United States Department of Labor
Employees' Compensation Appeals Board

B.G., Appellant	)	
and	)	**Docket No. 08-1496**
	)	**Issued: December 19, 2008**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL BUSINESS CENTER, 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:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 28, 2008 appellant filed a timely appeal from schedule award decisions of the Office of Workers' Compensation Programs dated May 8 and December 12, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determinations in this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she has more than a 20 percent impairment of the right upper extremity for which she received a schedule award.

FACTUAL HISTORY

On June 10, 2005 appellant, then a 63-year-old human resources assistant, dislocated her shoulder when she tripped on a wire at work. She was taken to the emergency room and came under the care of Dr. Mitchell K. Freedman, a Board-certified physiatrist. On July 27, 2005 the Office accepted that she sustained a closed dislocation of the right shoulder and right

sprain/strain of the rotator cuff. It subsequently accepted a partial tear of the right rotator cuff and brachial plexopathy on the right. Appellant returned to work on October 23, 2006. In a November 3, 2006 treatment note, Dr. Freedman advised that appellant had weakness and loss of motion in the right hand and 5/10 intermittent pain with some numbness. He indicated that she would reach maximum medical improvement within the next three months and provided permanent limitations of no use of the right arm for fine motor function and a five-pound weight restriction.

On April 20, 2007 appellant filed a schedule award claim. In a January 23, 2007 report, Dr. David Weiss, an osteopath, noted the history of injury and reviewed the medical record. He stated that appellant complained of right upper extremity pain and weakness. She reported that work activities and activities of daily living exacerbated her pain. She encountered difficulty performing household duties and self-care and in performing overhead reaching, grasping, pushing and pulling and lacked fine dexterity in her right hand. Physical examination of the right upper extremity demonstrated no atrophic changes and tenderness over the anterior and posterior cuff and acromion. He provided range of motion and strength findings for the right shoulder, wrist and hand. Sensory examination demonstrated no abnormalities. Dr. Weiss diagnosed status post dislocation of the right shoulder, post-traumatic acromioclavicular arthropathy with impingement to the right shoulder, chronic rotator cuff tendinopathy on the right with a partial thickness tear, chronic post-traumatic right brachia plexopathy, right carpal tunnel syndrome and status post contracture deformity of the right fifth digit at the proximal interphalangeal joint. He advised that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (herein after A.M.A., *Guides*),[1] appellant had 44 percent right upper extremity impairment. This included 10 percent right upper extremity impairment due to loss of shoulder motion, 7 percent impairment due to loss of finger motion, 30 percent impairment for right lateral pinch deficit and a 3 percent pain-related impairment. Dr. Weiss combined the impairment values.

On May 1, 2007 the Office referred the medical record to an Office medical adviser for review. In a May 1, 2007 report, the Office medical adviser reviewed the medical evidence, including Dr. Weiss' January 23, 2007 report. He advised that maximum medical improvement was reached on January 23, 2007 and agreed with Dr. Weiss' findings regarding the impairment due to loss of range of motion and pain. He noted that, under the A.M.A., *Guides*, decreased strength could not be rated in the presence of painful conditions. The Office medical adviser concluded that appellant had a 20 percent impairment of the right upper extremity.

By decision dated May 8, 2007, appellant was granted a schedule award for a 20 percent right upper extremity impairment, to run for 62.4 weeks from January 23, 2007 to April 3, 2008.

On May 18, 2007 appellant, through her attorney, requested a hearing. At the hearing, held on September 28, 2007, she testified that she was left-handed. Appellant described the June 10, 2005 injury, which she returned to full-time work with restrictions and described the current condition of her right hand. She stated that she could not grip and had limited motion, pain and numbness of her hand and shoulder. She was limited in daily activities because she

[1] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

could not open jars, sew or pick up her grandson. Appellant's attorney argued that Dr. Weiss' report should represent the weight of medical opinion or, at the very least, a conflict in medical evidence had been created.

In a December 12, 2007 decision, an Office hearing representative affirmed the May 8, 2007 schedule award decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[4] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[6] Office procedures provide that to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred ("date of maximum medical improvement"), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides*. The procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for opinion concerning the nature and percentage of impairment and the Office medical adviser should provide rationale for the percentage of impairment specified.[7]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides*, *supra* note 1.

[5] *See Joseph Lawrence, Jr., supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b-d) (August 2002).

itemized and stated in terms of percentage loss of use of the member in accordance with the figures and tables found in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[8]

Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[9] Section 16.8a provides that in a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods, the loss of strength may be rated separately. An example of such situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated.[10] Section 16.4 provides that in evaluating abnormal motion both active and passive motion measurements are necessary to evaluate the joint motion under the appropriate charts, and these should be added to obtain the total motion impairment.[11]

Section 18.3b provides that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*. Office procedures provide that, if the conventional impairment adequately encompasses the burden produced by pain, the formal impairment rating is determined by the appropriate section of the A.M.A., *Guides*.

ANALYSIS

The Board finds that appellant does not have more than 20 percent right upper extremity impairment. On January 23, 2007 Dr. Weiss provided range of motion measurements for appellant's right shoulder and concluded that she had 10 percent impairment due to loss of motion. His finding of 90 degrees of abduction under Figure 16-43 is 4 percent impairment.[12] Under Figure 16-40, forward flexion of 90 degrees is 6 percent impairment.[13] Dr. Weiss also advised that, under Figure 16-25, fifth digit loss of motion of the metacarpophalangeal joint yielded 6 percent digit impairment and under Figure 16-21, fifth finger range of motion of the distal interphalangeal joint of zero yielded 36 percent digit impairment, or a 40 percent fifth digit impairment or a 4 percent hand impairment.[14] He advised that, under Figure 16-23, ring and middle finger flexion of 0 to 80 degrees yielded 12 percent digit impairment or 1 percent hand

[8] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[9] A.M.A., *Guides*, *supra* note 1 at 433-521.

[10] *Id*. at 508; *see Cerita J. Slusher*, 56 ECAB 532 (2005).

[11] A.M.A., *Guides*, *id.* at 451-52.

[12] *Id.* at 477.

[13] *Id.* at 476.

[14] *Id*. at 461, 464.

impairment each.[15] The physician properly added the abnormal shoulder motion units to conclude that appellant had 10 percent right upper extremity impairment due to loss of shoulder motion. Under Table 16-2, the combined hand impairments of 7 percent yielded 6 percent upper extremity impairment.[16] Dr. Weiss rated an additional 3 percent impairment due to pain and 30 percent impairment due to right lateral pinch deficit.

Regarding pain, section 18.3d(c) of the A.M.A., *Guides* provides that an additional three percent impairment may be granted for pain that slightly increases the burden of a condition.[17] The Board notes, however, that the Office has advised its staff that Chapter 18 is not to be used.[18] Moreover, under the A.M.A., *Guides*, however, decreased strength cannot be rated in the presence of painful conditions.[19] The A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in the other chapters.[20] Dr. Weiss advised that appellant's right shoulder condition caused pain at the extremes of motion and that her household duties were restricted, noting difficulty brushing her teeth, grasping, pulling, pushing, and with fine dexterity with her right hand. He graded appellant's pain at 0-4/10. Dr. Weiss, however, did not adequately explain any sensory impairment to her right upper extremity could not be rated under Chapter 16 or how her condition came within one of the several situations identified under Chapter 18.3a.[21] Furthermore, there is no indication that the diagnosed conditions of carpal tunnel syndrome and contracture deformity of the right fifth finger, which limited her mobility, are employment related. The Office medical adviser merely adopted Dr. Weiss' conclusion. The Board finds that the medical evidence of record, does not provide a proper rating for sensory loss. Dr. Weiss did not adequately support the three percent impairment for pain.

Dr. Weiss also awarded an additional 30 percent for right lateral pinch deficit. The Office medical adviser properly found that appellant was not entitled to an additional award for loss of strength. The A.M.A., *Guides* provides that only in rare cases should an additional award be given for loss of strength and it cannot be rated in the presence of decreased motion or painful conditions.[22] As an example, an increased rating for loss of strength could be made if, after

[15] *Id*. at 463.

[16] *Id*. at 439.

[17] A.M.A., *Guides*, *supra* note 2 at 573.

[18] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (November 2002).

[19] A.M.A., *Guides*, *supra* note 1 at 508.

[20] *Id*. at 571.

[21] Section 18.3a of the A.M.A., *Guides* provides that a pain-related impairment can be rated when there is excess pain in the context of a verifiable medical condition that causes pain, when there are well-established pain syndromes without significant identifiable organ dysfunction to explain the pain and when there are other associated pain syndromes. *Id*. at 570.

[22] A.M.A., *Guides*, *supra* note 1, section 16.8a at 508.

healing, a palpable muscle defect is present.[23] Such is not the case here. The medical evidence does not establish more than the 20 percent right upper extremity impairment awarded.

CONCLUSION

The Board finds that appellant did not establish that she has more than a 20 percent impairment of the right upper extremity for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 12 and May 8, 2007 be affirmed.

Issued: December 19, 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

[23] *Id.*