United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 08-1142**
	)	**Issued: December 3, 2008**
DEPARTMENT OF LABOR, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 10, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' February 11, 2008 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she sustained permanent impairment.

FACTUAL HISTORY

On June 30, 2004 appellant, then a 41-year-old bill resolution specialist, filed an occupational disease claim alleging that she developed herniated discs at C4-5, C5-6 and C6-7 due to picking up mail crates eight hours a day, five days a week in the performance of duty. She did not stop work. The Office accepted appellant's claim for cervical disc herniations at C4-5, C5-6 and C6-7. Appellant received appropriate compensation benefits.

An April 28, 2004 magnetic resonance imaging (MRI) scan read by Dr. Glen Geremia, a Board-certified diagnostic radiologist, diagnosed disc herniation at C4-5, C5-6 and C6-7 and no fracture or subluxation. It also revealed that the bony canal and neural foramen were normal at C6-7.

On March 29, 2006 appellant filed a claim for a schedule award. By letter dated April 24, 2006, the Office requested that she provide an opinion from her physician addressing any permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) hereinafter (A.M.A., *Guides*). The physician was to provide an opinion regarding the percentage of impairment with an explanation of how the calculation was derived.

In a May 30, 2006 report, Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon and treating physician, noted that he had utilized the A.M.A., *Guides.* He referred to Table 13 and advised that appellant had 74 percent impairment to the right upper extremity and 100 percent impairment to the left upper extremity.[1]

In an April 6, 2007 report, the Office medical adviser reviewed appellant's history of injury and medical treatment. He indicated that appellant had no objective evidence of radiculopathy in the upper extremities and that she had sustained small incidental disc herniations at multiple levels. The Office medical adviser indicated that he had reviewed the MRI scan and noted that the bony canal and neural foramen were normal at C6-7, which were indicative of no nerve root impairment or impingement on the spinal cord. He opined that there must be evidence of nerve root impairment or impingement resulting from a disc herniation in order for there to be impairment to the upper extremities. The Office medical adviser concluded that there was no basis for an impairment rating to the upper extremities under the A.M.A., *Guides.*

By letter dated May 23, 2007, the Office referred appellant for a second opinion evaluation, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Kevin Fagan, a Board-certified neurologist.

In a report dated June 4, 2007, Dr. Fagan noted appellant's history of injury and medical treatment. He conducted a physical examination and concluded that her sensory examination was intact. Dr. Fagan noted that appellant did not give a full effort during her examination which compromised his ability to make a finding as to the degree of impairment other than to state that she had some discomfort in the neck and occasional radicular symptoms. He opined that Dr. Chmell's ratings was likely "over-estimations given his grade of testing of 4+ bilaterally at multiple levels, as this is not complete paralysis of the involved nerves or nerve roots."

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[1] Although Dr. Chmell indicated that he had utilized the A.M.A., *Guides,* it appears that he used the fourth edition of the A.M.A., *Guides*. However, the tables in the A.M.A., *Guides* have not substantively changed from their counterparts in the fifth edition of the A.M.A., *Guides* which is the edition in current use by the Office. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (June 2003) (notes that, effective February 1, 2001, the Office began using the fifth edition of the A.M.A., *Guides*).

The Office found a conflict in medical evidence between Dr. Chmell and Dr. Fagan. On November 15, 2007 it referred appellant to Dr. Jaroslaw Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a December 13, 2007 report, Dr. Dzwinyk reviewed appellant's history of medical treatment. He noted her complaint of cervical pain radiating into both shoulders. Dr. Dzwinyk conducted a physical examination and found no obvious pain behaviors, full and unrestricted motion of the neck, and a negative bilateral Spurling's test. He noted tenderness to palpation which was elicited diffusely over the posterior cervical musculature, cervical spinous processes, trapezii and rhomboids. Dr. Dzwinyk advised that appellant's neurological examination revealed symmetrically normoactive biceps reflexes symmetrically hypoactive triceps reflexes and hypoactive lower extremity reflexes. He noted that appellant had full active and passive range of motion, mildly positive impingement bilaterally, no swelling, atrophy or deformity about the shoulders and normal strength. Dr. Dzwinyk also found no evidence of a "frank disc herniation, nerve root nor cord impingement nor any significant stenosis." He reviewed nerve conduction studies that were consistent with bilateral cervical nerve root irritation based on normal spontaneous activity in the cervical paraspinal muscles and opined that the neurological examination was normal. Dr. Dzwinyk explained that, because the neurological examination and shoulder examinations were normal, with the exception of mildly positive impingement tests, there was no basis to award impairment to either extremity. He indicated that appellant reached maximum medical improvement one year after her conservative treatment.

By decision dated February 11, 2008, the Office denied appellant's claim for a schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[3] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[4] The Office has adopted the A.M.A., *Guides* for evaluation of scheduled losses.[5]

ANALYSIS

The Office accepted appellant's claim for cervical disc herniations. Appellant filed a claim for a schedule award and submitted medical evidence from Dr. Chmell who rated impairment of 74 percent of the right arm and 100 percent of the left arm. She was subsequently

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[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8107.

[4] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[5] 20 C.F.R. § 10.404.

examined by Dr. Fagan, who reviewed the results of diagnostic testing. Dr. Fagan noted that appellant did not give a full effort on evaluation and he could not rate any impairment. He stated that the ratings of Dr. Chmell had over estimated appellant's level of impairment.

The Office determined that a conflict in medical opinion was created between Dr. Chmell, appellant's physician, and Dr. Fagan. It properly referred appellant to Dr. Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

Section 8123(a) of the Act[6] provides, 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.[7] In situations were there are 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 on a proper factual background, must be given special weight.[8]

Dr. Dzwinyk examined appellant, reviewed the history of injury, and noted the evidence of record, including diagnostic studies. On December 13, 2007 he provided findings on physical examination and determined that appellant had no objective findings to substantiate permanent impairment due to her accepted cervical condition. Dr. Dzwinyk indicated that appellant had no obvious pain behaviors, full and unrestricted motion of the neck, a negative bilateral Spurling's test, a normal neurological examination, mildly positive impingement bilaterally, no swelling, atrophy or deformity about the shoulders and normal strength. He also determined that she did not have evidence of any cervical nerve root impingement or any significant stenosis. Dr. Dzwinyk advised that appellant's nerve conduction studies were consistent with bilateral cervical nerve root irritation based on normal spontaneous activity in the cervical paraspinal muscles. Based on appellant's normal neurological shoulder examination, with the exception of mildly positive impingement tests, there was no basis to award impairment to either extremity. Dr. Dzwinyk indicated that appellant reached maximum medical improvement one year after her conservative treatment.

The Board finds that Dr. Dzwinyk provided a detailed and well-rationalized report based on a proper factual background and thus his opinion is entitled to the special weight accorded an impartial medical examiner. Dr. Dzwinyk's report constitutes the weight of the medical opinion evidence and establishes that appellant does not have any impairment due to her accepted cervical condition.

The Board notes that a schedule award is not payable for a cervical or back condition.[9] However, a schedule award would be payable for permanent impairment of the extremities that

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[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8123(a).

[8] *Barbara J. Warren*, 51 ECAB 413 (2000).

[9] *See Vanessa Young,* 55 ECAB 575 (2004).

originates in the spine.[10] However, Dr. Dzwinyk did not find that appellant's accepted condition caused impairment to her upper extremities.

Appellant has the burden of proof to submit medical evidence supporting that she sustained permanent impairment of a schedule member of the body.[11] As such evidence has not been submitted, she has not established entitlement to a schedule award.

CONCLUSION

The Board finds that appellant has not established permanent impairment related to her accepted cervical condition.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 11, 2008 is affirmed.

Issued: December 3, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

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[10] *See Tania R. Keka*, 55 ECAB 354 (2004).

[11] *See Annette M. Dent,* 44 ECAB 403 (1993).