United States Department of Labor
Employees' Compensation Appeals Board

DIANE J. MITCHELL, Appellant	)	
and	)	**Docket No. 04-974**
	)	**Issued: July 29, 2004**
U.S. POSTAL SERVICE, BULK MAILING CENTER, Philadelphia, PA, Employer	)	

Appearances:
Diane J. Mitchell, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 3, 2004 appellant filed a timely appeal from the February 5, 2004 merit decision of the Office of Workers' Compensation Programs denying her claim for an additional impairment from a three percent permanent impairment of the right upper extremity. Under 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 entitlement to an additional schedule award.

FACTUAL HISTORY

On June 4, 2000 appellant, then a 33-year-old acting supervisor, filed a traumatic injury claim alleging that on that day she cut her right wrist while reaching into the back of a file cabinet drawer. On October 27, 2000 Dr. John Taras, appellant's treating physician and a Board-certified orthopedic surgeon, performed surgery on the right radial sensory nerve and on

December 14, 2000 released her to return to light duty effective December 16, 2000. A functional capacity evaluation was performed on April 27, 2001 and appellant was released to return to full duty on June 11, 2001.[1] The Office accepted a right wrist laceration, right radial nerve neuroma and right radial nerve exploration and resection performed on October 27, 2000.

On September 4, 2002 appellant filed a claim for a schedule award. On September 5, 2002 Dr. Taras stated that there was decreased sensation of the volar aspect of appellant's right index finger and dysesthesia in the dorsal radial sensory nerve distribution. He also noted a positive Tinel's sign over her scar area and normal range of motion finding in the wrists and fingers. Dr. Taras opined that appellant had a permanent deficit of her right dorsal sensory nerve secondary to June 4, 2000 work-related injury. He further noted that her current work activities seem to aggravate her condition and recommended that her repetitive work activities be limited to 15 minutes per hour and that she be limited from lifting no more than 25 pounds with her right arm. On October 1, 2002 the Office requested that Dr. Taras provide an impairment rating. In a letter dated October 7, 2002, Dr. Taras stated that impairment ratings were performed for a fee of $1,500.00. In a report also dated that day, Dr. Taras placed appellant on permanent restriction, limiting her keyboard activities to 20 minutes per hour and no lifting, pushing, pulling or carrying more than 50 pounds.

On October 17, 2002 the Office referred appellant to Dr. Anthony Salem, Board-certified in orthopedic surgery, for a second opinion medical evaluation. On October 25, 2002 Dr. Taras performed surgery for neurolysis of the right dorsal radial sensory nerve. On October 29, 2002 the Office noted that payment for medical benefits ended on August 30, 2001.

In a report dated November 19, 2002, Dr. Salem related appellant's subjective opinion that she could not work normally because of right wrist pain due to her June 4, 2000 work-related injury. Appellant noted symptoms of numbness and pain in the right wrist but also noted that her second surgery on October 27, 2002 eliminated her paresthesia. He then recounted appellant's history of injury including surgeries on October 27, 2000 and October 25, 2002.[2] He noted that appellant returned to light duty after each surgery and had a normal electromyogram (EMG) evaluation on February 11, 2002. Dr. Salem noted also a magnetic resonance imaging (MRI) scan performed on February 6, 2002 which revealed cystic changes in the distal ulnar and a possible scapholunate sprain with questionable widening of the interspace. Upon examination, Dr. Salem reported full range of motion of her right wrist and no evidence of atrophy. He stated that, although he found a negative Tinel's sign of the median nerve, she had fullness, exquisite and significant pain over the radial styloid. She also had marked pain on abduction with a positive Finkelstein's test. Dr. Salem read right wrist x-rays taken that day as normal, commenting that the cystic changes revealed in the MRI scan were no longer visible. Dr. Salem noted Dr. Taras' opinion that appellant had a permanent deficit of the right dorsal sensory nerve secondary to the original laceration. However, he did not agree with Dr. Taras' opinion that appellant's current work activities aggravated her condition, noting that the nerve problems were

[1] On August 22, 2001 appellant stated that on August 12, 2001 she sustained a recurrence of disability. By decisions dated November 19, 2001 and April 25, 2002, the Office denied her recurrence claim. This case is not before the Board in this appeal.

[2] Dr. Salem stated that the second surgery was performed on October 27, 2002. It was October 25, 2002.

resolved by surgery. However, he noted that her prior trauma and surgeries led to her current condition of de Quervain's disease from which she continued to be symptomatic. He based his opinion on physical examination, normal x-rays of the right wrist, a relatively normal functioning nerve and no paresthesia. Dr. Salem recommended either steroid injections or surgery to address this condition. He added that there was no permanent functional loss of the use of the right hands.

On January 3, 2003 the Office medical adviser reviewed Dr. Salem's report and determined that appellant had a three percent impairment of the right arm and that her date of maximum medical improvement was November 19, 2002. He stated that the maximum impairment for pain and decreased sensation of the radial nerve was 5 percent and that pain that interferes with some activities is Grade 3 or 60 percent. Dr. Salem then noted that 60 percent times 5 percent is a 3 percent of the right upper extremity. He also noted that after her tenosynovitis was treated to the maximum medical improvement a further schedule award may be needed.

In a letter dated June 8, 2003, the Office requested that Dr. Taras review Dr. Salem's November 19, 2002 report. The Office further advised Dr. Taras that it had accepted de Quervain's tenosynovitis as a work-related injury and that appellant may file a claim for an additional schedule award when she reached maximum medical improvement from that condition.

On January 10, 2003 the Office awarded appellant a three percent permanent impairment for the right upper extremity. The period of award ran for 9.36 weeks from November 19, 2002 to January 23, 2003.

On November 19, 2003 appellant filed a claim for a schedule award. In support of her claim, appellant submitted a November 10, 2003 report from Dr. Taras, who noted a familiarity with her history of injury, stating that she developed a recurrence of pain nine months after her second surgery on October 20, 2002 for a neurolysis of the right radial nerve and neurogen graft placement and that she was symptomatic with swelling, pain and some paresthesia in the area of her surgery. Upon examination that day, he reported full range of motion of her right upper extremity but also noted a positive Tinel's sign at the scar and continued symptoms in her right hand related to her neuroma and pain on palpation of her scar. Dr. Taras noted that operative and conservative treatments did not relieve her symptoms and that she most likely had a permanent partial mild disability in her right upper extremity secondary to the June 4, 2000 work injury. In a report dated November 17, 2003, Dr. Taras stated that appellant was partially disabled from October 19, 2000 to November 10, 2003, as result of her June 4, 2000 work-related lacerated wrist injury.

By letter dated December 1, 2003, the Office advised appellant to notify the Office within 30 days if her November 19, 2003 claim was a request for reconsideration of its January 10, 2003 schedule award or a new claim.

In a December 22, 2003 report, Dr. Taras stated that appellant, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A.,

Guides), appellant had reached maximum medical improvement on November 10, 2003. He found that she had full range of motion with no decrease in strength or atrophy but noted loss of sensation of the superficial radial nerve distribution and subjective complaints of chronic pain. The doctor opined that, based on a neuropsychiatric model of somatic pain resulting from actual tissue damage which interferes with work causing pain with repetitive use, appellant had a five percent impairment of the upper extremity. He further stated that his estimate was based on Figure 2, Chapter 15, of the A.M.A., *Guides* (5th ed. 2001) noting a partial sensory loss of the thumb and Table 13, Chapter 16, which listed the maximum percent impairment of upper extremity impairment due to a sensory deficit or pain as 5 percent.[3]

In a February 2, 2004 report, the Office medical adviser reviewed Dr. Taras' December 22, 2003 report and noted that the doctor did not multiply the maximum upper extremity impairment based on Table 16-13 by the grade based on description of the loss of sensation and pain using Table 16-10, page 482, of the A.M.A., *Guides*. He noted that a prior Office medical adviser report dated January 3, 2003, did make the calculation required by the A.M.A., *Guides* and that there was no basis for an additional schedule award.

By decision dated February 5, 2004, the Office denied appellant's claim for an additional impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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 regulation as the appropriate standard for evaluating schedule losses.[6]

ANALYSIS

In the instant case, the Office medical adviser, applied the A.M.A., *Guides* to the physical findings of Dr. Salem, the second opinion physician, to determine that appellant was entitled to a three percent impairment for the right upper extremity. In his January 3, 2003 report, the Office medical adviser reviewed Dr. Salem's November 19, 2002 report and noted appellant's pain and decreased sensation over the sensory branch of the radial nerve, while finding no motor impairment of permanent loss of range of motion. He then stated the maximum impairment for

[3] A.M.A., *Guides* 489, Table 13 is Table 16-13.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *See* 20 C.F.R. § 10.404; *Jacqueline S. Harris*, 54 ECAB ____ (Docket No. 02-303, issued October 4, 2002).

pain or loss to sensation of the radial nerve was 5 percent[7] and pain that interferes with some activity is Grade 3 or 60 percent[8] which when multiplied equals 3 percent impairment.[9] The Office medical adviser then found a three percent impairment of the right upper extremity which the Office awarded on January 10, 2003.

In support of an increase in her award, appellant submitted reports dated November 10 and 17, 2003 from Dr. Taras, her treating physician and a Board-certified orthopedic surgeon, who noted that she most likely had a permanent partial mild disability in her right upper extremity based on June 4, 2000 work injury and was partially disabled from October 19, 2000 to November 10, 2003, as result of her work-related injury. However, this evidence is insufficient to establish that appellant has impairment greater than three percent which she had been awarded. Dr. Taras' reports did not evaluate appellant for an impairment rating using the A.M.A., *Guides* and thus these reports are of no probative value. An award of compensation may not be made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.[10] Given appellant's prior schedule award of three percent for the right upper extremity, this evidence is insufficient to warrant an additional impairment.

In a December 22, 2003 report, Dr. Taras stated that, based on the A.M.A., *Guides*, appellant had a 5 percent impairment of the upper extremity on account of pain which interfered with work based on Table 16-13, page 489 which allowed for a 5 percent maximum upper extremity impairment based on pain. However, as noted, the A.M.A., *Guides* require that a grade classification be established based on Table 16-10 which is then multiplied by maximum impairment based on Table 16-13. Dr. Taras, however, only applied Table 16-13, finding that appellant sustained a 5 percent impairment based solely on a the maximum upper extremity impairment of sensory deficit. He failed initially to establish the percent of sensory deficit and the classification of the grade of the impairment prior to multiplying the grade with the upper extremity impairment based on Table 16-13.[11]

Since the Office medical adviser's determination of appellant's impairment is based on the examining physician's findings and complies with the A.M.A., *Guides*, the Office properly based its schedule award decision on the medical adviser's evaluation. There is no medical evidence of record, correctly based on the A.M.A., *Guides*, which establishes that appellant has no a greater than three percent impairment of the right upper extremity.

[7] A.M.A., *Guides* 492, Table 16-15.

[8] *Id*. at 482, Table 16-10.

[9] *Id*. The procedure in Table 16-11 states that the severity of the motor deficit is multiplied by the maximum impairment value to obtain the upper extremity impairment for each structure involved.

[10] *See Carolyn Sellers*, 50 ECAB 393 (1999) (medical opinion not based on the A.M.A., *Guides* is of little probative value in determining permanent impairment).

[11] A.M.A., *Guides*, *see supra* note 9.

CONCLUSION

Appellant failed to establish that she was entitled to more than a three percent impairment of the right upper extremity which the Office had previously awarded.

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member