

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

B.S., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL CENTER
ANNEX, Atlanta, GA, Employer**

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**Docket No. 09-542
Issued: November 6, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 19, 2008 appellant filed a timely appeal from the March 4 and November 17, 2008 merit decisions of the Office of Workers' Compensation Programs granting a schedule award for eight percent impairment to the left arm. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has more than eight percent impairment of the left upper extremity for which he received a schedule award.

On appeal, appellant contends that the rating of his attending physician establishes greater impairment.

FACTUAL HISTORY

On October 28, 2004 appellant, then a 35-year-old clerk, filed an occupational disease claim for cervical radiculopathy that was aggravated by his federal duties of keying, pulling, pushing and dispatching from a small parcel bundle sorter. On December 1, 2004 the Office

accepted his claim for aggravation of cervical radiculopathy. On May 3, 2005 an Office medical adviser reviewed the medical records and found that appellant had a five percent impairment of his left upper extremity. On May 23, 2005 appellant filed a claim for a schedule award. On July 6, 2005 the Office granted a schedule award for five percent impairment of the left arm.

By letter received November 23, 2005, appellant requested reconsideration of the July 6, 2005 decision, noting ongoing chronic pain to his left upper extremity and contending that his left and right upper extremity were both impaired with limited use. He was currently receiving chiropractic treatment. Appellant submitted an October 25, 2005 report by Dr. David D. Hubbel, a Board-certified physiatrist, who discussed his condition.¹

By decision dated December 22, 2005, the Office denied appellant's request for reconsideration as he did not provide sufficient medical documentation to support that he had increased measurable impairment rating established by the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). By decision dated October 3, 2006, it denied appellant's claim for a schedule award for his back.

On February 5, 2008, Dr. Ralph D'Auria, a Board-certified physiatrist, advised that appellant reached maximum medical improvement on that date. He noted the nerve root affecting appellant was the left C6 root. Dr. D'Auria rated permanent impairment of the upper extremity due to sensory deficit or pain as 2 percent (20 percent multiplied by 8 percent) impairment due to loss of strength as 17.5 percent; and that this equaled a total 20 percent impairment of the left upper extremity.

In a report dated February 19, 2008, the Office medical adviser noted that appellant had left C6-7 foraminal stenosis, which was treated conservatively. He noted that appellant had a Grade 4 sensory deficit and a Grade 4 motor deficit of 20 percent pursuant to the A.M.A., *Guides*.² The Office medical adviser noted that the maximum impairment due to combined sensory and motor deficits of C6 is 40 percent.³ Multiplying the 40 percent maximum under Table 16-13 by the 20 percent deficit grade results in 8 percent impairment to the left upper extremity. The Office medical adviser stated that Dr. D'Auria's 20 percent rating "does not follow the A.M.A., *Guides* and guidelines issued by this [O]ffice."

By decision dated March 4, 2008, the Office granted a schedule award for eight percent impairment to the left arm. As appellant had previously received a schedule award for five percent impairment, the Office found that he was entitled to an additional three percent.

¹ Dr. Hubbel indicated that appellant had some trigger point activity in the left upper trapezius and left rhomboid and no trigger point activity on the right side. He noted no muscle spasms. Dr. Hubbel indicated that the cervical range of motion in the left axial rotation bothers appellant's symptoms the most on the left side. He noted reflexes at 2+ with no upper motor neuron signs and no sensory or motor deficits. Dr. Hubbel indicated that the shoulder range of motion was completely intact and that no scapular winging was identified. He recommended a magnetic resonance imaging scan and that, thereafter, one could determine whether he may benefit from further chiropractic care, physical therapy, trigger-point injections or cortisone based injection.

² A.M.A., *Guides* 482, Table 16-10 and 484, Table 16-11.

³ A.M.A., *Guides* 489, Table 16-13.

In an April 16, 2008 report, Dr. Howard B. Krone, an orthopedic surgeon, examined appellant, x-rays of his cervical spine and discussed his treatment options with him, including the possibility of an anterior cervical disc fusion.

By letter dated September 12, 2008, appellant requested reconsideration of the March 4, 2008 schedule award decision. On October 1, 2008 the Office referred the record to the medical adviser for evaluation. Appellant noted that, while the attending physician found a C7 dermatomal pain in the left upper extremity, the physical examination failed to disclose any weakness or reflex changes. Based on the description of pain, the Office medical adviser assigned a Grade 3 deficit of 50 percent. He noted that 50 percent multiplied by the 5 percent maximum for C7 sensory loss was 2.5 or 3 percent impairment to the left arm.

By decision dated November 17, 2008, the Office determined that appellant did not have greater than eight percent impairment to his left arm.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a latter date causally related to his employment injury.⁸

ANALYSIS

The Office granted appellant schedule awards for a total impairment of eight percent to his left arm. Appellant applied for an increased schedule award. In a February 5, 2008 report, Dr. D'Auria, a treating physician, stated that appellant had 20 percent impairment of the left upper extremity. However, Dr. D'Auria did not provide any reference to the A.M.A., *Guides* in making his impairment rating. He failed to provide a rationalized opinion explaining how he arrived at this rating. The Office medical adviser reviewed the medical evidence and determined that the record did not support more than eight percent impairment to the left arm. The Board finds that the Office medical adviser properly determined that appellant had eight percent

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ *Id.*

⁸ *Linda T. Brown*, 51 ECAB 115 (1999).

impairment. The Office medical adviser correctly assigned appellant a 20 percent sensory deficit of Grade 4 and a similar motor deficit loss. He multiplied this by 40 percent (the maximum allowed for combined motor and sensory deficit of the C6 nerve) to find 8 percent impairment.⁹ Based on his calculations, the Office properly granted schedule awards for eight percent impairment of the left upper extremity.

On reconsideration, appellant submitted the report of Dr. Krone. A new Office medical adviser noted that Dr. Krone found a C7 dermatomal pattern of pain and numbness in the left upper extremity. Physical examination did not disclose any weakness or reflex changes. The medical adviser found 3 percent impairment of the left arm based on a sensory deficit of 50 percent multiplied by the maximum sensory loss of 5 percent. On appeal, appellant noted that Dr. Krone was not evaluating him for the purpose of making an impairment rating. Rather, Dr. Krone saw appellant for evaluation with regard to further surgery. The Board notes that there is no medical evidence based on a proper application of the A.M.A., *Guides* that establishes that appellant has more than eight percent impairment of the left arm.

CONCLUSION

The Board finds that the Office failed to establish that appellant had greater than an eight percent impairment of the left upper extremity, for which he already received a schedule award.

⁹ A.M.A., *Guides*, 484, Table 16-11; 489, Table 16-13.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 17 and March 4, 2008 are affirmed.

Issued: November 6, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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