United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 08-1391**
	)	**Issued: January 12, 2009**
U. S. POSTAL SERVICE, POST OFFICE, LANCASTER, PA, 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 11, 2008 appellant filed a timely appeal from a November 29, 2007 schedule award decision of an Office of Workers' Compensation Programs' hearing representative. 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 met her burden of proof to establish that she has more than 12 percent permanent impairment of her right arm for which she received a schedule award and any permanent impairment of her left arm.

FACTUAL HISTORY

On May 6, 2002 appellant, then a 44-year-old modified postmaster, was sitting at her computer desk when it was struck from the other side. She sustained injuries to her arms and

shoulders, the back and right side of her neck, chin and right ear.[1] Appellant did not return to work and took early retirement. The Office accepted the claim for cervical strain, bilateral shoulder sprain, and soft tissue injuries to the cervical spine and shoulders. It developed appellant's claim and on November 29, 2004 referred her for a second opinion examination with Dr. Anthony Salem, a Board-certified orthopedic surgeon.

In a December 23, 2004 report, Dr. Salem noted appellant's history of injury and treatment. His examination revealed that appellant had a congenital deformity of her left hand for which she had surgery many years prior. Dr. Salem conducted a physical examination and reported findings for the left hand which had a small cleft where a small little finger had been created surgically. He determined that appellant had a negative Tinel's, full range of motion of the neck, shoulders, elbows and wrists. Dr. Salem opined that appellant had recovered from the strains related to the May 6, 2002 injury and advised that her present physical condition was unrelated to that accident.

On January 11 and February 7, 2007 appellant claimed a schedule award and submitted additional evidence. In a September 14, 2006 report, Dr. David Weiss, an osteopath and treating physician, noted appellant's history of injury and treatment. He referred generally to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).[2] Dr. Weiss noted appellant's May 6, 2002 work injury and advised that x-rays of the left wrist showed dactylization of two and five at the left radius and ulna, but that x-rays of the left elbow and left shoulder were negative. He noted that diagnostic testing conducted on February 10, 2004 revealed bilateral brachial plexus neuropathy and mild nerve damage of the right radial nerve. Dr. Weiss indicated that appellant reported pain in the right arm but had no complaints in the left arm.[3] He found a full range of motion of the left and right elbows. Dr. Weiss indicated that appellant's brachial plexus on the right revealed a positive supraclavicular Tinel's sign and produced a "pins and needles sensation going down" the right arm. He provided findings for strength, circumference and touch and opined that sensory examination failed to reveal any perceived dermatomal abnormalities in the right or left upper extremities. Dr. Weiss diagnosed chronic post-traumatic cervical strain and sprain, bilateral upper brachial plexus injury with positive nerve conduction findings, recurrent right radial nerve neuropathy, congenital dactylization, cumulative and repetitive trauma disorder, radial nerve neuropathy of the right arm, carpal tunnel syndrome of the right wrist and several other

[1] The record reflects that appellant has a prior case under File No. xxxxxx394 for an October 9, 1997 occupational disease claim. That case was accepted for right wrist tendinitis, right carpal tunnel syndrome, right radial neuropathy, right radial decompression and right carpal tunnel release surgeries. On October 29, 2002 appellant received a schedule award of 12 percent to the right upper extremity. She filed an appeal with the Board. In a March 4, 2005 decision, the Board found that appellant had not met her burden of proof to establish that she sustained more than a 12 percent permanent impairment of her right upper extremity for which she received a schedule award. Docket No. 04-1516 (issued March 4, 2005). The claim under file number xxxxxx394 is not presently before the Board.

[2] Dr. Weiss also indicated that he had previously evaluated appellant on July 23, 2003 for an evaluation related to a right upper extremity condition.

[3] Although Dr. Weiss noted that appellant had a congenital deformity of the left forearm and hand and noted that a dactylization was performed on claimant at the age of 17.

conditions. He indicated that appellant had impairment of 10 percent under Table 16-27[4] for a right radial head arthroplasty. Dr. Weiss referred to Tables 16-11 and 16-15 and found that appellant had nine percent impairment for "4/5" motor strength deficit for right thumb abduction and four percent impairment for "4/5" motor strength deficit in the right supraspinatus.[5] Under Tables 16-10 and 16-15, appellant had 10 percent impairment for a Grade 4 sensory deficit to the right median nerve.[6] Dr. Weiss combined the values to determine that appellant had 29 percent impairment of the right arm. He opined that appellant's conditions were work related.

In a January 29, 2007 report, the Office medical adviser utilized the A.M.A., *Guides* and reviewed appellant's history of injury and treatment. He noted that appellant had complaints of numbness and tingling in the upper extremity, occasional headaches, and some intermittent right wrist pain but concluded that no schedule award was justified.

In a March 12, 2007 report, the Office medical adviser noted appellant's history that included the accepted conditions of sprain and strain of the shoulder and upper arm and neck. He explained that appellant had previously received a schedule award which took into consideration the radial head arthroplasty of the right elbow and carpal tunnel release in 1998. The Office medical adviser referred to appellant's 2002 injury and opined that no schedule award was supported as Dr. Salem had found that appellant did not have any work-related problems and advised that she had fully recovered from the May 6, 2002 work injury. Regarding Dr. Weiss' impairment rating, the Office medical adviser advised that the 29 percent impairment estimate was related to appellant's prior injury, which had been reviewed on appeal and affirmed by the Board for 12 percent of the right upper extremity. The Office medical adviser indicated that Dr. Weiss did not address the sprains and strains of the shoulder, upper arm or neck. He explained that Dr. Weiss' present ratings were incorrect because he utilized findings for right thumb abduction and right supraspinatus weakness which were not acceptable under section 16.8a of A.M.A., *Guides* which indicate that "decreased strength cannot be rated in the presence of painful conditions."[7]

In a May 9, 2007 addendum, Dr. Weiss opined that, although appellant did not complain of any left shoulder symptoms at the time of the evaluation, his examination found that she had a Grade "4/5" motor strength deficit in the left supraspinatus muscle. He advised that this represented four percent impairment under Table 16-11 and Table 16-15 of the A.M.A., *Guides*.[8]

On June 12, 2007 the Office asked the Office medical adviser for an opinion on appellant's left arm impairment. On June 20, 2007 the Office medical adviser indicated that, although Dr. Weiss found four percent impairment of the left arm, he did not describe any "complaints of any type, weakness, function or pain" or document any complaints related to loss

[4] A.M.A., *Guides* 506.

[5] *Id.* at 484, 492.

[6] *Id.* at 482, 492.

[7] *Id.* at 508.

[8] *Supra* note 5.

of function, weakness or other limitations of any kind in his September 14, 2006 report. He also noted that appellant had a congenital abnormality of the left forearm and hand and underwent surgery at age 17. The medical adviser noted that, while there were measurements for the right lower arm, there were no lower arm circumference measurements listed to support impairment. He also noted that Dr. Weiss did not perform grip strength and pinch evaluation of the left arm. The medical adviser opined that, "if there was any suspicion of weakness of the left upper extremity, these tests should have been performed." He referred to a February 10, 2004 electromyography scan read by Dr. Scott Fried, a Board-certified orthopedic surgeon, which revealed bilateral brachial plexus neuropathy of the right radial nerve, but no evidence of suprascapular nerve involvement. The medical adviser again referred to Dr. Salem's report and noted that his findings did not show any atrophy of the upper extremities but revealed left hand reconstruction for congenital abnormalities. Appellant had a full range of motion of both shoulders and her degenerative changes of the cervical spine with cervical radiculopathy were not accepted conditions. The medical adviser stated that none of the previous physicians found evidence of weakness in the left shoulder supraspinatus. He noted that Dr. Weiss should have provided testing for the supraspinatus on the left. The medical adviser concluded that the medical evidence did not support an impairment of four percent to the left upper extremity.

In a June 26, 2007 decision, the Office denied appellant's schedule award claim as the evidence did not establish that she sustained any permanent impairment.

Appellant requested a hearing that was held on October 18, 2007. At the hearing, she contended that there was a medical conflict and that Dr. Salem's report was outdated. The Office received several reports, including a September 11, 2007 report from Dr. James Barrett, a pain management specialist, who diagnosed chronic pain due to trauma that was work related. Dr. Barrett also diagnosed bilateral brachial plexopathy with myofascial pain, a history of radial nerve release on the right, which was work related and depression/anxiety. A September 27, 2007 magnetic resonance imaging (MRI) scan obtained by Dr. John S. Farrell, a Board-certified diagnostic radiologist, revealed "mild multilevel degenerative spondylosis of the cervical spine with no focal disc protrusion or significant central canal narrowing identified, and multilevel mild neural foraminal narrowing." In an October 31, 2007 report, Dr. Steven J. Valentino, an osteopath and Board-certified orthopedic surgeon, noted appellant's history. He diagnosed neck and shoulder strain, radiculitis, aggravation of degenerative disc disease, thoracic outlet syndrome and brachial plexitis.

By decision dated November 29, 2007, the Office hearing representative affirmed the Office's June 27, 2007 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[9] 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.[10] The Act, however, does not specify the manner by which the

[9] 5 U.S.C. §§ 8101-8193.

[10] 5 U.S.C. § 8107.

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.[11] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[12]

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[13]

ANALYSIS

In a September 16, 2006 report, Dr. Weiss, appellant's physician, opined that she had 29 percent right arm impairment. His findings included bilateral brachial plexus neuropathy and mild nerve damage of the right radial nerve. Dr. Weiss indicated that appellant complained of right arm pain and did not indicate that appellant had any left arm complaints other than her congenital deformity. He determined that appellant had full range of motion of the left and right elbows. Dr. Weiss indicated that appellant's brachial plexus on the right revealed a supraclavicular Tinel's sign which was positive on the right and produced a "pins and needles sensation going down the right upper extremity." He provided findings and diagnosed numerous conditions which included several conditions that were not work related. Dr. Weiss also provided findings related to her previous work injury,[14] for which appellant had already received a 12 percent schedule award. The findings included a rating of 10 percent for her right radial head arthroplasty under Table 16-27.[15] Dr. Weiss also provided impairment percentages of nine percent for "4/5" motor strength deficit right thumb abduction and an impairment of four percent for "4/5" motor strength deficit right supraspinatus.[16] He referred to Tables 16-10 and 16-15 and opined that appellant had 10 percent impairment for a Grade 4 sensory deficit to the right median nerve.[17] Dr. Weiss combined these values and determined that appellant had 29 percent impairment of the right arm. He opined that appellant's conditions were work related.

The Board notes that appellant has already received an award for the right radial arthroplasty and carpal tunnel release due to her October 9, 1997 work injury. Dr. Weiss did not provide any rationale to support that appellant had more than the 12 percent for which she had already received a schedule award or how any additional impairment would be related to the

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

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

[13] *Veronica Williams*, 56 ECAB 367 (2005).

[14] *See supra* note 1.

[15] *Supra* note 4.

[16] *Supra* note 6.

[17] *Id*.

shoulder and cervical spine sprains and strains that the Office accepted.[18] The Office medical adviser opined that the May 6, 2002 work injury did not cause any permanent impairment and supported his opinion by noting that Dr. Salem found that appellant had fully recovered from her 2002 soft tissue work injury.

The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[19] The Board finds that Dr. Weiss has not sufficiently explained how the accepted cervical strain, bilateral shoulder sprain, and soft tissue injuries to the cervical spine and shoulder caused impairment to the right arm. The Board has held that, before applying the A.M.A, *Guides*, the Office must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.[20] Although Dr. Weiss opined that appellant's impairment was employment related, he did not provide any medical reasoning, or medical rationale, in support of his conclusion.[21] Consequently, appellant has not established that her May 6, 2002 employment injuries caused permanent impairment of her left arm.

Regarding the left arm, Dr. Weiss also has not sufficiently explained how any impairment is causally related to the accepted cervical strain, bilateral shoulder sprain, and soft tissue injuries to the cervical spine and shoulder. On September 14, 2006 he stated that appellant did not complain of any left shoulder symptoms. Dr. Weiss acknowledged this in his May 9, 2007 report but advised that "it did appear," at the time of the evaluation, that appellant had a motor strength deficit in the left supraspinatus muscle that resulted in left arm impairment of four percent. He did not specifically address how any impairment was causally related to appellant's accepted sprains and strains of the shoulder and cervical spine. As noted, appellant has the burden of proving that the condition for which a schedule award is sought is causally related to her employment. Dr. Weiss also did not provide any findings to show how he arrived at these values for motor strength deficit. The examining physicians did not find any signs of weakness in the supraspinatus muscle, including Dr. Weiss in his September 14, 2006 report. Dr. Weiss did not explain how appellant's congenital condition in her left arm affected the findings on examination. The Office medical adviser also noted the limited findings provided by Dr. Weiss to support left arm impairment. He noted that, while the record, documented that appellant had degenerative changes of the cervical spine and cervical radiculopathy, these were not accepted conditions.[22] The medical adviser found no basis on which to attribute any permanent impairment to appellant's accepted conditions.

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[18] *See Thomas P. Lavin*, 57 ECAB 353 (2006) (not all medical conditions accepted by the Office result in permanent impairment to a scheduled member).

[19] *Veronica Williams*, *supra* note 13.

[20] *See Michael S. Mina*, 57 ECAB 379, 385 (2006).

[21] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[22] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (for conditions not accepted by the Office as being employment related, the employee bears the burden of proof to establish that the condition is causally related to the employment injury).

The Board finds that the medical evidence is insufficient to establish that appellant accepted conditions have caused any permanent impairment of the left arm.

On appeal, appellant's attorney alleges that the Office medical adviser's opinion is not probative or, in the alternative, should have created a conflict. However, as noted above, Dr. Weiss did not sufficiently explain how the accepted conditions of cervical strain and bilateral shoulder strain and soft tissue injuries would cause a permanent impairment. As such, Dr. Weiss' reports are insufficient to create a medical conflict.[23]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained more than 12 percent permanent impairment of her right arm for which she received a schedule award or that she has permanent impairment of her left arm causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 29, 2007 is affirmed.

Issued: January 12, 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

[23] *See* 5 U.S.C. § 8123(a) regarding conflicts in the medical evidence.