

disability after March 3, 2004 causally related to her accepted conditions.¹ By decision dated May 9, 2007, the Board found that the Office properly denied appellant's request for a hearing; however, the record contained a timely reconsideration request of a July 27, 2005 schedule award denial. The Board instructed the Office to issue an appropriate decision in that regard.² In a January 11, 2008 decision, the Board found that the Office improperly denied appellant's request for a merit review pursuant to section 8128(a). The case was remanded to the Office to determine if appellant had established that she had any permanent impairment due to her accepted conditions. The Office was to review a June 9, 2006 report from Dr. Bialecki-Haase.³ The law and the facts of the previous Board decisions are incorporated herein by reference.

On June 9, 2006 Dr. Bialecki-Haase reviewed appellant's history of injury, noting that she stopped work in 2001. Appellant complained of daily radiating neck pain with numbness and tingling in her right arm and hand and loss of right arm strength and endurance for any repetitive or sustained activity. On physical examination, there was no atrophy of upper extremity musculature, weakness of right biceps, deltoid and triceps strength on manual testing, and no sensory abnormalities. Dr. Bialecki-Haase advised that appellant had reached maximum medical improvement. She referred to Table 16-11 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),⁴ to find that appellant had a Grade 4 deficit of 20 percent. She then obtained the maximum impairment for the three affected nerves from Table 16-15. Dr. Bialecki-Haase noted the maximum motor deficit for deltoid weakness of 35 percent which, when multiplied by 20 percent, yielded a 7 percent impairment. The maximum motor deficit for biceps weakness of 25 percent, when multiplied by 20 percent yielded a 5 percent impairment. The maximum motor deficit for triceps weakness of 42 percent, when multiplied by 20 percent, yielded an 8.4 percent impairment. This totaled a right upper extremity impairment of 20.4 percent, rounded off to a 20 percent impairment.

¹ Docket No. 05-110 (issued June 8, 2005). Appellant sustained injury on November 8, 1997 when struck in the back by a mail cart. The Office accepted lumbar and cervical sprain and aggravation of cervical radiculitis and right carpal tunnel syndrome. Following additional development, in 2002 the Office accepted a ruptured cervical disc at C5-6 and authorized surgery.

² Docket No. 06-2164 (issued May 9, 2007). On July 14, 2005 appellant filed a schedule award claim. By decision dated July 27, 2005, the Office found that she was not entitled to a schedule award. The Office explained that, as her compensation benefits had been terminated because she no longer had residuals of her employment injury, she was not entitled to a schedule award. It provided appeal rights and attached the appropriate form. On June 21, 2006 appellant, through counsel, noted that a schedule award claim had been filed and submitted a medical report from Dr. Dee Ann Bialecki-Haase, Board-certified in family medicine.

³ Docket No. 07-1786 (issued January 11, 2008).

⁴ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

On February 11, 2008 the Office referred Dr. Bialecki-Haase's report and a statement of accepted facts to an Office medical adviser for review. In a February 20, 2008 report, the Office medical adviser agreed with Dr. Bialecki-Haase's opinion that appellant had a 20 percent impairment of the right upper extremity.

By decision dated April 3, 2008, the Office denied appellant's claim for a schedule award on the grounds that Dr. Bialecki-Haase's report was insufficient to establish that the impairment found was a result of the accepted work injuries. It noted that appellant's compensation benefits had been terminated on March 3, 2004 on the basis that she no longer had residuals of any work-related injury which, in turn, was affirmed by the Board.

On April 7, 2008 appellant, through her attorney, requested a telephonic hearing that was held on August 11, 2008. At the hearing, appellant's attorney argued that she was entitled to schedule award compensation.

By decision dated October 1, 2008, an Office hearing representative affirmed the April 3, 2008 decision.

LEGAL PRECEDENT

Pursuant to section 8107 of the Federal Employees' Compensation Act⁵ and section 10.404 of the implementing federal regulations,⁶ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*⁷ has been adopted by the Office and the Board has concurred in such adoption as an appropriate standard for evaluating schedule losses.⁸

Chapter 16 provides the framework for assessing upper extremity impairments.⁹ Section 16.5b of the A.M.A., *Guides* describes the methods for evaluating upper extremity impairments due to peripheral nerve disorders and provides that the severity of motor deficit or weakness should be classified according to Table 16-11.¹⁰ The maximum impairment for the affected nerves are listed at Table 16-15 for the nerve structure involved.¹¹ The grade of severity for each

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ A.M.A., *Guides*, *supra* note 4.

⁸ See *Joseph Lawrence, Jr.*, *supra* note 4; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁹ A.M.A., *Guides*, *supra* note 4 at 433-521.

¹⁰ *Id.* at 484.

¹¹ *Id.* at 492.

deficit is then to be multiplied by the maximum upper extremity impairment value for the nerve involved to reach the upper extremity impairment for each function. Office procedures provide that, after obtaining all necessary medical evidence, the file should be referred to the Office medical adviser for review and opinion on the percentage of impairment.¹²

ANALYSIS

The Board finds that this case is not in posture for decision as to whether appellant met her burden of proof to establish that she is entitled to a schedule award for a 20 percent impairment of the right upper extremity.

In its June 8, 2005 decision, the Board found that appellant no longer had continuing residuals of any employment-related condition and affirmed the March 3, 2004 termination of appellant's compensation benefits.¹³ The determination that appellant no longer had residuals of any employment-related condition as of March 3, 2004, however, does not preclude consideration of a schedule award for any impairment related to her accepted conditions discovered or realized at a later date. Office regulations and procedures provide for payment of compensation when a claimant sustains a recurrence of disability and for an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to the employment injury.¹⁴ The relevant conditions accepted were an aggravation of cervical radiculitis, muscle spasms in the neck and a ruptured disc at C5-6 with surgical correction.

Clearly the medical reports support that appellant has permanent impairment. In the June 9, 2006 report of Dr. Bialecki-Haase, appellant was found to have reached maximum medical improvement and that appellant demonstrated weakness, or loss of strength, of the right biceps, deltoid and triceps on manual testing with no sensory abnormalities. Dr. Bialecki-Haase advised that, under Table 16-11 of the A.M.A., *Guides*, appellant had a Grade 4 classification for motor weakness involving her right biceps, triceps and deltoid muscles, which she rated a 20 percent deficit. Dr. Bialecki-Haase then properly utilized Table 16-15 to find the maximum motor deficit for deltoid weakness of 35 percent which, when multiplied by 20 percent, yielded a 7 percent impairment. The maximum motor deficit for biceps weakness is 25 percent which, when multiplied by 20 percent, is 5 percent impairment. The maximum motor deficit for triceps weakness is 42 percent which, when multiplied by 20 percent, is an 8.4 percent impairment. When added, this is a total impairment of 20.4 percent, rounded down to a 20 percent impairment.¹⁵ In a February 20, 2008 report, the Office medical adviser agreed with Dr. Bialecki-Haase's rating and her application of the A.M.A., *Guides*. He concurred that

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002).

¹³ *Supra* note 1.

¹⁴ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (March 1995); *see* A.A., 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008).

¹⁵ A.M.A., *Guides*, *supra* note 4 at 487, 492.

appellant had a 20 percent impairment of the right upper extremity. This was in accordance with the appropriate tables and grading schemes of the A.M.A., *Guides*.

The Office summarily dismissed appellant's claim for a schedule award in its decision dated April 3, 2008 by noting: "As there is no longer a work[-]related condition, there is no medical condition on which a schedule award is payable." This finding is inconsistent with the Office procedure manual and existing Board case law.¹⁶ This decision was later affirmed by the Office hearing representative by decision dated October 1, 2008. The Office found that the report of Dr. Bialecki-Haase "does not equal or overcome the opinion of Dr. Pollak." Further it noted, "Dr. Bialecki-Haase gave no rationalized medical opinion explaining how and why the claimant's 20 percent PPI [permanent partial impairment] of the RUE [right upper extremity] was due to any or all of the claimant's work injuries, particularly in view of Dr. Pollak's opinion that the claimant had objectively recovered from her work injuries." By affirming the April 3, 2008 decision, and by reverting to Dr. Pollak, the Board finds that the Office is using the wrong standard to review this case. The fact that no residuals were found in 2004 does not preclude a later finding of a schedule award, should permanent impairment later be found to be causally related to the original accepted injuries.

Dr. Bialecki-Haase found permanent impairment due to appellant's cervical condition resulting in 20 percent impairment to the right arm and the Office medical adviser agreed. The Office must consider this evidence, and further develop the evidence, to determine if the permanent impairment is causally related to the accepted injury. Appellant bears the burden of proof that the impairment is indeed causally connected to the original accepted injury, but the Office must not summarily deny appellant's claim for a schedule award on the basis that there was an earlier finding that she had no residuals, sufficient to terminate wage-loss compensation and medical benefits. Proceedings under the Act are not adversary in nature and the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.¹⁷ On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation regarding whether appellant's permanent impairment is a result of the accepted employment injury and, if so, the extent of the impairment.¹⁸ After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁶ *Supra* note 14.

¹⁷ *Claudia A. Dixon*, 47 ECAB 168 (1995).

¹⁸ *See* 20 C.F. R. § 10.408; *Debra S. Judkins*, 41 ECAB 616 (1990).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2008 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for action consistent with this decision.

Issued: October 9, 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