United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 09-232**
	)	**Issued: November 16, 2009**
DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER, Patuxent River, MD, Employer	)	

Appearances:
J. Steven Huffines, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2008 appellant, through her attorney, filed a timely appeal of an October 6, 2008 merit decision by an Office of Workers' Compensation Programs' hearing representative finding that she had no permanent impairment. 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 has established that she sustained employment-related permanent impairment of her right upper extremity warranting a schedule award.

FACTUAL HISTORY

This is the second appeal in this case. On October 15, 1992 appellant injured her right hand and arm while retrieving a file from a back file cabinet. On June 2, 1993 the Office accepted her claim for strain of the right forearm. It also accepted her claim for cervical radiculitis, right ulnar neuropathy, brachial neuritis or radiculitis on the right and right brachial plexus lesions. Appellant filed a recurrence of disability claim on February 8, 1996, alleging that

she sustained a recurrence of disability on December 13, 1995. The Office denied this claim on March 6, 1996. Appellant requested an oral hearing on April 11, 1996. The hearing representative affirmed the Office's March 6, 1996 decision on November 18, 1996. The Office affirmed its decision on September 4, 1997.

By decision dated October 5, 1999, the Board found the case not in posture for decision and remanded appellant's claim for recurrence of disability to the Office for additional development of the medical evidence.[1] The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

On May 7, 1999 appellant underwent a nerve conduction study (NCS) and an electromyography (EMG) scan report which showed mild right C6-7 radiculopathy.

In a report dated April 20, 2001, Dr. Baljeet S. Sethi, a Board-certified neurologist, reviewed appellant's diagnostic studies and noted that her multiple EMG scan revealed evidence of mild cervical nerve root irritation and that her vascular studies were consistent with neurogenic type of thoracic outlet syndrome. He opined that appellant had initially sustained a brachial plexopathy related to the October 7, 1992 employment injury and subsequently developed thoracic outlet syndrome also related to her employment injury. Dr. Sethi noted in a diagnosis of thoracic outlet syndrome most of the studies and examinations were usually negative. Dr. Michele T. Cerino, a Board-certified surgeon, opined that appellant's arterial evaluation was consistent with neurogenic thoracic outlet syndrome.

Appellant underwent electrodiagnostic testing on January 26, 2002 involving the somatosensory evoked potentials. Left ulnar somatosensory evoked potential and median somatosensory evoked potentials suggested that there was a lower brachial plexus involvement indicating thoracic outlet syndrome of a neurogenic type.

The Office denied appellant's claim for a recurrence of disability and for permanent impairment on February 21, 2002. Appellant requested an oral hearing. By decision dated May 1, 2003, the hearing representative remanded the claim for additional review of the medical evidence. He noted that the opinion of a second opinion specialist was not sufficient to resolve the issues of disability or permanent impairment.

The Office referred appellant to Roger L. Raiford, a Board-certified orthopedic surgeon, to review the medical evidence. On December 11, 2003 Dr. Raiford reviewed appellant's history of injury and medical treatment. He mentioned appellant's electrodiagnostic testing including EMG scans and the somatosensory evoked potentials which demonstrated a thoracic outlet syndrome of the neurogenic type. Dr. Raiford also discussed Dr. Cerino's arterial evaluation. He opined that appellant had permanent partial impairment of the right upper extremity secondary to a neurogenic type of thoracic outlet syndrome which became chronic around 1995. Dr. Raiford found that appellant had a Grade 2 sensory deficit of 70 percent or 18 percent impairment of the right upper extremity.[2] He found that appellant had chronic disability due to

[1] Docket No. 98-619 (issued October 5, 1999).

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) 482, Table 16-10; 490, Table 16-14.

her accepted conditions. The Office accepted appellant's claim for a recurrence of disability beginning on August 21, 2002.

In a report dated June 16, 2004, Dr. Harry Kerasidis, a Board-certified neurologist, diagnosed reflex sympathetic dystrophy (RSD) as a result of appellant's accepted employment injury. He noted that appellant underwent stellate ganglion blocks, which did not alter her condition and opined that she had reached maximum medical improvement.

On April 6, 2006 Dr. Elizabeth G. Forrest, a Board-certified physiatrist, opined that appellant had 18 percent impairment of the upper extremity due to sensory deficit and pain.

Appellant filed a claim for a schedule award on February 27, 2006. On March 9, 2007 Dr. Raiford found tenderness to palpation in the cervical region on the right side, equal deep tendon reflexes and no motor deficits. He stated that there was diminished sensation on two-point discrimination in the right thumb and index finger and increased discomfort in the right shoulder. Dr. Raiford found abduction of 120 degrees, three percent impairment;[3] adduction of 50 degrees, not a ratable impairment,[4] flexion of 110 degrees, 5 degrees of impairment,[5] extension of 50 degrees, not a ratable impairment,[6] external rotation of 70 degrees, not a ratable impairment and internal rotation of 45 degrees, two percent impairment.[7] He found that appellant had a total 10 percent impairment of the upper extremity due to loss of range of motion. Dr. Raiford further found that appellant had a Grade 2 sensory deficit of 70 percent and unilateral sensory deficit of the brachial plexus of 25 percent for 18 percent impairment of the right upper extremity. He combined the impairments to total 26 percent impairment of the right upper extremity.

On August 17, 2007 the Office medical adviser opined that appellant had no permanent impairment. He stated that appellant's last diagnostic study in 1999 was negative for entrapment neuropathy of the upper extremity and showed no evidence of brachial plexus neuritis. The Office medical adviser stated that there was no evidence of loss of motion of the elbow. He found no evidence to support ongoing symptoms related to thoracic outlet syndrome. In a report dated September 28, 2007, the Office medical adviser stated that appellant had no impairment of her right elbow under the A.M.A., *Guides*. As to brachial plexus neuritis and thoracic outlet syndrome, appellant's NCS were negative. The Office medical adviser stated that these tests indicated no ongoing pathology to nerves of the brachial plexus which would lead to a thoracic outlet syndrome. He concluded, "[T]he only basis for an impairment rating as it relates to the brachial plexus neuritis and/or thoracic outlet syndrome would be if there was some residual nerve impairment of impingement and this does not exist."

[3] A.M.A., *Guides* 477, Table 16-43.

[4] *Id.*

[5] *Id*. at 476, Figure 16-40.

[6] *Id.*

[7] *Id*. at 479, Figure 16-46.

By decision dated December 19, 2007, the Office denied appellant's claim for a schedule award.

Appellant requested an oral hearing on January 3, 2008 which was held on July 2, 2008. In a report dated July 30, 2008, Dr. Cerino reviewed appellant's history of injury and provided findings on physical examination. She stated that some of appellant's symptoms were consistent with a neurogenic type of thoracic outlet syndrome, but that her physical examination failed to establish that diagnosis. Dr. Cerino stated that the diagnosis of a neurogenic type of thoracic outlet syndrome was suspected only based on historical findings.

By decision dated October 6, 2008, the hearing representative affirmed the December 19, 2007 decision, finding that appellant had not submitted sufficient medical evidence to establish any permanent impairment of her right upper extremity. He found that Dr. Raiford's July 9, 2007 report of 26 percent impairment was not sufficiently detailed or rationalized on the issue of permanent impairment. The hearing representative noted that the Office medical adviser reviewed the medical records and found no evidence of loss of range of motion of the right elbow or other permanent impairment and that electrodiagnostic testing did not support an entrapment neuropathy or other pathology of the brachial plexus.

On appeal, appellant contends that the Office should have referred her to an impartial medical examiner and relied on outdated medical examinations in denying her claim.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulations[9] 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 regulations as the appropriate standard for evaluating schedule losses.[10] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[11]

ANALYSIS

The Office accepted appellant's claim for strain right forearm, cervical radiculitis and right ulnar neuropathy as well as brachial neuritis or radiculitis on the right and right brachial

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id.*

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

plexus lesions. Appellant filed a claim for a schedule award. Dr. Raiford opined that appellant had permanent partial impairment of the right upper extremity secondary to a neurogenic type of thoracic outlet syndrome, which became chronic around 1995. He found that appellant had a Grade 2 sensory deficit which is defined as "decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility), with abnormal sensations or moderate pain, that may prevent some activities" and encompasses a sensory deficit of 61 to 80 percent.[12] Dr. Raiford advised that appellant had 70 percent sensory deficit or 18 percent impairment to the right upper extremity. He reexamined appellant on March 9, 2007 and found abduction of 120 degrees, adduction of 50 degrees, flexion of 110 degrees, extension of 45 degrees, external rotation of 70 degrees and internal rotation of 45 degrees. This totaled 10 percent impairment of the upper extremity due to loss of range of motion. Dr. Raiford reiterated that appellant had a Grade 2 sensory deficit of 70 percent and unilateral sensory deficit of the brachial plexus of 25 percent for 18 percent impairment of the right upper extremity. He combined the impairments to total 26 percent impairment of the right upper extremity.

The Office medical adviser disagreed not with Dr. Raiford's application of the A.M.A., *Guides*, but with his conclusion that appellant had developed thoracic outlet syndrome as a result of her accepted injury and that she had permanent impairment due to this condition. His opinion was based on a review of the medical evidence of record.

Dr. Raiford's report contains a diagnosis and an opinion that appellant has permanent impairment due to her accepted employment injuries. While this report is not sufficient to meet appellant's burden of proof, it generally supports her claim for permanent impairment and is sufficient to require further development of her claim.[13] While a claimant has the burden of proof to establish her claim, the Office has a responsibility in the development of evidence. Once it has begun an investigation of a claim, the Office must pursue the evidence as far as reasonably possible.[14] As the Office referred appellant to Dr. Raiford, to determine the extent of her permanent impairment, it should further develop the medical evidence as appropriate to determine whether she has any permanent impairment as a result of her accepted conditions.

CONCLUSION

The Board finds the case not in posture for decision.

[12] A.M.A., *Guides* 482, Table 16-10.

[13] *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

[14] *Edward Schoening*, 41 ECAB 277, 282 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for additional development consistent with the findings of the Board.

Issued: November 16, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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