United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 08-1323**
	)	**Issued: April 20, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, 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 April 2, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative decision dated November 13, 2007, which affirmed a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant has more than 29 percent impairment of her left arm, for which she received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board.[1] In an October 23, 2001 decision, the Board found that the case was not in posture for decision regarding whether appellant had more

[1] Docket No. 00-0859 (issued October 23, 2001) and Docket No. 02-1612 (issued November 7, 2002). The Office combined the claims under case No. xxxxxx803 on May 6, 2005.

than 20 percent impairment to her left upper extremity. In a November 7, 2002 decision, the Board found the case was not in posture for a decision with regard to whether appellant had more than nine percent impairment of her left arm for which she had received a schedule award. The Board found that a conflict in medical opinion between Dr. Weiss, a treating physician, and an Office medical adviser regarding the extent of impairment to appellant's left upper extremity. The facts and the history contained in the prior decisions are incorporated by reference.

The Office followed the Board's instructions on remand and obtained an opinion from an impartial specialist. In a February 28, 2003 decision, it denied appellant's claim for an increased schedule award. On September 23, 2003 the Office found that appellant did not have more than 20 percent impairment to the left upper extremity.

On September 29, 2003 appellant's representative requested a hearing which was held on June 22, 2004. In a December 8, 2004 decision, the Office hearing representative remanded the case for further development and directed the Office to combine the claims.

On March 17, 2005 the Office referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion. In an April 5, 2005 report, Dr. Stark reviewed appellant's history of injury and conducted a physical examination. Appellant had range of motion of the left shoulder which was restricted by 10 degrees of internal rotation, 20 degrees of abduction, and 20 degrees or forward flexion. Dr. Stark advised that appellant had normal adduction and external rotation, and negative impingement and apprehension tests. He advised that his examination of the left upper extremity revealed a healed arthroscopic scar over the left shoulder area and examination of the left elbow revealed some tenderness on palpation over the medial aspect of the elbow. Dr. Stark noted that appellant had normal range of motion of the left elbow and negative Tinel's and Phalen's tests for entrapment of the median or ulnar nerves in the left wrist or at the left elbow. Appellant had local tenderness over the lateral aspect of the distal radius, preserved motion of the left wrist and a negative Finkelstein maneuver in the left hand. Dr. Stark found that motion of the fingers of the left hand was preserved, and muscle power to both hands appeared to be equal.[2] In rating left shoulder impairment, he referred to pages 474-79 of the A.M.A., *Guides* and opined that appellant had four percent impairment based on 10 degrees internal rotation, two percent impairment for 20 degrees of abduction, and two percent impairment for 20 degrees forward flexion, or a total of eight percent based on loss of range of motion. Dr. Stark noted that external rotation and adduction were normal. He opined that there were no objective findings to substantiate de Quervain's syndrome of the left wrist and no impairment related to that diagnosis pursuant to Table 16-7 D.[3] Dr. Stark rated 3 percent impairment for left ulnar nerve entrapment in the elbow, for a total impairment of 11 percent to the left upper extremity. Dr. Stark advised that maximum medical improvement was reached on December 1, 2000. He completed a work capacity evaluation and opined that appellant could perform her usual job.

[2] The physician also addressed findings for appellant's right arm.

[3] A.M.A., *Guides* 507.

In a report dated May 3, 2005, an Office medical adviser reviewed Dr. Stark's report and the A.M.A., *Guides.* He determined that appellant had a total of 12 percent left arm impairment. The Office medical adviser rated appellant's loss of range of motion under Figures 16-40, 16-43 and 16-46.[4] He explained that 10 degrees of internal rotation resulted in zero percent impairment, 20 degrees abduction resulted in one percent impairment, and 20 degrees of forward flexion resulted in one percent impairment, which he added for two percent impairment for loss of range of motion. The Office medical adviser determined that, under Table 16-27,[5] a subacromial decompression warranted 10 percent impairment.[6] He combined the 2 percent for loss of range of motion with the 10 percent subacromial decompression to find 12 percent impairment. The Office medical adviser noted that Dr. Stark did not include a rating for the subacromial decompression.

In a decision dated May 6, 2005, the Office found that appellant did not have more than 20 percent impairment of the left upper extremity, for which she had received a schedule award.[7] On May 9, 2005 appellant requested a hearing, which was held on December 7, 2005.

In a February 22, 2006 decision, the Office hearing representative found that the Office medical adviser failed to address whether Dr. Stark correctly awarded three percent impairment for left elbow entrapment under section 16.5d of the A.M.A., *Guides*.[8] The Office hearing representative remanded the case for clarification from the Office medical adviser.

On October 26, 2006 the Office requested that the Office medical adviser provide an opinion regarding whether appellant had impairment for left elbow nerve entrapment. In a November 1, 2006 report, the medical adviser explained that Dr. Stark's examination did not support an ulnar neuropathy as there were no findings of neurological deficit of the wrist. On January 30, 2007 the Office medical adviser noted that the only objective findings on examination were loss of motion equal to eight percent and a pain evaluation equal to three percent. The Office medical adviser opined that appellant did not have any ulnar nerve entrapment.

In a May 31, 2007 decision, the Office found that appellant was not entitled to an additional schedule award.

On June 7, 2007 appellant's representative requested a hearing, which was held on September 25, 2007. He contended that appellant's claims for the left shoulder, left carpal tunnel syndrome, and ulnar nerve problems, should be combined to obtain an accurate impairment

[4] *Id.* at 476, 477, 479.

[5] *Id.* at 506.

[6] Dr. Stark noted that a clavicle excision was actually listed but not performed.

[7] The record reflects that appellant has received schedule awards totaling 29 percent impairment to her left arm. On June 10, 1997 the Office granted appellant a schedule award for 20 percent impairment of her left arm. On April 20, 2001 it issued appellant a schedule award for nine percent impairment of the left arm.

[8] A.M.A., *Guides* 491.

assessment. Appellant's representative also argued that Dr. Stark's range of motion findings were unclear and incomplete as the physician did not provide any measurements for range of motion of the elbow or wrist.

By decision dated November 13, 2007, an Office hearing representative affirmed the May 31, 2007 decision.[9]

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[10] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[11] The Act, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[12] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[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 tables in the A.M.A., *Guides*.[14]

ANALYSIS

Appellant received a schedule award for 20 percent impairment of the left arm on June 10, 1997. She received another schedule award for 9 percent impairment of the left arm on April 26, 2001, for a total of 29 percent impairment. On appeal, appellant asserts that she has greater impairment. In the course of developing her claims, the Office combined her claims and referred appellant to, Dr. Stark, a Board-certified orthopedic surgeon.

In an April 5, 2005 report, Dr. Stark noted appellant's history of injury and treatment. On physical examination, he noted that appellant had normal adduction and external rotation, with negative impingement and apprehension tests. He also advised that range of motion of the

[9] The hearing representative phrased the issue as whether appellant had more than 20 percent impairment of her left arm. However, as indicated at note 7, the record establishes that appellant has received two schedule awards for her left arm totaling 29 percent impairment.

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8107.

[12] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[13] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

[14] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

fingers of the left hand was not reduced and muscle power to both hands appeared to be equal. Dr. Stark provided range of motion findings for the shoulder which included 10 degrees of internal rotation, 20 degrees of abduction, and 20 degrees of forward flexion. He found a well-healed arthroscopic scar over the left shoulder area with some tenderness on palpation over the medial aspect of the elbow, normal range of motion of the left elbow, and negative Tinel's and Phalen's tests for entrapment of the median or ulnar nerve in the left wrist or of the ulnar nerve at the left elbow. Dr. Stark indicated that appellant had local tenderness over the lateral aspect of the distal radius, preserved motion of the left wrist and a negative Finkelstein maneuver in the left hand. He referred to the A.M.A., *Guides*[15] and opined that appellant had four percent impairment based on 10 degrees internal rotation, two percent impairment for 20 degrees of abduction, and two percent impairment for 20 degrees forward flexion, or a total of eight percent impairment based on loss of range of motion. Dr. Stark noted that external rotation and adduction were normal. He opined that there were no objective findings to substantiate a diagnosis of de Quervain's syndrome of the left wrist and no impairment related to that diagnosis pursuant to Table 16-7 D.[16] Dr. Stark opined that appellant had 3 percent impairment due to ulnar nerve entrapment in the elbow for a total of 11 percent impairment to the left upper extremity. He advised that appellant reached maximum medical improvement on December 1, 2000 and that she could perform her usual job.

In a report dated May 3, 2005, an Office medical adviser reviewed Dr. Stark's report and the A.M.A., *Guides.* The Office medical adviser referred to Table 16-46[17] and determined that 10 degrees of internal rotation resulted in zero percent impairment. However, the Board notes that 10 degrees of internal rotation would warrant five percent impairment under Table 16-46. Additionally, the Office medical adviser determined that 20 degrees of abduction would result in one percent impairment; however, according to Table 16-43,[18] this is seven percent impairment. Regarding forward flexion, the Office medical adviser indicated that 20 degrees of forward flexion resulted in 1 percent impairment; however, the Board notes that Table 16-40[19] provides for 11 percent impairment for 20 degrees of forward flexion. Adding these shoulder range of motion findings results in an impairment of 23 percent. The Office medical adviser referred to Table 16-27 and found that appellant's subacromial decompression represented 10 percent impairment.[20] Under the Combined Values Chart, 23 percent impairment for lost range of motion combined, with 10 percent for the subacromial decompression results in a total of 31 percent impairment.[21]

[15] A.M.A., *Guides* 474-79.

[16] *Id.* at 507.

[17] *Id.* at 479.

[18] *Id.* at 477.

[19] *Id.* at 476.

[20] *Id.* at 506.

[21] *Id.* at 604.

The Office medical adviser also explained that appellant would not be entitled to additional impairment for ulnar neuropathy as she did not have an ulnar nerve entrapment. He explained that there were no findings of neuropathy at the wrist. The medical adviser noted that there were no focal neurological deficits. He also advised that the only objective findings provided by Dr. Stark on examination were for loss of motion and a pain rating equal to three percent. The Board also notes that the A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters.[22] The A.M.A., *Guides* state: the impairment ratings in the body organ system chapters make allowance for any accompanying pain.[23] So the presence of pain alone does not justify a pain-related impairment. None of the physicians provided an opinion or explanation to show why appellant's condition could not be rated in other chapters of the A.M.A., *Guides* or how her condition falls within one of the several situations identified under Chapter 18.3a.[24]

The Board finds that appellant sustained 31 percent impairment of her left arm. As appellant has already received schedule awards totaling 29 percent impairment of her left arm, she is entitled to receive an additional 2 percent impairment for a total of 31 percent impairment of her left upper extremity.

On appeal, appellant's representative alleged that the second opinion report of Dr. Stark was insufficient, or at a minimum should have created a conflict with the report of Dr. Weiss. The Board notes that the evidence does not suggest a conflict in the instant matter. The opinion of Dr. Weiss was previously considered and he has not submitted a more current report with new findings sufficient to support further development. The Board also notes that the Office combined the cases to consider the extent of appellant's impairment due to her accepted conditions.

CONCLUSION

The Board finds that appellant has no more than 31 percent impairment of the left upper extremity. As she has previously received schedule awards totaling 29 percent of the left upper extremity, she should receive a schedule award for an additional two percent impairment of the left upper extremity.

[22] *Id.* at 571.

[23] *Id.* at 20.

[24] *Id.* at 570-571.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2007 is affirmed as modified.

Issued: April 20, 2009
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