

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUANITA E. MILES and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

*Docket No. 01-377; Submitted on the Record;
Issued March 4, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has more than a five percent permanent impairment of her right arm and a five percent permanent impairment of her left arm for which she received schedule award compensation.

The Board finds that appellant has no more than a five percent permanent impairment of her right arm and a five percent permanent impairment of her left arm for which she received schedule award compensation.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative, and substantial evidence,² including that she sustained an injury in the performance of duty as alleged and that her disability, if any, was causally related to the employment injury.³ The schedule award provision of the Act⁴ and its implementing regulation⁵ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

On October 4, 1993 appellant, then a 44-year-old distribution clerk, sustained thoracic, cervical and bilateral shoulder sprains, spinal subluxations, and a C3-4 disc bulge when she unloaded mail hampers and distributed a heavy volume of mail to carriers. Appellant stopped work but later returned to the employing establishment in a limited-duty position.⁶

Appellant claimed that she was entitled to a schedule award for permanent impairment of her arm and, by award of compensation dated September 29, 1999, the Office granted appellant a schedule award for a three percent permanent impairment of her right arm and a three percent permanent impairment of her left arm. The Office based its award on the September 23, 1999 report of an Office district medical consultant who had determined that appellant had a three percent impairment of each arm due to sensory deficit or pain.⁷ The Office district medical consultant based her calculation on the medical evidence of record, including a September 7, 1999 report of Dr. Stanley Baer, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation. In his report, Dr. Baer noted that appellant complained of constant numbness in her hands and pain in her neck, shoulders and arms which worsened with repeated lifting, pushing and pulling.⁸ He indicated that appellant had normal range of motion and strength in her shoulders and upper extremities.

Appellant submitted a November 3, 1999 report in which Dr. Robert Minkowsky, an attending physician Board-certified in physical medicine and rehabilitation, provided an assessment of her neck, shoulder and upper extremity conditions. Dr. Minkowsky indicated that appellant reported that she experienced constant pain of a mild nature that radiated from the neck to the shoulders bilaterally. He noted that appellant further reported that the pain became moderate with activities and moderate to severe when the weather was inclement.⁹ Dr. Minkowsky indicated that appellant had limited motion upon flexion and abduction of her arms, but that she did not exhibit any weakness or atrophy of her arms.

The Office determined that there was a conflict in the medical evidence between the opinions of Drs. Baer and Minkowsky regarding the extent of appellant's permanent impairment.¹⁰ The Office indicated that the report of Dr. Minkowsky posited that appellant had

⁶ The Office had previously accepted that on April 12, 1992 appellant sustained shoulder and back strains while loading mail trays. She returned to work in June 1992.

⁷ The Office district medical consultant determined that appellant's symptoms represented a Grade 2 level of pain (equaling 25 percent) and then applied this figure to the maximum values for the involved nerve distributions; see A.M.A., *Guides* 48, 54, Tables 11, 15 (4th ed. 1993).

⁸ He indicated that appellant's shoulder pain was slight but progressed at times to the moderate or severe level depending on her activity.

⁹ Dr. Minkowsky noted that appellant self-limited some of her activities.

¹⁰ "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

impairment due to limited motion of her arms, whereas the report of Dr. Baer indicated that appellant did not have such limitation. The Office referred appellant and the case record to Dr. Bryan Barber, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding the extent of her arm impairment.

In a report dated December 8, 1999, Dr. Barber indicated that appellant had limited flexion and abduction motion of her arms bilaterally. He further noted that examination did not reveal any weakness in the upper extremity muscles and indicated that the grip strength testing was invalid due to lack of effort. Dr. Barber indicated that appellant experienced pain in her cervical and shoulder areas which was moderate in nature. In a report dated January 16, 2000, an Office district medical consultant evaluated the reports of Dr. Barber and determined that appellant had a five percent permanent impairment of her right arm and a five percent permanent impairment of her left arm. By award of compensation dated January 20, 2000, the Office determined that appellant was entitled to a schedule award which provided, in total, for a five percent permanent impairment of her right arm and a five percent permanent impairment of her left arm. By decision dated October 30, 2000, the Office affirmed its January 20, 2000 decision.¹¹

The Board notes that the Office properly relied on the opinion of the Office district medical consultant, as it interpreted the findings of Dr. Barber, in determining that appellant had a five percent permanent impairment of her right arm and a five percent permanent impairment of her left arm. The Office district medical consultant properly determined that appellant had a 1 percent impairment due to limited bilateral arm flexion of 165 degrees and a 1 percent impairment due to limited bilateral arm abduction of 155 degrees.¹² She also correctly determined that the pain in both of appellant's arms warranted a 60 percent sensory deficit (the highest percentage for the Grade 3 level).¹³ The Office district medical consultant then properly multiplied this figure by the five percent maximum value associated with the C5 nerve distribution in order to arrive at a three percent impairment rating for each arm based on sensory deficit or pain.¹⁴

Appellant submitted a July 24, 2000 report of Dr. Robert Harrison, an attending Board-certified internist specializing in occupational medicine, who indicated that he agreed with the prior assessment of appellant's impairment based on limited motion and motor loss. He suggested that a different method of rating appellant's impairment due to pain should be performed, but he did not adequately explain how such a calculation should be performed in

¹¹ In an accompanying memorandum, the Office suggested that it was denying appellant's request for merit review. However, the Office actually performed a merit review of appellant's claim.

¹² See A.M.A., *Guides* 43-44, Figures 38, 41 (4th ed. 1993).

¹³ This assessment of appellant's pain level is in accordance with the findings of Dr. Barber as well as the other medical evidence of record; see A.M.A., *Guides* 48, Table 11.

¹⁴ See A.M.A., *Guides* 51, Table 13. She also noted that appellant did not have arm weakness and therefore was not entitled to an impairment rating for motor loss.

accordance with the relevant standards of the A.M.A., *Guides*.¹⁵ In the absence of such an explanation, the report of Dr. Harrison is of limited probative value on the relevant issue of the present case.¹⁶

As the report of the Office district medical consultant provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.¹⁷ Therefore, the Office properly determined that appellant has no more than a five percent permanent impairment of her right arm and a five percent permanent impairment of her left arm for which she received schedule award compensation.

The October 30 and January 20, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
March 4, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁵ Dr. Harrison stated that appellant's pain "should be characterized as moderate, frequent, increasing to moderate, constant, in that it results in an extensive diminution of her ability to carry out specific activities of daily living." He did not provide any further description of appellant's pain condition or attempt to assign a pain grade under the specific standards of the A.M.A., *Guides*; see A.M.A., *Guides* 48, Table 11. It is not readily apparent that this does not constitute Grade 3 level under Table 11.

¹⁶ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

¹⁷ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).