United States Department of Labor
Employees' Compensation Appeals Board

K.O., Appellant	)	
and	)	**Docket No. 07-1885**
	)	**Issued: March 6, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Dallastown, 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:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated June 25, 2007. 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 met her burden of proof to establish that she sustained more than seven percent permanent impairment of her right upper extremity for which she received a schedule award.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[1] In a November 3, 2006 decision, the Board found that appellant's case was not in posture for decision as to whether she

[1] Docket Nos. 06-984 & 06-1820 (issued November 3, 2006). The record reflects that the Office authorized an anterior cervical discectomy and allograft fusion with anterior cervical plating for a right-sided C5-6 herniated nucleus pulposus and left-sided C6-7 herniated nucleus pulposus, which she underwent on March 7, 2003.

had more than seven percent impairment of her right arm. The Board also found that she had no more than 14 percent impairment of the larynx. The Board remanded the case for further development. The facts and the history are set forth in the prior decision and are incorporated by reference.

On November 27, 2006 the Office referred appellant to Dr. Perry Eagle, a Board-certified orthopedic surgeon, along with a statement of accepted facts, a set of questions and the medical record.

In a report dated December 18, 2006, Dr. Eagle utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 166 (5th ed. 2001) (A.M.A., *Guides*) and described appellant's history of injury and treatment. He rated appellant as having 25 percent whole person impairment. On physical examination, Dr. Eagle noted that appellant had limitation of motion in her neck and could rotate 70 degrees in either direction; flex to 30 degrees, extend to 50 degrees, and could laterally tilt to 25 degrees in either direction. Additionally, he noted that appellant had no complaints of pain with range of motion. Dr. Eagle determined that deep tendon reflexes in the upper extremities were symmetrical, and there was no deltoid, biceps, triceps, and wrist dorsiflexor or hand muscle weakness, with the distal sensation intact except for hypoesthesia over the dorsal aspects of the right little and ring fingers, and excellent grip strength. Regarding the right shoulder, he noted that appellant had full range of motion and no tenderness over the acromioclavicular (AC) joint, rotator cuff or biceps groove. Dr. Eagle noted that appellant had a normal electromyography (EMG) scan, and advised that magnetic resonance imaging (MRI) scans of the cervical spine revealed a disc protrusion at C3-4, spondylosis at C4-5, and posterior spondylosis at C5-6 and C6-7. He advised that appellant had reached maximum medical improvement. Dr. Eagle referred to Table 15-5,[2] stating that appellant would fall into the DRE Cervical Category IV, with loss of motion segments due to surgical arthrodesis and radiculopathy which would correlate to 25 percent impairment of the whole person.

In an addendum dated January 2, 2007, Dr. Eagle noted that appellant's impairment involved the C3 dermatome and referred to Figure 15-2.[3] He referred to Table 15-15,[4] finding that appellant had a Grade 4 deficit. Dr. Eagle indicated that under Table 16-14[5] the maximum percentage of upper extremity impairment due to sensory deficit to C8 was 20 percent. He multiplied this by the Grade 4 sensory deficit to find four percent impairment to the right arm. In a January 30, 2007 addendum, Dr. Eagle opined that the four percent award was the total award and it was not in addition to the prior award.

By decision dated February 2, 2007, the Office denied appellant's claim for an additional schedule award to the right arm. Based on the evaluation of Dr. Eagle, appellant had no increase in the impairment to the right upper extremity.

[2] A.M.A., *Guides* 392.

[3] *Id*. at 377.

[4] *Id*. at 424.

[5] *Id*. at 490.

By letter dated February 8, 2007, appellant's representative requested reconsideration. He alleged that he was not given notice of the second opinion examination and that the Office's failure to notify him effectively denied appellant the right to have a physician present to participate in the examination. Counsel requested that the Office vacate the decision and arrange for a new second opinion examination and a notice of the examination.

On February 16, 2007 the Office vacated the February 2, 2007 decision, as appellant and her representative were not properly notified of her right to have a physician of her choice (and paid for by her) present at the second opinion examination performed on December 18, 2006.

On February 28, 2007 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record to Dr. Robert Draper, a Board-certified orthopedic surgeon.

In a March 27, 2007 report, Dr. Draper noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*. For the right shoulder he noted that appellant had 180 degrees of abduction and 180 degrees of forward flexion. Dr. Draper indicated that, with the right shoulder abducted to 90 degrees, appellant had 90 degrees of internal rotation and 90 degrees of external rotation. He also advised that appellant had 170 degrees of forward flexion and 170 degrees of abduction. Dr. Draper referred to Table 16-40[6] and determined that abduction of 170 degrees for the right shoulder was equal to one percent of the right upper extremity. He referred to Figure 16-43[7] and determined that abduction of 170 degrees equated to zero percent. Dr. Draper referred to Table 16-46[8] and determined that 90 degrees of external rotation was equivalent to zero percent of the shoulder and opined that the total impairment of the right arm associated with the shoulder was equal to one percent. He noted that appellant did not have a sensory or motor deficit involving the cervical nerve roots at C5, C6 and C7. Dr. Draper also determined that there was no C8 sensory or motor deficit and no physical examination findings consistent with cervical radiculopathy involving the right upper extremity.

In a June 18, 2007 report, the Office medical adviser noted appellant's history of injury and treatment and reviewed the medical reports submitted by Drs. Eagle and Draper. He indicated that appellant reached maximum medical improvement on May 9, 2005. The Office medical adviser determined that Dr. Eagle's impairment rating of four percent only included impairment for one level nerve root, whereas appellant's operation included two different nerve roots and explained that the calculation of C8 was correct at four percent. The Office medical adviser explained that, because appellant's postoperative radiculopathy would involve both the C5-6 and C6-7 anterior disc excision and fusion, the impairment would equate to seven percent for both nerve roots. The Office medical adviser also explained that Dr. Draper indicated that appellant had limitation of range of motion of the right upper extremity which was comprised of limited flexion and extension which resulted in one percent impairment to the right arm. He also explained that Dr. Draper's report did not recognize that radiculopathy would be present and

[6] *Id*. at 476.

[7] *Id*. at 477.

[8] *Id*. at 479.

anticipated after such a clinical situation. The Office medical adviser also indicated that Dr. Eagle, who examined appellant three and a half months prior to Dr. Draper, noted that the right shoulder had full range of motion, but Dr. Eagle found decreased sensation over the dorsal aspect of the ring and little fingers. He opined that appellant should receive a schedule award of seven percent to the right upper extremity.[9]

By decision dated June 25, 2007, the Office denied appellant's claim for an increased schedule award. The Office found that appellant had no more than a seven percent permanent impairment of the right upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[10] and its implementing regulations[11] 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 appellants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all appellants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[12]

ANALYSIS

This Board finds that this case is not in posture for a decision. The case requires further development of the medical evidence.

In the instant case, the Office referred appellant for a second opinion with Dr. Eagle, but failed to notify appellant's representative of the examination. The Board has held that, under 20 C.F.R. § 10.144, the Office's failure to notify the representative of the referral of appellant for a second opinion examination denied a claimant the statutory right to have a physician designated and paid by the claimant present to participate in the examination.[13] As a result of failing to notify appellant's representative of the examination, the Office vacated its February 2, 2007 decision and scheduled a new examination with Dr. Draper, a Board-certified orthopedic surgeon, in order to allow appellant and his representative the opportunity to have a physician present or participate in the examination.

[9] Dr. Eagle also provided an impairment rating of 14 percent to the larynx and advised that the accepted condition should be expanded to include paralysis of right recurrent laryngeal nerve.

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404; *see Jacqueline S. Harris*, 54 ECAB 139 (2002).

[13] *Donald J. Knight*, 47 ECAB 706 (1996).

In a March 27, 2007 report, Dr. Draper utilized the A.M.A., *Guides* and provided range of motion measurements for the right shoulder. He referred to Table 16-40[14] and determined that abduction of 170 degrees for the right shoulder was equal to one percent impairment of the right upper extremity. Dr. Draper noted that appellant had abduction of 170 degrees and referred to Figure 16-43[15] which indicated that this would warrant an impairment of zero percent. He referred to Table 16-46[16] and determined that 90 degrees of external rotation was equivalent to zero percent of the shoulder. Dr. Draper concluded that appellant had one percent impairment of the right arm. He did not opine that appellant was entitled to any additional impairment.

In a June 18, 2007 report, the Office medical adviser reviewed the medical record and the report submitted by Dr. Draper. The Office medical adviser noted that, while Dr. Draper opined that appellant only had one percent impairment to the right arm, he did not recognize that radiculopathy would be present and anticipated after such a clinical situation. Therefore, the Office medical adviser referred to the findings contained in Dr. Eagle's impairment rating of four percent. He explained that Dr. Eagle only included impairment for one level nerve root, whereas appellant's operation[17] included two different nerve roots and explained that the calculation of C8 was correct at four percent based on impairment for one level nerve root. However, the Office medical adviser explained that the levels of C5-6 and C6-7 involved nerve roots C6 and C7, and not C8. He therefore opined that this would equate to seven percent for both nerve roots and that appellant was therefore entitled to seven percent to the right upper extremity. The Office medical adviser did not adequately explain how he arrived at his conclusion. He did not refer to any sections or pages in the A.M.A., *Guides* to support his findings. The Office's procedures indicate that the opinion of the Office medical adviser can constitute the weight of the medical opinion evidence only if it is rationalized, considers each reported finding of impairment and comports with the A.M.A., *Guides*.[18] As the Office referred appellant for an evaluation of the permanent impairment of her right arm, it has an obligation to obtain a report on which a proper evaluation and assignment of permanent impairment can be done.[19]

On remand, the Office should refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an evaluation and calculation of her work-related impairment of her right upper extremity based upon a proper application of the fifth edition of the A.M.A., *Guides.* Following such further development as the Office deems necessary, it should issue a *de novo* decision.

[14] A.M.A., *Guides* 476.

[15] *Id*. at 477.

[16] *Id*. at 479.

[17] *See supra* note 1.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(h) (April 1993).

[19] *See Robert Kirby*, 51 ECAB 474 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983).

CONCLUSION

The Board finds that this case is not in posture for decision regarding the extent of appellant's upper extremity impairment, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 25, 2007 is set aside and the case remanded for further development consistent with this decision.

Issued: March 6, 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