et seq.*; 20 C.F.R. § 10.404; *Anna V. Burke*, 57 ECAB 521 (2006).

[10] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

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

[12] 5 U.S.C. § 8123(a).

[13] *Id.*; *see C.N.*, 57 ECAB 730 (2006); *see also* 20 C.F.R. § 10.321.

[14] *Supra* note 10.

[15] *See Terry E. Mills*, 47 ECAB 309 (1996).

shoulder, in a comprehensive report, Dr. Chapman advised that she reported that she had no problems with her right upper extremity. On physical examination of the right upper extremity, he found no positive physical findings and recorded a normal range of motion of the shoulder, elbow, wrist and hand. Dr. Chapman concluded that appellant had no employment-related residuals and could work eight hours a day without restrictions.

Dr. Chapman provided examination findings and rationale for his opinions and conclusions. The Board finds that his report is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.[16] Appellant therefore did not establish that she sustained permanent impairment to a scheduled member related to her accepted injury.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2008 be affirmed.

Issued: September 11, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[16] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).