United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 08-1493**
	)	**Issued: February 11, 2009**
U.S. POSTAL SERVICE, POST OFFICE, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 28, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 12, 2007 merit decision concerning her schedule award claim. 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 met her burden of proof in establishing that she has more than three percent impairment of the left upper extremity and any impairment of the right upper extremity.

FACTUAL HISTORY

On March 21, 2001 appellant, then a 53-year-old mail processor, filed an occupational disease claim indicating that she injured her arms while in the performance of her federal duties. On October 12, 2001 the Office accepted her claim for tendinitis of right and left shoulders.[1] Appropriate treatment and compensation benefits were authorized.

On December 10, 2003 appellant filed a claim for a schedule award. In an August 12, 2002 impairment evaluation, Dr. David Weiss, an osteopath, presented findings on examination of appellant's wrists and elbows as well as findings on grip strength and pinch key unit testing. He applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (hereinafter A.M.A., *Guides*) to appellant's grip strength deficit and pain-related complaints to find 13 percent permanent impairment to each upper extremity.

On March 4, 2004 the Office referred appellant to Dr. Anthony W. Salem, a Board-certified orthopedic surgeon, for a second opinion. In a report of the same date, Dr. Salem examined appellant and found no objective evidence of any residual due to the accepted conditions.

On October 29, 2004 the Office determined that a conflict in medical opinion arose between Dr. Weiss and Dr. Salem as to whether appellant had residual or impairment due to her accepted conditions. She was referred, together with a statement of accepted facts, a list of questions and a copy of the medical record, to Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a November 19, 2004 report, Dr. Meller noted findings on examination. Left and right lateral rotation was 65 degrees bilaterally, all fully and completely normal without any stated complaints or visible discomfort. Extension was 40 degrees. Shoulder motion was 170 degrees flexion, 160 degrees abduction and 40 degrees extension. Dr. Meller opined that appellant had subjective discomfort in the left wrist as well as the left shoulder blade. The shoulder blade was described as stiff, but was objectively normal and the left wrist did not correlate with appellant's examination and complaints. Dr. Meller stated that there was nothing to suggest that any of the diagnostic conditions, such as the bilateral shoulder tendinitis or the tenosynovitis of the left wrist and hand were clinically active. He characterized appellant's subjective aches and pains as being due to significantly advanced age, proximity to retirement, obesity, deconditioning, diabetes and a passive sedentary existence. Dr. Meller opined that the work-related injury had completely resolved without any residuals. He advised that she required no further treatment with regard to the work injury and could return to full-unrestricted duty without any restrictions.

On January 8, 2005 an Office medical adviser reviewed the medical evidence of record, including Dr. Meller's November 19, 2004 report. He noted that Dr. Meller's evaluation was normal with subjective complaints only and with complete resolution of the work-related injury. Based on Figure 18.1, page 573 of the A.M.A., *Guides,* and the Office medical adviser

[1] Under claim number xxxxxx676, appellant has an accepted condition for tendinitis of the right hand and wrist.

[2] A.M.A., *Guides* (5th ed. 2001).

recommended three percent pain impairment for the left upper extremity and no permanent impairment of the right upper extremity. He stated that the maximum medical improvement was reached November 19, 2004.

By decision dated January 18, 2005, the Office granted appellant a schedule award for three percent impairment of the left upper extremity. The period of the award ran for 9.36 weeks from November 19, 2004 to January 23, 2005.

On January 21, 2005 appellant's attorney disagreed with the January 18, 2005 decision and requested an oral hearing, which was held November 17, 2005. By decision dated February 6, 2006, the Office's January 18, 2005 decision was vacated and the case remanded for the Office medical adviser to provide an assessment of appellant's impairment based on Dr. Meller's report.

On September 21, 2006 the Office referred the case record to its Office medical adviser and requested that he provide an assessment of appellant's impairment consistent with the instructions from the hearing representative. In a September 21, 2006 report, the hearing representative indicated that appellant was thoroughly evaluated by Dr. Meller, who specifically looked for any residuals of the accepted work-related injury/accepted conditions and who indicated that the work-related injury had resolved fully and completely without any residuals impairments. The Office medical adviser further indicated that the hearing representative had indicated that Chapter 18 should not be used to evaluate pain, which was used in finding the three percent upper extremity impairment for pain. Thus, he concluded there were no ratable impairments related to any work-related injury.

By decision dated September 26, 2006, the Office denied appellant's claim for an additional schedule award.

In a September 28, 2006 letter, appellant disagreed with the Office's September 26, 2006 decision and requested an oral hearing, which was held February 6, 2007. By decision dated April 3, 2007, an Office hearing representative set aside the September 26, 2006 decision and remanded the case for clarification of Dr. Meller's opinion. The Office hearing representative noted that, while Dr. Meller concluded that appellant had no impairment of either upper extremity due to her accepted bilateral shoulder tendinitis, the range of motion measurements he reported for both shoulders would justify a three percent bilateral impairment rating under figures 16-40 and 16-42 of the A.M.A., *Guides*.

In an April 5, 2007 letter, the Office requested that Dr. Meller clarify his opinion regarding whether appellant had any permanent impairment of either upper extremity due to her accepted condition of bilateral shoulder tendinitis.

In an April 22, 2007 report, Dr. Meller advised that appellant's range of motion findings noted in his November 19, 2004 evaluation were in his opinion, within normal limits and would be the equivalent of what the A.M.A., *Guides* consider full and unrestricted. He stated that he was unable to objectively verify any restrictions due to tendinitis on both shoulders. Dr. Meller advised that tendinitis was basically inflamed tissue and appellant did not exhibit any apprehension, guarding, dyssynergy or irregularity of movement on examination. On specific

provocation, appellant noted a little stiffness to the shoulder. Dr. Meller advised that one would expect a little stiffness in the shoulder due to appellant's age, diabetic condition of 12 years and fact that she did not engage in exercise or fitness. He further stated that those types of complaints typically respond to Celebrex, which she indicated was quite effective. Although appellant might have some achiness in the shoulders, Dr. Meller opined that her complaints were not due to tendinitis, but rather due to age, wear and tear, diabetes and perhaps deconditioning. He reiterated that appellant did not have any impairment using the A.M.A., *Guides* and apportioned zero impairment to her work-injury relating to the shoulder.

On May 17, 2007 the Office requested its Office medical adviser to review Dr. Meller's reports. In a May 20, 2007 report, the Office medical adviser concluded there were no ratable impairments or residuals from the accepted conditions which would restrict appellant's shoulders. He noted that the accepted condition was bilateral shoulder tendinitis and section 16.7d, page 507 of the A.M.A., *Guides* did not allow for an impairment rating based upon tendinitis. The Office medical adviser also concurred that there was no medical condition restricting appellant's shoulders range of motion and there were no residuals from the accepted condition. He also stated that the A.M.A., *Guides* were not the absolute authority for what a normal range of motion values for shoulder motion were and advised he did not find anything incorrect or outside the norm when Dr. Meller discussed why he choose a value for the normal shoulder range of motion movements which were different from that of the A.M.A., *Guides*.

By decision dated May 21, 2007, the Office denied the claim for an increased schedule award for the left upper extremity and denied an award for the right upper extremity.

On May 24, 2007 appellant disagreed with the Office's May 21, 2007 decision and requested an oral hearing, which was held September 28, 2007. By decision dated December 12, 2007, the Office hearing representative affirmed the Office's May 21, 2007 decision. Determinative weight was accorded to Dr. Meller, the impartial medical examiner.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[5]

[3] 5 U.S.C § 8107.

[4] 20 C.F.R § 10.404 (2002).

[5] A.M.A., *Guides* 250 (5th ed. 2001); *see B.C.*, 58 ECAB ___ (Docket No. 06-925, issued October 13, 2006).

Section 8123(a) of the Act provides in pertinent part: 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.[6] In situations where there exist 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 upon a proper factual background, must be given special weight.[7]

ANALYSIS

The Office accepted appellant's claim for tendinitis of right and left shoulders. It issued a schedule award for three percent impairment of appellant's upper left extremity, but denied her claim for an upper right extremity schedule award. The issue is whether appellant has established that she has more than the three percent left upper extremity impairment or any permanent impairment to her right upper extremity causally related to her accepted injuries.

The Office determined that a medical conflict existed between Dr. Weiss, appellant's treating physician, and Dr. Salem, the Office referral physician, concerning the extent of any permanent impairment to the upper extremities due to the accepted bilateral shoulder condition.[8] Dr. Weiss diagnosed conditions affecting both upper extremities as work related and opined that appellant had a 13 percent impairment of each upper extremity due to decreased grip strength and pain caused by those conditions. Dr. Salem opined that appellant had no impairment of either upper extremity based on the results of an objectively normal examination. He concluded that appellant recovered without residuals from the accepted bilateral shoulder condition. To resolve this conflict, the Office referred appellant to an impartial medical examiner, Dr. Meller, a Board-certified orthopedic surgeon.

In a November 19, 2004 report, Dr. Meller reviewed the medical evidence and presented examination findings, including rotation, extension and range of motion findings. He stated that, while appellant had subjective discomfort in the left wrist and left shoulder blade, there was nothing to suggest that the work-related condition of bilateral shoulder tendinitis or tenosynovitis of the left wrist and hand were clinically active. Dr. Meller opined appellant's work-related injury had resolved without residuals and her subjective aches and pains were due to other factors such as advanced age, obesity, deconditioning, diabetes and a passive sedentary existence. He further opined no further medical treatment was necessary. In an April 22, 2007 supplemental report, Dr. Meller again stated that he did not find any impairment under the A.M.A., *Guides* as he was unable to objectively verify any restrictions due to the work-related tendinitis on both shoulders.[9] He explained that tendinitis was inflamed tissue and appellant did

[6] 5 U.S.C. § 8123(a).

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[8] *See Geraldine Foster*, 54 ECAB 435 (2003).

[9] It was proper for the Office to secure a supplemental report from Dr. Meller as the Board has held that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect. *V.G.*, 59 ECAB ___ (Docket No. 07-2179, issued July 14, 2008).

not exhibit any of the signs indicative of an inflammation on examination. Dr. Meller further explained that appellant's stiffness in her shoulder was not due to tendinitis, but rather were due to other factors such as age, wear and tear, diabetes and deconditioning. He additionally advised that the measurements he took were equivalent of what the A.M.A., *Guides* would consider full and unrestricted and were not attributable to the work-related injury. Dr. Meller provided a zero impairment rating for appellant's upper extremities. The Board finds that Dr. Meller's medical opinion is sufficient to represent the weight of the medical opinion evidence because it is well rationalized and based on proper factual and medical background. The Office properly relied on this medical opinion in denying appellant's claim of an increased schedule award for her left upper extremity and in denying her claim for the right upper extremity.

An Office medical adviser applied Dr. Meller's findings to the A.M.A., *Guides* and determined that appellant had three percent impairment for pain under Chapter 18 of the A.M.A., *Guides*. However, the Board notes that Dr. Meller's referee report establishes that any symptoms or pain that appellant experienced were not due to the accepted condition. Thus, any impairment due to pain was not causally related to the accepted employment conditions. Furthermore, the Board has noted that physicians should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[10]

On appeal, appellant contends that Dr. Meller did not take into account appellant's diabetic condition in calculating the schedule award. Appellant's counsel properly notes that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[11] However, in this case, there was no ratable impairment due to the accepted employment injury.[12] Appellant, therefore, is not entitled to any impairment arising out of complications from her diabetic condition or any other condition that may have preexisted her accepted employment injury.

CONCLUSION

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

[10] *Frantz Ghassan*, 57 ECAB 349 (2006).

[11] *Beatrice L. High*, 57 ECAB 329 (2006); *Michael C. Milner*, 53 ECAB 446 (2002); *Lela M. Shaw*, 51 ECAB 372 (2000).

[12] *See Thomas P. Lavin*, 57 ECAB 353 (2006) (where the claimant did not demonstrate any permanent impairment caused by the accepted occupational exposure, the claim was not ripe for consideration of any preexisting impairment).

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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