

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

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Y.C., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Philadelphia, PA, Employer )

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**Docket No. 08-1545  
Issued: March 10, 2009**

*Appearances:*  
*Jeffrey P. Zeelander, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 5, 2008 appellant filed a timely appeal of the April 14, 2008 merit decision of the Office of Workers' Compensation Programs 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 the case.

**ISSUE**

The issue is whether the Office properly denied appellant's claim for a schedule award.

**FACTUAL HISTORY**

On July 18, 2001 appellant then a 44-year-old letter carrier, filed a claim alleging that on April 30, 2001 she experienced neck, shoulder and arm pain while in the performance of duty. The Office accepted her claim for aggravation of degenerative disc disease of the cervical spine. Appellant stopped work on July 18, 2001 and returned on September 26, 2002 and worked intermittently thereafter. Appropriate compensation benefits were paid.

Appellant was treated by Dr. Steven J. Valentino, an osteopath, on June 13, 2001 for cervical degenerative disc disease with neck pain radiating into her right arm which became worse when she carried mail. Dr. Valentino noted that appellant's history was significant for carpal tunnel syndrome. He diagnosed exacerbation of cervical degenerative disc disease with facet strain, right C6 radiculopathy and recommended conservative treatment. In subsequent reports, Dr. Valentino noted appellant's symptoms of neck pain radiating into both arms with paresthesias and diagnosed aggravation of cervical degenerative disc disease with herniated disc, stenosis, radiculitis and facet syndrome and recommended splinting and limited-duty work.

On November 14, 2007 appellant filed a claim for a schedule award.

On February 21, 2008 the Office advised appellant to submit a physician's opinion regarding the extent of any permanent impairment due to the accepted condition. It advised that the impairment rating should be prepared in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup> It attached an impairment form to be completed by appellant's treating physician and requested that the form be submitted within 30 days.

In a report dated February 27, 2008, Dr. Valentino noted appellant's complaints of neck pain, diminished range of motion with paresthesias and weakness dating back to a work injury in 2000. Dr. Valentino noted range of motion of the cervical spine for flexion measured 30 degrees, extension measured 10 degrees, lateral rotation measured 25 degrees. He further noted the modified Spurling's maneuvers reproduced neck pain and right biceps strength measured 4/5 with diminished sensation about the right C5 and D6 dermatome. Examination of the bones, muscles, tendons, skin, vascular and palpatory lymphatic systems of the four extremities revealed no abnormalities. Dr. Valentino opined that in accordance with the A.M.A., *Guides* appellant sustained 18 percent whole person impairment pursuant to DRE cervical category 3. However, he noted that appellant had not yet reached maximum medical improvement. Dr. Valentino recommended additional facet injections.

In a decision dated April 14, 2008, the Office denied appellant's claim for a schedule award. It noted that the evidence was insufficient to establish that appellant sustained permanent impairment to a scheduled member due to her accepted work injury.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulations<sup>3</sup> 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,

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

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 regulations as the appropriate standard for evaluating schedule losses.<sup>4</sup>

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. A schedule award is not payable until maximum improvement of the claimant's condition has been reached.<sup>5</sup> Maximum improvement means that the physical condition of the injured member's body has stabilized and will not improve further.<sup>6</sup> The question of when maximum medical improvement has been reached is a factual one which depends on the medical evidence of record. The determination of such date in each case is to be made based upon the medical evidence.<sup>7</sup>

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.<sup>8</sup> As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.<sup>9</sup> The Board notes that section 8101(19) specifically excludes the back from the definition of "organ."<sup>10</sup> However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.<sup>11</sup>

### ANALYSIS

Appellant contends that she is entitled to a schedule award for impairment due to her cervical spine condition. The Office accepted her claim for aggravation of degenerative disc disease of the cervical spine.

Appellant's treating physician was asked by the Office to prepare a medical opinion addressing appellant's degree of permanent impairment under the A.M.A., *Guides* and the date of maximum medical improvement. On February 27, 2008 Dr. Valentino opined that appellant had not reached maximum medical improvement and requested that she be permitted to proceed with additional facet injections. In the absence of a finding by him that maximum medical improvement had been reached, it cannot be found that appellant's condition has stabilized and

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<sup>4</sup> See *id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>5</sup> See *Robert L. Mitchell, Jr.*, 34 ECAB 8 (1982).

<sup>6</sup> *Joseph R. Waples*, 44 ECAB 936 (1993).

<sup>7</sup> *Richard Larry Enders*, 48 ECAB 184 (1996); *Joseph R. Waples, id.*

<sup>8</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>9</sup> See *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>10</sup> 5 U.S.C. § 8101(19).

<sup>11</sup> *Thomas J. Engelhart, supra* note 8.

will not improve any further.<sup>12</sup> Since Dr. Valentino did not find that maximum medical improvement has been reached, it is premature to consider appellant's claim for a schedule award. There is no other current medical evidence of record supporting that appellant has reached maximum medical improvement. Consequently, the Office properly found that appellant is not entitled to receive a schedule award.

Furthermore, the Board notes that Dr. Valentino opined that appellant sustained 18 percent whole person impairment pursuant to DRE cervical category 3, page 392 of the A.M.A., *Guides*, which pertains to impairment for a cervical spine.<sup>13</sup> However, as noted, neither the Act nor its regulations provide for the payment of a schedule award for whole body impairment or for impairment of the cervical spine. In addition to finding that appellant had not reached maximum medical improvement, Dr. Valentino did not otherwise address how the accepted employment injury caused any impairment to a scheduled member of the body.

Although appellant contends that she is entitled to a schedule award for permanent impairment of her upper extremities due to the accepted work-related condition, she has the burden of proof to establish entitlement to a schedule award.<sup>14</sup> She has not submitted medical evidence supporting that she has reached maximum medical improvement or that she sustained permanent impairment to a scheduled member of the body causally related to her accepted condition.

### **CONCLUSION**

The Board finds that appellant failed to establish that she sustained permanent impairment due to her accepted cervical condition.

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<sup>12</sup> See *supra* notes 6-7; see also *L.H.*, 58 ECAB \_\_\_ (Docket No. 06-1691, issued June 18, 2007) (the question of when maximum medical improvement has been reached is a factual one that depends upon the medical findings in the record; the determination of such date is to be made in each case on the basis of the medical evidence).

<sup>13</sup> A.M.A., *Guides* 392.

<sup>14</sup> *D.H.*, 58 ECAB \_\_\_ (Docket No. 06-2160, issued February 12, 2007). A description of a claimant's impairment must be obtained from his or her physician which is 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. *James E. Archie*, 43 ECAB 180 (1991); *Patricia J. Lieb*, 42 ECAB 861 (1991).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 14, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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