United States Department of Labor
Employees' Compensation Appeals Board

SHIRLEY SWEET, Appellant	)	
and	)	**Docket No. 04-1999**
	)	**Issued: March 16, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer	)	

Appearances:
Shirley Sweet, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 9, 2004 appellant filed a timely appeal of the May 4, 2004 merit decision of the Office of Workers' Compensation Programs' which awarded her an additional schedule award for a 22 percent loss of function of her bilateral upper extremities and a June 24, 2004 nonmerit decision in which the Office denied her request for reconsideration. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award claim and over the Office's June 24, 2004 decision denying merit review.

ISSUES

The issues are: (1) whether appellant sustained greater than a 21 percent permanent impairment of each upper extremity, for which she received a schedule award; and (2) whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 20, 2000 appellant, then a 49-year-old distribution clerk, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome due to the requirements of her job. On December 27, 2000 the Office accepted the claim for bilateral carpel tunnel syndrome. Appellant received appropriate compensation for medical benefits and wage loss.

On December 20, 2000 appellant filed a claim for a schedule award. Following appropriate development, by decision dated March 14, 2001, the Office granted appellant a schedule award for a 10 percent permanent impairment of the right upper extremity and a 10 percent permanent impairment of the left upper extremity. The period of the schedule award ran from June 24, 1999 to September 2, 2000.[1]

Appellant also filed additional claims for a schedule award. In an undated medical report, which the Office received November 14, 2003, Dr. Harvey B. Leslie, an internist, noted that he reviewed appellant's medical records. He stated that a September 23, 2002 electromagnetic (EMG) scan revealed both median motor responses had prolonged latency with normal amplitude, while all other motor responses were normal. Both median sensory responses were absent, while all other sensory responses were normal. The needle examination of selected muscles of both arms and legs were discussed. Under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) at Table 16-15, page 492, Dr. Leslie opined that appellant had a 45 percent combined motor and sensory deficit for each wrist.[2]

In a December 4, 2003 report, an Office medical adviser reviewed Dr. Leslie's suggested impairment rating of 45 percent for bilateral carpel tunnel syndrome under the A.M.A., *Guides* and opined that the impairment rating was not compatible to office notes or to the diagnosis.

The Office referred appellant to Dr. Jeffrey Fried, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated January 6, 2004, Dr. Fried advised that he examined appellant on October 8, 2003 took x-rays of both the acromioclavicular joints with weights, ordered a functional capacity evaluation and reviewed appellant's medical records along with her history. Dr. Fried noted his physical examination findings and diagnosed bilateral carpel tunnel syndrome, left acromioclavicular joint separation, a history of right knee contusion with the magnetic resonance imaging (MRI) scan showing chondromalacia of right lateral femoral condyle and a lumbar strain with lumbar disc bulge noted on the MRI scan. He opined that the diagnoses were causally related to appellant's employment and that she still has residual loss of motion, some weakness of the hands, positive Tinel's sign, decreased motion of the back, spasm and limited left shoulder motion with deformity. He further opined that appellant could only perform light-duty work with restrictions and that she may possibly benefit from carpal

[1] Although a September 17, 2004 Statement of Accepted Facts reflects that appellant received an additional three percent permanent impairment to the left upper extremity for the period February 2 to April 8, 2001, there is no evidence in the record to verify whether appellant had received such an additional schedule award.

[2] A.M.A., *Guides* (5th ed. 2001).

tunnel releases. However, without any surgery, he advised that appellant had reached maximum medical improvement.

On February 19, 2004 the Office referred appellant to Dr. Joseph Hoffman, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 15, 2003 report, Dr. Hoffman noted that he had previously examined appellant on December 20, 2002 with regard to her work-related injuries and that he would be rendering an opinion with regard to the degree of impairment relative to her bilateral carpel tunnel syndrome. Dr. Hoffman noted his findings on examination, provided an impression of bilateral carpel tunnel syndrome, left greater than right and advised that appellant reached maximum medical improvement on January 1, 2002. Using the A.M.A., *Guides*, Tables 16-10, 16-15, pages 482, 492, with the Combined Values Chart on page 604, Dr. Hoffman opined that appellant had a 50 percent decrease in sensibility in the median nerve below the forearm of both arms and a 10 percent decrease in motor function of both median nerves below the forearm, which equated to a 21 percent total impairment in each upper extremity. In separate sheets, Dr. Hoffman noted range of motion findings for the right and left wrists, which were reported as: 20 degrees radial deviation, 20 degrees ulnar deviation, 70 degrees dorsi-flexion and 60 degrees palmar-flexion for both wrists. Additional impairment of function of the arm due to weakness, atrophy, pain or discomfort was estimated at 20 percent. Dr. Hoffman recommended an impairment rating of 21 percent for both the left and right upper extremity. Copies of his earlier report of December 20, 2002 and a January 16, 2003 addendum report were provided; however, these reports do not contain any impairment ratings.

In an April 8, 2004 report, an Office medical adviser reviewed the medical reports of record and stated that appellant achieved maximum medical improvement on January 1, 2002. The Office medical adviser also stated that the referral physician, in his March 15, 2004 report, had indicated that appellant had a 50 percent loss of sensory function and a 10 percent loss of motor function in each hand based on EMG scan studies. The Office medical adviser found that the A.M.A., *Guides* were correctly applied with 20 percent rating for sensory loss and 1 percent rating for motor loss in each hand using Table 16-15, page 492 combined with Table 16-10, page 482. Thus, the Office medical adviser found that the final impairment for each upper extremity was 21 percent.

By decision dated May 4, 2004, the Office found that appellant had a 21 permanent impairment for each upper extremity. The Office noted that as it had previously paid appellant 20 percent for loss of function of the bilateral upper extremities, appellant was entitled to an additional schedule award of 11 percent for each upper extremity or 68.64 weeks of compensation. The period of the award ran from March 22, 2003 to July 14, 2004.

In a June 1, 2004 letter, appellant requested reconsideration of her schedule award, which found that she suffered from a 42 percent total loss of function of her bilateral upper extremities. Appellant noted that she had previously received a schedule award of 20 percent for loss of function of her bilateral upper extremities, but stated that she should not be penalized for having previously received a schedule award when she continued to work with an abnormal condition in a sometimes unpleasant environment. She additionally advised that her upper extremities continually bother her everyday and that this has had a serious disadvantage on her health and well being and has caused a traumatic impact on her life. Although the Office received some

medical evidence following appellant's request for reconsideration, none of the medical evidence received contained any impairment ratings.

By decision dated June 24, 2004, the Office denied appellant's request for reconsideration, finding that she failed to submit any evidence of error on the part of the Office or submit any evidence to give raise to any legal arguments or to raise doubt as to the accuracy of the last merit decision issued on her claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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.[5]

ANALYSIS -- ISSUE 1

In his November 14, 2003 report, Dr. Leslie, appellant's treating physician, opined that appellant had a 45 percent combined motor and sensory deficit for each wrist under Table 16-15, page 492 of the A.M.A., *Guides* by attributing a 100 percent grade for each motor and sensory deficit of each wrist. Dr. Leslie, however, failed to provide any medical rationale or provide an adequate description of appellant's physical condition to justify his 100 percent grading for both motor and sensory deficits of each wrist. He did not provide any discussion of his review of appellant's records and, although he described the results of the September 24, 2002 EMG scan and needle examination, he failed to provide an adequate description of appellant's sensory and motor deficits in which to properly grade appellant's impairment under Table 16-10, page 482 and Table 16-11, page 484 of the A.M.A., *Guides*. In order to determine entitlement to a schedule award appellant's physician must provide a sufficiently detailed description of her condition so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[6] The Office medical adviser, when reviewing Dr. Leslie's report, specifically opined that the application of a 100 percent grade for appellant's sensory and motor deficits was not compatible with the diagnosis or office notes. As Dr. Leslie did not sufficiently describe appellant's condition or

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *See id*.; *Jacqueline S. Harris*, 54 ECAB ___ (Docket No. 02-203, issued October 4, 2002).

[6] *Renee M. Straubinger*, 51 ECAB 667, 669 (2000).

correlate his findings with the A.M.A., *Guides*, his November 14, 2003 report is insufficient to establish the extent of appellant's permanent impairment.[7]

The Board has carefully reviewed Dr. Hoffman's March 15, 2003 report, along with the Office medical adviser's review of such report and finds that Dr. Hoffman's impairment rating of a 21 percent permanent impairment for each upper extremity conforms to the A.M.A., *Guides*. Dr. Hoffman advised that both Tables 16-10 and 16-15 of the A.M.A., *Guides* were used in arriving at his impairment rating of 21 percent for both the right and left upper extremities.[8] Dr. Hoffman opined that appellant had a 50 percent decrease in sensibility in the median nerve below the forearm of both arms which, under Table 16-10, page 482 results in a Grade 3 sensory deficit. Under Table 16-15, page 492, the maximum sensory deficit or pain for the median nerve below the forearm is 39. The severity of the sensory deficit (50 percent) multiplied by the maximum upper extremity impairment value (39) for the nerve structure involved equates to a 19.5 or 20 percent rating for sensory loss. Dr. Hoffman further opined that appellant had a 10 percent decrease in motor function of both median nerves below the forearm which, under Table 16-11, page 484, results in a Grade 4 motor deficit. Under Table 16-15, page 492, the maximum motor deficit for the median nerve below the forearm is 10. The severity of the motor deficit (10 percent) multiplied by the maximum upper extremity impairment value (10) for the nerve structure involved equates to a 1 percent rating for motor loss in each hand. Thus, by properly combining Tables 16-10 and 16-11 with Table 16-15, both Dr. Hoffman and the Office medical adviser properly arrived at a 21 percent impairment for both upper extremities. There is no other evidence of record to reflect that appellant is entitled to a greater impairment rating than 21 percent for each upper extremity. Moreover, as the record reflects that appellant was previously awarded a 10 percent impairment for each upper extremity or a total impairment rating of 10 percent for each upper extremity, the Office properly awarded appellant an additional 11 percent for impairment to each upper extremity in accordance with its determination that appellant had a total permanent impairment of the upper extremities of 21 percent in each arm.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10]

[7] *Lela M. Shaw*, 51 ECAB 372 (2000).

[8] A.M.A., *Guides*, Tables 16-10, 16-15, pp. 482, 492.

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant's June 1, 2004 request for reconsideration neither alleged, nor demonstrated that the Office had erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Appellant stated that she did not feel it was appropriate to deduct the 20 percent previously paid portion of the award she had received from the total award of 42 percent. As previously noted, the schedule award provision of the Act and its implementing regulation set forth the number of weeks of compensation to be paid for permanent loss or loss of use, of the members of the body listed in the schedule.[11] Section 8108 of the Act[12] provides for the reduction of compensation for subsequent injury to the same member:

> "The period of compensation payable under the schedule in section 8107(c) of this title is reduced by the period of compensation paid or payable under the schedule for an earlier injury if --
>
> > (1) compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and
> >
> > (2) the Secretary of Labor finds that compensation payable for the later disability in whole or in part would duplicate the compensation payable for the preexisting disability."

In this case, appellant received compensation, in the form of a schedule award, for impairment to the upper extremities. She had previously received a 20 percent award for impairment to the upper extremities. The recent evidence reflected that her condition had worsened and that she was entitled to a 42 percent total impairment to the upper extremities. As compensation payable for appellant's subsequent worsening condition or impairment would duplicate the compensation paid for the preexisting disability or impairment, appellant would only be entitled to the difference between the 20 percent award she had received and her new total impairment of 42 percent. The Office, therefore, properly determined that appellant was entitled to a schedule award for only an additional 22 percent as a result of her worsening upper extremity condition. Consequently, as the Office cannot award greater schedule compensation than what is allowed by the Act, appellant's argument lacks any reasonable color of validity.[13] Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, the evidence of record received after appellant filed her request for reconsideration is not relevant to the issue of whether appellant was entitled to a

[11] 5 U.S.C. § 8107; 20 C.F.R. § 10.404 (1999).

[12] 5 U.S.C. § 8108.

[13] *See Robert P. Mitchell*, 52 ECAB 116 (2000).

schedule award greater than the amount received. Inasmuch as appellant did not submit any "relevant and pertinent" new evidence, she is not entitled to a review of the merits of her claim based on the third requirement.

CONCLUSION

The Board finds that appellant is entitled to no more than a 21 percent permanent impairment for each arm. The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the June 29 and May 4, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 16, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member