United States Department of Labor
Employees' Compensation Appeals Board

D.N., Appellant	)	
and	)	**Docket No. 07-1940**
	)	**Issued: June 17, 2008**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2007 appellant filed a timely appeal from a May 31, 2007 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than five percent impairment to her left arm and four percent impairment to both her right and left legs.

FACTUAL HISTORY

This case has previously been before the Board.[1] Appellant's claim was accepted by the Office for contusions to her neck, back and shoulders following an employment-related automobile accident. She was treated for cervical and lumbar radiculopathy and a herniated disc

[1] Docket No. 06-1250 (issued April 5, 2007).

at C5-6. Appellant filed a claim for a schedule award and submitted the report of Dr. Paul J. Sedacca, an attending general practitioner, who rated her impairment as 18 percent of the whole person due to her cervical and lumbar radiculopathy. She also submitted a report from Dr. George L. Rodriguez, Board-certified in physical medicine and rehabilitation, who rated her impairment as 22 percent to the left arm and 19 percent impairment to both her right and left legs. An Office medical adviser reviewed the medical evidence and found that neither Dr. Sedacca nor Dr. Rodriguez had properly applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) in making their impairment ratings. He rated appellant's impairment as three percent of the left upper extremity and to both lower extremities due to pain. On December 14, 2004 the Office issued schedule awards conforming to the impairment rating of the Office medical adviser. This decision was subsequently affirmed by an Office hearing representative on February 7, 2006. In an April 5, 2007 decision, the Board set aside the schedule awards noting deficiencies in the impairment rating provided by each physician. The case was remanded to the Office for further development on the issue of the extent of permanent impairment related to appellant's accepted injury. The factual history of the case, as set forth in the Board's prior decision, is hereby incorporated by reference.

On remand, the Office requested that the Office medical adviser clarify his rating of permanent impairment. On April 29, 2007 the Office medical adviser noted that appellant complained of pain in the area of the left cervical spine and to both lower extremities. The medical adviser noted that he had previously rated three percent impairment of both legs and the left arm. He noted that, under Table 15-17, page 424, the maximum percent loss for sensory deficit affecting the upper extremity was eight percent, rather than five percent as he had previously indicated. The medical adviser utilized Table 15-15 to grade the severity of the sensory loss as Grade 4, allowing 25 percent deficit for the left upper extremity based on C6 nerve root involvement. This resulted in two percent impairment to the left arm for sensory loss. The medical adviser rated impairment to both legs, noting that, under Table 15-18, page 424, the maximum percent loss for sensory deficit affecting the lower extremities was five percent for the L5 nerve root. He utilized Table 15-15 to grade the severity of the sensory loss as Grade 4, allowing 25 percent deficit for both the right and left lower extremities. This resulted in 1.25 percent impairment to both legs.

The medical adviser noted that his previous rating had allowed two percent for pain based on Figure 18-1, page 574 as a contributing factor. He noted that, upon reconsideration, he would allow the maximum three percent allowed under this category. The medical adviser combined this three percent for pain to the two percent sensory loss for the left upper extremity to find a total of five percent impairment to the arm. He also combined the three percent for pain to the one percent sensory loss for both lower extremities to find four percent impairment to both the right and left leg.

On May 31, 2007 the Office granted schedule awards, finding five percent impairment to the left arm and four percent impairment to both the right and left legs, less the amounts previously awarded.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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.[4] 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.[5]

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulation. As neither the Act nor the regulation provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[6] However, as the Act makes provision for the lower extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originates in the spine.[7]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from her physician. The description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[8]

ANALYSIS

The Board finds that the case is not in posture for decision as the April 29, 2007 impairment rating of the Office medical adviser does not conform to the Office's protocols.

The Office accepted appellant's claim for injury to her cervical and lumbar spines sustained in a 1989 motor vehicle accident. As noted, appellant is not entitled to a schedule award for any impairment to her spine or back; however, she may receive schedule awards for any impairment originating in the spine affecting her upper or lower extremities. In this case, the Office granted schedule awards for impairment of the C6 nerve root impacting her left arm and for impairment originating in the L5 nerve root affecting both legs. The Board previously

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] 20 C.F.R. § 10.404(a).

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

[6] *George E. Williams*, 44 ECAB 530 (1993).

[7] *Id.*

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

remanded the case to the Office, based on its determination that the medical evidence did not provide an impairment rating conforming to the A.M.A., *Guides*.

On April 29, 2007 the Office medical adviser again reviewed the medical evidence. He rated two percent impairment to the left arm due to sensory loss by applying Tables 15-17 and 15-15.[9] The Office medical adviser found one percent impairment due to sensory loss to both legs based on Table 15-18 and Table 15-15. However, he again used Chapter 18 to provide an additional pain-related impairment of three percent to each of the affected extremities. This was error and reduces the probative value of his medical opinion. Chapter 18 clearly states that examiners should not use "this chapter 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 other chapters of the [A.M.A.,] *Guides*."[10] The Office has advised its staff that Chapter 18 is "not to be used in combination with other methods to measure impairment due to sensory pain…."[11] The medical adviser did not provide any discussion as to why an additional impairment rating for pain would be appropriate in this case after having rated sensory loss under the tables of Chapter 15. In essence, he provided a duplicative rating for pain.

While appellant has the burden of establishing the extent of impairment due to her accepted injury, the Office shares responsibility in the development of the medical evidence.[12] On remand, the Office should refer appellant for examination by a physician knowledgeable in the use of the A.M.A., *Guides* for an opinion on the nature and extent of any impairment related to her 1989 automobile accident.[13] After such further development as may be warranted, the Office should issue a *de novo* decision on her claim for a schedule award.

CONCLUSION

The Board finds that the case is not in posture as to the extent of permanent impairment resulting from appellant's accepted injury.

[9] The medical adviser noted that Table 15-17 provides an eight percent maximum for C6 nerve root impairment.

[10] A.M.A., *Guides*, page 571 at 18.3b.

[11] FECA Bulletin No. 01-05 (issued January 29, 2001). *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 use of fifth edition of the A.M.A., *Guides* (November 2002).

[12] *See Anthony P. Silva*, 55 ECAB 179 (2003).

[13] On appeal, counsel for appellant contends that the Board should accept the impairment ratings provided by Dr. Rodriguez. However, as noted in the prior appeal, his impairment rating was found not to have conformed with the A.M.A., *Guides*. This finding is *res judicata* absent any additional report from the physician. *See W.B.*, Docket No. 06-1283 (issued April 5, 2007); citing *Paul Raymond Kuyoth*, 27 ECAB 498 (1976).

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2007 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further development in conformance with this decision.

Issued: June 17, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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