

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

_____)
D.M., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE)
THREAT REDUCTION AGENCY,)
KIRKLAND AIR FORCE BASE, NM, Employer**)

_____)

**Docket No. 08-886
Issued: February 19, 2009**

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 5, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 31, 2007 merit decision concerning her entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), 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 more than a 15 percent permanent impairment of her right arm and a 23 percent permanent impairment of her left arm, for which she received schedule awards.

FACTUAL HISTORY

In mid 1999 the Office accepted that appellant, then a 41-year-old administrative support assistant, sustained bilateral carpal tunnel syndrome due to the repetitive duties of her job. On January 4, 2000 appellant underwent left carpal tunnel release surgery which was authorized by

the Office.¹ Her claim was later upgraded to include bilateral-lateral epicondylitis, bilateral brachial plexus lesions, reflex sympathetic dystrophy, cervicalgia and disturbance of skin sensation.²

Appellant claimed entitlement to schedule award compensation due to her accepted injuries. In a December 18, 2001 decision, the Office granted appellant a schedule award for a 10 percent permanent impairment of her right arm and a 10 percent permanent impairment of her left arm. The award ran for 62.4 weeks from June 7, 2001 to August 17, 2002.

In August 2006 appellant filed a claim alleging that she was entitled to additional schedule award compensation. In order to seek clarification regarding this matter, the Office referred appellant to Dr. Barrie Ross, a Board-certified physical medicine and rehabilitation physician, for an opinion on this matter. On December 11, 2006 Dr. Ross detailed appellant's factual and medical history and stated that she complained of posterior headaches, pain in her forearms and elbows and numbness in both wrists and all fingers of both hands. She reported the findings of range of motion, motor strength and pain elicitation testing. Dr. Ross indicated that in appellant's right shoulder appellant had 160 degrees of flexion, 50 degrees of extension, 110 degrees of abduction, 40 degrees of adduction, 90 degrees of external rotation and 70 degrees of external rotation which warranted a five percent impairment rating. In the left shoulder, she had 160 degrees of flexion, 50 degrees of extension, 120 degrees of abduction, 50 degrees of adduction, 80 degrees of external rotation and 60 degrees of external rotation which warranted a six percent impairment rating. Dr. Ross indicated that combining a 10 percent impairment rating for a left distal clavicle resection with the 6 percent impairment rating for limited motion yielded 15 percent impairment for the left shoulder. She determined that appellant had a Grade 3 sensory loss of 26 percent for the right digits 1, 2 and 3 which multiplied by the 36 percent maximum sensory loss for this sensory pattern yielded a 9 percent rating. Appellant had a Grade 4 motor loss of 10 percent in the right median nerve which multiplied by the 10 percent maximum motor loss for the median nerve yielded a 1 percent rating. Dr. Ross combined these values to equal 10 percent on the right. She determined that appellant had a Grade 3 sensory loss of 26 percent for the left digits 1, 3 and 4 which multiplied by the 30 percent maximum sensory loss for this sensory pattern yielded an 8 percent rating. Appellant had a Grade 4 motor loss of 10 percent in the left median nerve which multiplied by the 10 percent maximum motor loss for the median nerve yielded a 1 percent rating. Dr. Ross combined these values to equal nine percent on the left. She then combined the 10 and 5 percent ratings for the right arm to yield a total permanent impairment of 15 percent in the right arm. Combining the 15 and 9 percent ratings yielded a total permanent impairment of 15 percent in the left arm.

On December 26, 2006 Dr. Ronald Blum, a Board-certified orthopedic surgeon who served as an Office medical adviser, stated that he had reviewed the findings of Dr. Ross. He determined that, under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), appellant had a 15 percent permanent impairment of her right arm and a 23 percent permanent impairment of her left arm. Dr. Blum

¹ Appellant also underwent a left distal clavicle resection.

² It was also accepted that appellant sustained "other affections" of his right shoulder, not otherwise classified.

detailed Dr. Ross' impairment calculations and indicated that he agreed with her method of calculating appellant's permanent impairment.

In a January 11, 2007 decision, the Office granted appellant additional schedule award compensation for a 5 percent permanent impairment of her right arm and a 13 percent permanent impairment of her left arm. The award ran for 56.16 weeks from January 21, 2007 to February 18, 2008. It was designed to compensate appellant for her total impairment which was comprised of a 15 percent permanent impairment of her right arm and a 23 percent permanent impairment of her left arm.

On February 23, 2007 Dr. Thomas Whalen, an attending Board-certified internist, asserted that Dr. Ross and Dr. Blum failed to consider the effect of the accepted conditions of bilateral brachial plexus lesions or cervicgia on appellant's sensory loss ratings. Regarding the calculation of her permanent impairment, he stated:

“RIGHT UPPER EXTREMITY: [Appellant] has a 60 percent impairment of the upper extremity as a result of a sensory impairment due to brachial plexus injury plus an 11 percent impairment of the upper extremity due to brachial plexus motor impairment plus a 3 percent impairment of the upper extremity for median nerve injury plus an 8 percent impairment due to right shoulder decreased range of motion. Utilizing the ‘Combined Values Chart’ on page 604, 60 percent plus 11 percent plus 3 percent plus 8 percent is equivalent to 68 percent impairment of the upper extremity. Utilizing Table 16-3 on page 439 ‘Conversion of Impairment of the Upper Extremity to Impairment of the Whole Person,’ I find that 68 percent upper extremity impairment corresponds to a 41 percent impairment of the whole person.

“LEFT UPPER EXTREMITY: [Appellant] has a 60 percent impairment of the upper extremity due to sensory impairment from her brachial plexus lesion plus an 18 percent impairment of the left upper extremity due to motor weakness as a result of her brachial plexus injury plus 10 percent impairment of the left upper extremity due to her distal claviclectomy plus 6 percent impairment of the left upper extremity as a result of her decreased shoulder range of motion. Utilizing the ‘Combined Value Chart’ on page 604, 60 percent upper extremity impairment plus 18 percent upper extremity impairment plus 10 percent upper extremity impairment plus 6 percent upper extremity impairment corresponds to a 72 percent impairment of the upper extremity. Utilizing Table 16-3 on page 439 a 72 percent impairment of the left upper extremity is equivalent to a 43 percent impairment of the whole person.

“As noted on prior impairment rating, [appellant] has developed sexual dysfunction to which I had assigned a six percent impairment of the whole person.

“Utilizing ‘Combined Values Chart’ on page 604, 41 percent impairment of the whole person for her right upper extremity, right brachial plexus injury plus 43 percent impairment of the whole person for her left upper extremity, left brachial

plexus injury plus 6 percent impairment for her sexual dysfunction is equivalent to a 68 percent impairment of the whole person.”

Appellant requested a telephonic hearing before an Office hearing representative. At the October 10, 2007 hearing, Gordon Reiselt, appellant’s attorney, argued that the February 23, 2007 report of Dr. Whalen showed that appellant had a much greater impairment than calculated by Dr. Ross and Dr. Blum.

In a December 31, 2007 decision, the Office hearing representative affirmed the Office’s January 11, 2007 decision finding that appellant did not meet her burden of proof to establish that she has more than a 15 percent permanent impairment of her right arm and a 23 percent permanent impairment of her left arm.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act³ and its implementing regulations⁴ 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.⁵ A schedule award is not payable under section 8107 of the Act for an impairment of the whole person.⁶

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome, bilateral-lateral epicondylitis, bilateral brachial plexus lesions, reflex sympathetic dystrophy, cervicgia, disturbance of skin sensation and other affections of her right shoulder, not otherwise classified. Appellant received schedule awards for a 15 percent permanent impairment of her right arm and a 23 percent permanent impairment of her left arm. In a December 31, 2007 decision, the Office determined that appellant did not meet her burden of proof to establish that she has more than a 15 percent permanent impairment of her right arm and a 23 percent permanent impairment of her left arm. It found that the impairment calculations of Dr. Ross, an attending Board-certified physical medicine and rehabilitation physician, and Dr. Blum, a Board-certified orthopedic surgeon who served as an Office medical adviser, showed that appellant was not entitled to a higher rating.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

The Board finds that the impairment ratings of Dr. Ross and Dr. Blum do not show that appellant has more than a 15 percent permanent impairment of her right arm or a 23 percent permanent impairment of her left arm. Both Dr. Ross and Dr. Blum properly indicated that in her right shoulder appellant had a one percent impairment due to 160 degrees of flexion, a three percent impairment due to 110 degrees of abduction and a one percent impairment due to 70 degrees of external rotation which added up to a five percent impairment rating. In the left shoulder, they correctly noted that she had a one percent impairment due to 160 degrees of flexion, a three percent impairment due to 120 degrees of abduction and a two percent impairment due to 60 degrees of external rotation which added up to a six percent impairment rating.⁷ Dr. Ross and Dr. Blum correctly calculated appellant's sensory and motor losses. They determined that she had a Grade 3 sensory loss of 26 percent for the right digits 1, 2 and 3 which multiplied by the 36 percent maximum sensory loss for this sensory pattern yielded a 9 percent rating. Appellant had a Grade 4 motor loss of 10 percent in the right median nerve which multiplied by the 10 percent maximum motor loss for the median nerve yielded a 1 percent rating. Dr. Ross and Dr. Blum determined that appellant had a Grade 3 sensory loss of 26 percent for the left digits 1, 3 and 4 which multiplied by the 30 percent maximum sensory loss for this sensory pattern yielded an 8 percent rating. Appellant had a Grade 4 motor loss of 10 percent in the left median nerve which multiplied by the 10 percent maximum motor loss for the median nerve yielded a 1 percent rating.⁸ Dr. Ross and Dr. Blum properly combined these sensory and motor losses using the Combined Values Chart.⁹

The record contains a February 23, 2007 report in which Dr. Whalen, an attending Board-certified internist, determined that appellant's permanent impairment was much greater than 15 percent in the right arm and a 23 percent in the left. Dr. Whalen's higher rating was mostly due to his assessment of appellant's sensory and motor loss due to her brachial plexus injury. He also included an impairment rating for sexual dysfunction. The Board finds that the opinion of Dr. Whalen is of limited probative value in that Dr. Whalen failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹⁰ Dr. Whalen did not make reference to specific standards of the A.M.A., *Guides* to explain his

⁷ See A.M.A., *Guides* 476-79, Figures 16-40, 16-43 and 16-46. Dr. Ross and Dr. Blum indicated that combining a 10 percent impairment rating for a left distal clavicle resection with the 6 percent impairment rating for limited motion yielded 15 percent impairment for the left shoulder. Under Table 17-2 of the A.M.A., *Guides*, it is impermissible to combine such a diagnosis-based impairment rating with a range of motion rating. See A.M.A., *Guides* 526, Table 17-2.

⁸ See A.M.A., *Guides* 482, 484 and 492, Tables 16-10, 16-11 and 16-15.

⁹ See A.M.A., *Guides* 604, Combined Values Chart. As noted above, Dr. Ross and Dr. Blum improperly included a diagnosis-based rating in their calculations. However, in no case did they make errors in their calculations which showed that appellant was entitled to greater schedule award compensation.

¹⁰ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment). Dr. Whalen asserted that Dr. Ross and Dr. Blum did not consider the conditions of brachial plexus lesion or cervicgia. However, in their reports, they acknowledged that these were accepted conditions.

impairment ratings. Moreover, it has not been accepted that appellant has an employment-rated sexual dysfunction.¹¹

For these reasons, appellant has not shown that she has more than a 15 percent permanent impairment of her right arm or a 23 percent permanent impairment of her left arm.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than a 15 percent permanent impairment of her right arm and a 23 percent permanent impairment of her left arm, for which she received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 31, 2007 decision is affirmed.

Issued: February 19, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ Dr. Whalen also made reference to whole person impairments but the Act does not allow for whole person impairments. *See supra* note 6 and accompanying text.