United States Department of Labor
Employees' Compensation Appeals Board

B.D., Appellant	)	
and	)	**Docket No. 07-1142**
	)	**Issued: September 13, 2007**
U.S. POSTAL SERVICE, POST OFFICE, New York City, NY, Employer	)	

Appearances:
Appellant, pro se
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 March 21, 2007 appellant filed a timely appeal from the February 6, 2007 decision of an Office of Workers' Compensation Programs' hearing representative, which affirmed a schedule award. Pursuant to 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 that she has more than a 12 percent impairment of her right upper extremity, for which she received a schedule award. On appeal, appellant contends that her impairment rating did not account for the pain and sensory deficit created by her spinal impairment.

FACTUAL HISTORY

On August 17, 1999 appellant, then a 50-year-old traffic management specialist, sustained cervical and lumbosacral strains and right shoulder impingement syndrome when an elevator at the employing establishment began to shake violently. On September 7, 1999 the

claim, File No. 020761616, was accepted for cervical strain. On January 24, 2000 appellant strained her back and neck when the postal vehicle in which she was riding was rear-ended.[1] On February 25, 2000 the claim, File No. 020768300, was accepted for back sprain/whiplash. These claims were later combined and accepted for a torn right rotator cuff.[2]

On April 24, 2001 appellant filed a request for a schedule award based on her August 17, 1999 employment injury. Following the Office's request for medical documentation of permanent impairment, she submitted the June 5, 2001 report of Dr. Albert Graziosa, her treating orthopedic surgeon, who stated that appellant had reached maximum medical improvement with 90 degrees of flexion and 90 degrees of adduction in her right shoulder and 120 degrees of flexion and 90 degrees of adduction in her left shoulder. Based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.), he found 18 percent impairment of her right arm and 16 percent impairment of her left arm. Dr. Graziosa also opined that appellant's cervicothoracic condition resulted in the 25 percent whole person impairment.

The Office provided Dr. Graziosa's report to an Office medical adviser, to review the medical records for the 1999 and 2000 injuries together, as they both involved the neck or cervical spine. When the Office medical adviser found discrepancies between shoulder ranges of motion in the two files, the Office requested clarification from Dr. Graziosa. He stated that the different ranges of motion found on different examination dates were based on the normal waxing and waning of chronic injury symptoms.

The Office referred appellant to Dr. Lester Lieberman, a Board-certified orthopedic surgeon, for a second opinion on her disability and impairment rating. On December 18, 2001 Dr. Lieberman diagnosed torn right rotator cuff, cervical and lumbar sprain and possible disc problems. He opined that appellant would not reach maximum medical improvement until her torn right rotator cuff was repaired. On January 28, 2002 the Office provided this report to Dr. Graziosa for review. On March 25, 2002 Dr. Graziosa stated that he had discussed arthroscopic shoulder surgery with appellant and that she was considering it.

On June 20, 2002 Dr. Graziosa reported that appellant declined surgery. He recommended that she continue physical therapy to maximize range of motion and prevent the formation of adhesive capsulitis. Finding that appellant was at maximum medical improvement, he rated her right arm impairment at 65 percent under the State of New York Workers' Compensation Board Medical Guidelines. Dr. Graziosa opined that even if appellant later had an arthroscopy, the "likelihood of significant improvement would be minimal."

On January 28, 2003 the Office provided the reports of Dr. Graziosa and Dr. Lieberman to the Office medical adviser who found that a schedule award was not warranted as appellant had not reached maximum medical improvement.

[1] Her title had changed to network management specialist.

[2] File Nos. 020761616 and 020768300 were combined on January 10, 2002. A 1997 claim for back spasms was not combined with the other two files, though it was referenced to in statements of accepted facts.

By decision dated April 2, 2003, the Office denied appellant's claim for a schedule award on the grounds that she had not reached maximum medical improvement.

On April 25, 2003 appellant requested an oral hearing on this decision. By decision dated February 17, 2005, the Office hearing representative found that the case was not in posture for a hearing. She found that there was a conflict of medical opinion evidence between Dr. Lieberman, who stated that appellant had not yet reached maximum medical improvement, and Dr. Graziosa, who stated that she had. The Office hearing representative stated that, as the opinions were of equal weight, an impartial medical examiner was required to resolve the conflict.

On June 29, 2005 Dr. Martin Barschi, a Board-certified orthopedic surgeon, conducted an impartial medical examination. He reviewed appellant's medical history and conducted a physical examination. Dr. Barschi found that her cervical spine had flexion and extension of 20 degrees, left lateral rotation of 50 degrees and right lateral rotation of 40 degrees. He noted that she had pain during this process, but no muscle spasms. Dr. Barschi stated that her right shoulder had abduction of 90 degrees, forward flexion of 90 degrees, internal rotation to the lower back level, external rotation of 60 degrees and extension of 70 degrees. The only difference in the left shoulder was internal rotation to the waist level. Appellant reported that she had tenderness around the right coracoid, but Dr. Barschi found no evidence of atrophy or deformity and no diminishment of reflexes, sensation or power in either upper extremity. He stated that appellant's cervical disc herniations did not involve spinal stenosis or the nerve roots. Dr. Barschi stated that appellant's cervical disc herniation "could have occurred during any one of the three injuries she sustained as well as the normal aging process." He opined that she had reached maximum medical improvement four to five years previously, when she stopped physical therapy. Dr. Barschi stated that appellant's cervical strain of August 17, 1999 would have resolved by the year 2005 were it not for the aging process as well as her 2000 motor vehicle accident, which he found may have contributed to her neck and back symptoms. Using the A.M.A., *Guides* (5th ed.), he rated her right upper extremity impairment as 12 percent: 6 percent for forward flexion of 90 degrees, 4 percent for abduction of 90 degrees and 2 percent for partial loss of internal rotation.[3] Dr. Barschi noted that her left shoulder, which had not been injured in an employment incident, had an impairment rating of 11 percent.

The Office medical adviser reviewed Dr. Barschi's findings and found that appellant had a 10 percent impairment rating. He agreed that the A.M.A., *Guides*, provide for a six percent rating for 90 degrees of flexion (Figure 16-40, page 476) and a four percent rating for 90 degrees of abduction (Figure 16-43, page 477). However, he found that 90 degrees of internal rotation would not yield a two percent rating (Figure 16-40, page 476). On August 8, 2005 the Office requested clarification of Dr. Barschi's finding that appellant was entitled to a two percent rating for loss of internal rotation. On August 15, 2005 Dr. Barschi responded that he had not measured internal rotation from the neutral position, so the 90 degrees he indicated corresponded

[3] Dr. Barschi did not state which tables in the A.M.A., *Guides* he was referencing to achieve this rating.

with a loss of 30 degrees of internal rotation.[4] On September 15, 2005 the Office medical adviser concurred with Dr. Barschi's finding that 30 degrees of internal rotation loss yielded a two percent impairment rating based on Table 16-46, page 479, of the A.M.A., *Guides.*

By decision dated September 20, 2005, the Office awarded appellant compensation for the 12 percent permanent impairment of her right upper extremity. Appellant received 37.44 weeks of compensation from June 29, 2005 to March 18, 2006.

On October 4, 2005 she requested an oral hearing on the schedule award. Appellant questioned the Office's failure to provide a disability rating for her left arm, which Dr. Graziosa found to be nearly as disabled as her right.

On April 10, 2006 the Office hearing representative informed appellant that her case was not in posture for a hearing. As the Office had prematurely issued the schedule award decision without seeking clarification of appellant's cervical condition and the possible employment-related impairment of her upper left extremity. The Office hearing representative found that Dr. Barschi's opinion did not explain how appellant's cervical strain continued several years after the accepted injuries and whether appellant's cervical disc herniations were caused by any of appellant's accepted injuries. She also directed that Dr. Barschi be asked on whether appellant's left shoulder condition was related to the accepted cervical disc herniation.

On July 19, 2006 the Office requested clarification from Dr. Barschi. On August 9, 2006 Dr. Barschi opined that appellant's cervical disc herniations did not cause any impairment to her upper extremities and that any impairment was caused by her unrelated shoulder impingement and carpel tunnel syndrome. He noted that a magnetic resonance imaging (MRI) scan conducted on November 19, 1999 revealed small anterior focal disc herniations, but no spinal stenosis or nerve root involvement. Dr. Barschi stated that while these could have been related to her employment injuries, they were of a type that is more likely related to the normal aging process. He indicated that the record contained a 2003 electromyogram (EMG) which revealed right cervical radiculopathy and bilateral carpal tunnel syndrome. Dr. Barschi stated, however, that appellant's carpal tunnel syndrome predated her 1999 and 2000 employment injuries and that she displayed no symptoms of cervical radiculopathy in her June 29, 2005 clinical examination. For these reasons, he found that her left upper extremity impairment was unrelated to her cervical condition, which was itself not an employment injury.

On August 24, 2006 the Office medical adviser agreed with Dr. Barschi's opinion that appellant's disc herniations were unrelated to her employment-related upper extremity impairments. He noted that appellant had not reported any direct cervical trauma and that the MRI scan did not report any herniations that would result in nerve root impingement. The Office medical adviser also stated that Dr. Barschi did not find any objective physical evidence of cervical nerve root dysfunction or neurological deficits that would be caused by cervical disc problems.

[4] Dr. Barschi stated that he had asked appellant to reach toward the middle of her back and so, the fact that she could only get to the level of her waist represented a 30-degree loss of internal rotation. The Board notes that Dr. Barshi's original report stated that appellant's right shoulder had "internal rotation to the lower back level." Appellant's left shoulder was the one with internal rotation limited to the waist.

By decision dated August 25, 2006, the Office found that appellant had no more than 12 percent impairment of the right upper extremity.

On September 15, 2006 appellant requested an oral hearing. She argued that the Office hearing representative found in her April 10, 2006 decision that Dr. Barschi's opinion did not carry the weight of the medical evidence and that the Office failed to follow her directions. On October 4, 2006 appellant requested that the Office conduct a review of the written record instead of an oral hearing.

By decision dated February 6, 2007, an Office hearing representative affirmed the August 25, 2006 decision. She found that the Office properly sought clarification of the impartial medical examiner's opinion and that Dr. Barschi supplied his clarification on August 9, 2006. The Office hearing representative noted that the Office medical adviser concurred with Dr. Barschi's opinion. She found that Dr. Barschi's opinion was properly accorded the special weight of the medical evidence because it was sufficiently rationalized.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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 should be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.[7] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[8]

The Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.[9] Likewise, 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 or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[10] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist,

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] 20 C.F.R. § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[9] 5 U.S.C. §§ 8101-8193, 8123(a).

[10] 20 C.F.R. § 10.321.

if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[11]

ANALYSIS

The Office issued a schedule award to compensate appellant for the 12 percent impairment of her upper right extremity. The issue is whether appellant has established that she has more than 12 percent impairment of her right upper extremity related to her accepted employment injuries.

The Office hearing representative found a conflict of medical evidence between Dr. Graziosa, appellant's orthopedic surgeon, and second opinion physician Dr. Lieberman, a Board-certified orthopedic surgeon, and accordingly, the Office properly referred appellant for an impartial medical examination with Dr. Barschi, a Board-certified orthopedic surgeon. The Board finds that the opinion of Dr. Barschi carries the special weight of the medical evidence in establishing appellant's impairment level.

Dr. Barschi's June 29, 2005 report included a review of the medical history and findings from his physical examination. Appellant's right shoulder had abduction of 90 degrees, forward flexion of 90 degrees, internal rotation "to the lower back level," external rotation of 60 degrees and extension of 70 degrees. Her left shoulder had identical findings except for internal rotation, which was limited "to the waist level." Appellant reported tenderness around the right caracoid, but Dr. Barschi found no objective evidence of atrophy or deformity. Dr. Barschi opined that she had reached maximum medical improvement four to five years prior, when she stopped physical therapy. Using the A.M.A., *Guides* (5th ed.), he rated her right upper extremity impairment as 12 percent: 6 percent for forward flexion of 90 degrees, 4 percent for abduction of 90 degrees, and 2 percent for partial loss of internal rotation. Dr. Barschi noted that appellant's left shoulder, which had not been injured in an employment incident, had an impairment rating of 11 percent. On August 15, 2005 at the request of the Office, Dr. Barschi supplemented his opinion to explain that appellant had lost 30 degrees of internal rotation in her right shoulder, which yielded a two percent impairment rating.

In a June 29, 2005 report, Dr. Barschi found that appellant's cervical spine had flexion and extension of 20 degrees, left lateral rotation of 50 degrees and right lateral rotation of 40 degrees. Appellant reported pain during the examination, but Dr. Barschi noted no muscle spasms. Dr. Barschi stated that appellant's cervical disc herniations did not involve spinal stenosis or the nerve roots. His examination showed no diminishment of reflexes, sensation or power in either of appellant's upper extremities. On August 9, 2006 Dr. Barschi noted that, despite a 2003 EMG showing right cervical radiculopathy, appellant had displayed no symptoms of upper extremity radiculopathy during her examination. He also stated that her 1999 MRI scan, which showed herniation on some cervical discs, did not indicate any spinal stenosis or nerve root involvement. Dr. Barschi stated that appellant's upper extremity impairments were related to shoulder impingement and carpal tunnel syndrome, which were not employment-related conditions. He also opined that appellant's spinal herniations were likely not related to

[11] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

her employment injuries because they were of a type that is generally related to the normal aging process. The Board finds that Dr. Barschi's medical opinion, as supplemented, is thorough and well reasoned and thus carries the special weight of the medical opinion evidence.

The determination of the Office medical adviser concurred with Dr. Barschi's clinical findings. He noted that, under Figure 16-40, page 476, of the A.M.A., *Guides,* 90 degrees of flexion yielded a 6 percent impairment rating.[12] The Office medical adviser stated that Figure 16-43, page 477, yielded a four percent rating for 90 degrees of abduction and that Table 16-46, page 479, yielded a two percent rating for a 30 degree loss of internal rotation.[13] Adding them together,[14] the Office medical adviser found a total right upper extremity impairment rating of 12 percent based on loss of range of motion. In addressing appellant's cervical condition, he noted that appellant had not sustained any direct cervical trauma in her employment injuries. The Office medical adviser also noted that her 1999 cervical MRI scan did not establish that any herniations involved nerve root impingement and that Dr. Barschi's clinical findings did not establish any radiculopahtic symptoms in appellant's right or left upper extremities. Appellant has no more than 12 percent impairment of her right upper extremity.

Appellant contended on appeal that the Office did not properly consider her left upper extremity pain and sensory deficit caused by her cervical condition. The Board notes that the Office did not issue a schedule award for any left upper extremity impairment. As the Board's review in an appeal is limited to final decisions of the Office, appellant's contentions regarding her left upper extremity are not properly before the Board on this appeal.

CONCLUSION

The Board finds that appellant has not established that she has more than a 12 percent impairment of her right upper extremity.

[12] A.M.A., *Guides* 476, Figure 16-40.

[13] *Id*. at 477, Figure 16-43; *Id*. at 479, Figure 16-46.

[14] *See Id*. at 479, which provides that impairments due to abnormal shoulder motion should be added.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2007 is affirmed.

Issued: September 13, 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