United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 07-954**
	)	**Issued: September 24, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated January 19, 2007 finding that she had no more than seven percent permanent impairment of each upper extremity for which she received schedule awards. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than two percent impairment of each of her upper extremities due to her accepted cervical spine injuries for which she has received schedule awards; and (2) whether she has more than five percent impairment of each upper extremity due to bilateral carpal tunnel syndrome (CTS).

FACTUAL HISTORY

This case has previously been before the Board on appeal. In an order remanding case dated December 29, 2006, the Board noted that the record on appeal was not complete and

remanded the case for reassemblage.[1] While the Office had indicated that appellant's claims for cervical injury and CTS were combined, only a portion of the case file regarding appellant's cervical injury was contained in the record before the Board.

On December 8, 1994 appellant, then a 47-year-old clerk, filed a traumatic injury claim alleging that she sustained pain in the left side of her neck and shoulder when she threw a box in the performance of duty. The Office accepted her claim for cervical strain. Appellant underwent a C5-6 anterior cervical discectomy and fusion on January 24, 1996. The Office approved this surgery and entered her on the periodic rolls on February 5, 1996. Appellant filed claims for recurrence of disability which were accepted by the Office

On January 30, 2003 appellant filed an occupational disease claim alleging that she developed CTS due to her federal job duties. The Office accepted her claim for bilateral CTS on March 31, 2003. Appellant underwent surgical decompression of the right median nerve on April 21, 2003 and surgical decompression of the left median nerve on July 1, 2003.

Appellant requested a schedule award due to her accepted CTS on November 17, 2003. She requested a schedule award due to her cervical spine injuries on February 23, 2004.

In a report dated March 8, 2004, Dr. Leonard F. Hirsh, appellant's attending physician and a Board-certified neurosurgeon, found that appellant had reached maximum medical improvement (MMI) on January 8, 2004. He stated that a unilateral spinal nerve root impairment of C6 bilaterally provided up to 16 percent loss of function due to sensory deficit, pain or discomfort in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* Dr. Hirsh stated that this would provide an upper extremity impairment of up to 40 percent. He found that pain due to CTS constituted a 40 percent unilateral impairment. Dr. Hirsh stated, "If a middle ground is chosen, then there is a combined loss of function due to pain or discomfort of 8 percent related to the cervical nerve roots and 20 percent related to the bilateral CTS."

The Office medical adviser reviewed Dr. Hirsh's report on March 31, 2004 and found that appellant had two percent impairment of each upper extremity due to a Grade 4 sensory impairment of the C6 nerve root. He also found that appellant was entitled to five percent impairment of each upper extremity due to impairments of the median nerves.

By decision dated April 21, 2004, the Office granted appellant schedule awards for two percent impairment of each of her upper extremities due to her accepted cervical injuries.

In a decision dated June 8, 2004, the Office granted appellant schedule awards for five percent impairment of each upper extremity due to bilateral CTS.

Appellant, through her attorney, requested reconsideration of the April 21, 2004 decision on February 11, 2005 and submitted a medical report from Dr. David Weiss, an osteopath. In a November 2, 2004 report, Dr. Weiss noted appellant's history of injury and findings on physical examination. He concluded that she had bilateral upper extremity sensory deficits of four

[1] Docket No. 06-1206 (issued December 29, 2006).

percent due to the C5 nerve root, six percent due to the C6 nerve root and four percent due to the C7 nerve root. Dr. Weiss also accorded appellant three percent impairment due to pain for total impairment ratings of 17 percent for each upper extremity. He concluded that appellant had reached MMI on November 2, 2004. Appellant's attorney also argued that both schedule award claims should be based on appellant's recurrent pay rate.

The Office concluded that there was a conflict of medical opinion evidence between Drs. Hirsh and Weiss regarding the nature and extent of appellant's permanent impairments for schedule award purposes. The Office referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, to determine the nature and extent of appellant's permanent impairment. In a report dated August 18, 2005, Dr. Didizian noted appellant's history and treatment of both her cervical injuries and CTS. He performed a physical examination and noted normal strength. Dr. Didizian stated, "The sensory system was matching bilaterally in all the dermatomes." He concluded that appellant had five to eight percent impairment of the whole person due to her cervical injuries. Dr. Didizian further stated, "As far as the carpal tunnels are concerned, I used Table 18.1 on page 574 and provided a pain-related impairment of three percent in each upper extremity."

In a letter dated September 19, 2005, the Office requested a supplemental report from Dr. Didizian. The Office informed him that a rating of the whole person was not applicable under the Federal Employees' Compensation Act and requested that he provide the exact degree and extent of permanent impairment of both upper extremities due to residuals of the herniated cervical disc and surgery. Dr. Didizian responded on September 26, 2005 that appellant exhibited a Grade 4 sensory deficit of the C6 nerve root or 25 percent impairment which when multiplied by the maximum value of the nerve root of 8 percent resulted in 2 percent impairment of each upper extremity due to appellant's cervical conditions. In regard to appellant's CTS, he found normal sensibility on two-point discrimination, normal opposition strength and therefore no objective basis for an impairment rating under the A.M.A., *Guides*.

The Office medical adviser reviewed the medical reports on October 30 and November 14, 2005. He agreed that appellant had no more than two percent impairment of her upper extremities due to her accepted cervical conditions. However, the medical adviser stated that he believed that appellant still had residuals of her CTS and was entitled to an impairment rating of five percent due to an abnormal electromyelogram (EMG).

By decision dated December 28, 2005, the Office denied modification of the April 21 and May 8, 2004 decisions. It alleged that Dr. Weiss' November 2, 2004 report created a conflict with medical evidence in the record and necessitated referral to Dr. Didizian for an impartial medical examination. The Office noted that its medical adviser disagreed with Dr. Didizian and concluded that appellant had no more than five percent impairment due to CTS. The medical adviser further found that appellant had no more than two percent impairment due to her cervical injuries. The Office noted that Dr. Didizian's report was entitled to the weight of the medical evidence. It further found that appellant was correctly paid the recurrent pay rate for her cervical injuries, but that she was not entitled to a recurrent rate of pay due to her. Appellant then appealed this decision to the Board which resulted in the December 29, 2006 order remanding case mentioned above.

Appellant testified at the oral hearing on February 28, 2006 and disagreed with her award for five percent impairment of each upper extremity due to CTS. By decision dated May 2, 2006, the hearing representative affirmed only the June 8, 2004 schedule award decision regarding her permanent impairment due to CTS.[2]

On June 6, 2006 appellant requested reconsideration of the hearing representative's decision and submitted a report dated May 4, 2006 from Dr. Weiss who reviewed Dr. Didizian's reports and alleged that appellant had cervical discogenic disease at C4-5 and C5-6 based on magnetic resonance imaging. Dr. Weiss further stated that appellant had advanced CTS based on her January 20, 2003 electomyelogram and nerve conduction velocity studies.

By decision dated January 19, 2007, the Office reissued its December 28, 2005 decision denying modification of the schedule award determinations.[3]

LEGAL PRECEDENT -- ISSUE 1

The Act provides that, if there is a 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.[4] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[5]

ANALYSIS -- ISSUE 1

Appellant alleged that she had permanent impairment as a result of her accepted cervical conditions and submitted a report from her attending physician, Dr. Hirsh, a Board-certified neurosurgeon, supporting that she had eight percent impairment due to sensory impairment of the C6 nerve root. The Office medical adviser reviewed Dr. Hirsh's report and found that appellant had two percent impairment of the C6 nerve root. Appellant then submitted a report dated November 2, 2004 from Dr. Weiss, an osteopath, opining that she had 17 percent impairment of her upper extremities due to her sensory deficits in the C5, C6 and C7 nerve roots as well as impairment due to pain. The Office then concluded that there was a conflict of medical opinion

[2] Following the date of appellant's initial appeal to the Board on April 17, 2006, Docketed as 06-1206, the Office issued its May 2, 2006 decision. The Board finds that this decision is null and void, as both the Board and the Office cannot have jurisdiction over the same issue in the same case at the same time. 20 C.F.R. § 501.2(c); *Arlonia B. Taylor*, 44 ECAB 591 (1993).

[3] Appellant's attorney did not raise the issue of appellant's pay rate on appeal and the Board will not address this issue in this decision. The Office issued a decision on October 13, 2006 denying appellant's request for hypnotherapy. Appellant and her attorney requested an oral hearing on this issue on September 18, 2006. As this claim is in an interlocutory status, the Board will not address that issue in this decision. 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. §§ 8101-8193, 8123.

[5] 20 C.F.R. § 10.321.

evidence between appellant's physicians, Drs. Hirsh and Weiss and referred the claim to Dr. Didizian, a Board-certified orthopedic surgeon, to resolve the issue.[6]

Contrary to the Office's finding that there was a conflict between Drs. Hirsh and Weiss, the Board notes that a conflict of medical opinion evidence requiring referral to an impartial medical specialist can only arise between a physician for appellant and a physician for the Office. As neither Dr. Hirsh nor Dr. Weiss can be considered a physician of the United States a conflict cannot be found and the report of Dr. Didizian cannot be given special weight assigned to the report of an impartial specialist.[7] Instead, there presently exists an unresolved conflict in medical opinion between appellant's physicians, who found that she had no less than eight percent permanent impairment due to her cervical injuries and Dr. Didizian, the Office referral physician, who concluded that she had no more than two percent impairment due to her cervical conditions. Therefore, the case will be remanded to the Office for referral of appellant, a statement of accepted facts and a list of specific questions regarding the nature and extent of appellant's permanent impairment due to her cervical condition.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulation[9] 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.

ANALYSIS -- ISSUE 2

Appellant's attending physician, Dr. Hirsh, a Board-certified neurosurgeon, completed a report on March 8, 2004 and stated that appellant had reached MMI on January 8, 2004. He concluded that she had 20 percent impairment of each upper extremity due to her bilateral CTS. Dr. Hirsh did not provide any citations to the A.M.A., *Guides*. As his opinion is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses it is of little probative value in determining the extent of appellant's impairment.[10]

---

[6] There is no indication that the Office believed that there was a conflict regarding the extent of appellant's permanent impairment due to CTS as Dr. Weiss did not comment on this aspect of her claim.

[7] *Pierre W. Peterson*, 39 ECAB 955, 959-960 (1988).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

[10] *Carl J. Cleary*, 57 ECAB ___ (Docket No. 05-1558, issued May 10, 2006).

The Office medical adviser reviewed Dr. Hirsh's March 8, 2004 report and concluded that appellant had five percent of his upper extremity due to her CTS. Dr. Didizian examined appellant and reported on August 18, 2005 that she had normal strength. On September 26, 2005 he found that appellant had no basis for a rating due to CTS due to normal two-point discrimination. Dr. Weiss noted on May 4, 2006 that appellant had an abnormal EMG in January 2003 prior to her CTS. The medical adviser reviewed the medical evidence and noted that appellant had an abnormal EMG which warranted a five percent impairment rating under the A.M.A., *Guides*. He found that appellant had "[n]ormal sensibility and opposition strength with abnormal sensory and /or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS is still present and an impairment rating not to exceed five percent of the upper extremity may be justified."[11] The Board finds that appellant has no more than five percent impairment of her upper extremities due to CTS for which she has received a schedule award.

CONCLUSION

The Board finds that appellant has no more than five percent impairment of her upper extremities due to her accepted bilateral CTS. The Board further finds that there is an unresolved conflict in the medical opinion evidence regarding the extent of appellant's permanent impairment due to her accepted cervical injury.

[11] A.M.A., *Guides* 495.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2007 decision is affirmed in regarding to the extent of appellant's permanent impairment due to CTS. The January 19, 2007 decision is set aside and remanded for further development in regard to appellant's scheduled impairment due to cervical injury.

Issued: September 24, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board