United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 08-1318**
	)	**Issued: March 10, 2009**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs January 8, 2008 decision, which denied modification of a schedule award. 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 more than 34 percent permanent impairment of her right upper extremity and 20 percent permanent impairment of her left upper extremity.

FACTUAL HISTORY

On November 18, 1994 appellant, then a 45-year-old postal clerk, filed an occupational disease claim alleging that she sustained injuries to her arms in the performance of duty. The Office accepted her claim for bilateral wrist strain, bilateral carpal tunnel syndrome with right carpal tunnel release on July 28, 1997 and right shoulder impingement syndrome and shoulder

surgery to repair a torn rotator cuff on May 5, 2004.[1] Appellant received appropriate compensation and benefits.

By decision dated March 28, 2000, the Office granted appellant schedule awards for 34 percent permanent impairment of the right arm and 20 percent impairment of the left arm. The awards covered the period March 26, 2000 to June 19, 2003.

In a March 22, 2005 report, Dr. Richard R. Tavernetti, a Board-certified orthopedic surgeon and treating physician, noted that appellant was post rotator cuff repair of the right shoulder with a "fairly successful result." He opined that her permanent impairment was unchanged. Dr. Tavernetti noted that appellant had improved her range of motion and advised that she had forward flexion and abduction from 0 to 160 degrees, external rotation of 0 to 45 degrees and internal rotation of 0 to L5. He opined that appellant had improved about 20 degrees in "most directions."

On May 3, 2006 appellant filed a Form CA-7 claim for an additional schedule award.

In an August 2, 2006 report, Dr. Tavernetti noted that an examination of the right elbow revealed extension of 8 degrees and flexion of 128 degrees compared with the left side, which had full extension and 130 degrees of flexion. He noted that appellant had full supination and pronation and diagnosed degenerative joint disease of the right elbow and post rotator cuff repair of the right shoulder. Dr. Tavernetti diagnosed degenerative joint disease of the right elbow and status post rotator cuff repair of the right shoulder. He indicated that he did not believe that this was related to the work injury.

By letters dated August 3 and 17, 2006, the Office referred appellant for an examination with Dr. Alan Kimelman, Board-certified in physical medicine and rehabilitation, to determine whether she sustained a permanent impairment due to her work injury.

In an August 25, 2006 report, Dr. Kimelman reviewed appellant's history of injury and treatment. He noted that the bilateral median nerves showed normal findings without evidence of mononeuropathy at the wrists and advised that normal parameters were seen in the median nerve properties in the forearms and late F waves. Dr. Kimelman indicated that sensory and motor radial studies revealed normal findings bilaterally. He conducted an examination and provided range of motion findings for the right shoulder. Dr. Kimelman determined that appellant had flexion of 145 degrees, extension of 50 degrees, abduction of 130 degrees and adduction of 35 degrees. He noted that appellant had internal rotation of 70 degrees, external rotation of 60 degrees and extension of 50 degrees. Dr. Kimelman opined that appellant had no evidence of carpal tunnel syndrome; or median, ulnar or radial neuropathy in either arm.

In a November 1, 2006 report, an Office medical adviser noted appellant's history of injury and treatment. She utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*) (5th ed. 2001) to rate impairment due to loss of

[1] The record reflects that the Office doubled appellant's claim for right rotator strain with the present claim. File Nos. xxxxxx567 and xxxxxx096.

range of motion. For the right shoulder, she referred to Figure 16-40[2] and noted that loss of flexion, yielded three percent impairment and zero percent for loss of extension. The Office medical adviser referred to Figure 16-43[3] for loss of abduction and determined that appellant had three percent impairment for loss of abduction and one percent for loss of adduction. She referred to Figure 16-46[4] and advised that appellant had one percent impairment loss for internal rotation and no impairment for loss of external rotation. The Office medical adviser indicated that this would equate to eight percent impairment. Regarding impairment due to loss of strength and sensory deficit or pain, she referred to Table 16-10[5] and indicated that, for the right, appellant had a Grade 4 or 25 percent deficit. She referred to Table 16-15[6] and explained that the maximum combined impairment based on the suprascapular nerve was equal to 20 percent. The Office medical adviser multiplied the value for the loss of strength by the maximum combined impairment for the suprascapular nerve (25 percent x 20 percent = 5 percent) and determined that would warrant five percent impairment for loss of strength and pain. For the median nerve distribution, the medical adviser referred to Table 16-10[7] and advised that the impairment due to sensory deficit or pain was bilateral and assigned a Grade 4 or 25 percent deficit. She determined that the maximum impairment for total sensory loss of the median nerve was 39 percent according to Table 16-15,[8] which, when multiplied by the 25 percent deficit, was equal to 10 percent (25 percent x 39 percent = 10 percent). The Office medical adviser referred to the Combined Values Chart[9] to find total impairment of the right upper extremity as 21 percent and 10 percent for the left upper extremity. She opined that there was no additional impairment for either extremity since the previous determination and advised that appellant reached maximum medical improvement on August 25, 2006.

By decision dated December 28, 2006, the Office denied appellant's claim for an additional schedule award as the medical evidence did not establish greater impairment.

By letter dated September 28, 2007, appellant requested that her claim be reopened as her accepted conditions had worsened. On October 20, 2007 she requested reconsideration. She submitted a January 10, 2007 report from Dr. Tavernetti, who indicated that he had examined appellant's right shoulder and determined that external rotation was 45 degrees; internal rotation was 40 degrees; forward flexion was 145 degrees; abduction was 145 degrees; and adduction was 15 degrees. Dr. Tavernetti noted that he had utilized Figures 16-40, 16-43, 16-46 and Table

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

[3] *Id*. at 477.

[4] *Id*. at 479.

[5] *Id*. at 482.

[6] *Id*. at 492.

[7] *Id*. at 482.

[8] *Id*. at 492.

[9] *Id*. at 604.

16-3.[10] He opined that appellant had an eight percent permanent limitation in movement, which translated to five percent whole body impairment.

In a January 29, 2007 report, Dr. David C.M. Schiff, a Board-certified orthopedic surgeon, advised that appellant had good passive range of motion, but her active range of motion was "not as good as I would like and she has pain at the root of the neck." He recommended x-rays of the cervical spine. In a February 12, 2007 report, Dr. Schiff noted that x-rays of the cervical spine revealed severe multilevel degenerative changes at C5-6 and C6-7 with some changes at C4-5. He indicated that appellant should undergo a magnetic resonance imaging (MRI) scan. In an April 23, 2007 report, Dr. Schiff, noted that appellant's MRI scan revealed changes in the subacromial space and biceps tendinitis. He advised physical therapy.

By decision dated January 8, 2008, the Office denied modification of the December 28, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[11] and its implementing regulations[12] 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 regulations as the appropriate standard for evaluating schedule losses.[13]

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 itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[14] 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.[15]

[10] *Id*. at 476, 477, 479, 439.

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

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

[14] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[15] *Bernard A. Babcock, Jr*., 52 ECAB 143 (2000); *see also Paul A. Toms*, 28 ECAB 403 (1987).

The Office's procedures[16] specifically provide that upper extremity impairment secondary to carpal tunnel syndrome and other entrapment neuropathies should be calculated using section 16.5d and Tables 16-10, 16-11 and 16-15.[17]

ANALYSIS

Appellant claimed an additional schedule award, contending greater impairment than her March 28, 2000 award. On August 2, 2006 Dr. Tavernetti provided range of motion measurements for the left arm. However, he did not reference the A.M.A., *Guides* or make reference to any specific tables, figures or pages, in addressing appellant's impairment. Dr. Tavernetti did not provide any opinion regarding the percentage of impairment. His subsequent report dated January 10, 2007, is of limited probative value as Dr. Tavernetti merely provided a percentage of impairment without any explanation of how he arrived at his conclusion pursuant to the A.M.A., *Guides*.[18] The Board notes that Dr. Tavernetti provided a whole person impairment rating. The Act, however, does not provide a schedule award based on whole person impairments.[19] The reports provided by Dr. Schiff, are also of limited probative value as he did not provide any opinion on impairment.

The Office referred appellant for a second opinion examination with Dr. Kimelman. In an August 25, 2006 report, Dr. Kimelman noted appellant's history of injury and treatment and provided findings on examination. On November 1, 2006 the Office medical adviser applied the A.M.A., *Guides* to Dr. Kimelman's findings. She noted that appellant reached maximum medical improvement on August 25, 2006. For the right shoulder, the Office medical adviser referred to Figure 16-40[20] and noted that loss of flexion of 145 degrees represented three percent impairment and extension of 50 degrees result in no impairment. She referred to Figure 16-43[21] for loss of abduction and determined that for 130 degrees of abduction, appellant had three percent impairment. The Board notes however, that this is a two percent loss for abduction. For 35 degrees of adduction, the Office medical adviser correctly found that this represented one percent impairment. She referred to Figure 16-46[22] and determined that 70 degrees of internal rotation was a one percent impairment and no impairment resulted from 60 degrees of external rotation. The Office medical adviser added the values for loss or range of motion and found

[16] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808 (August 2002) (March 1995).

[17] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). *See also Cristeen Falls*, 55 ECAB 420 (2004).

[18] *See Shalanya Ellison*, 56 ECAB 150 (2004) (schedule awards are to be based on the A.M.A., *Guides*; an estimate of permanent impairment is irrelevant and not probative where it is not based on the A.M.A., *Guides*).

[19] *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither the Act, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

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

[21] *Id*. at 477.

[22] *Id*. at 479.

eight percent impairment. However, as noted, for two percent impairment for loss of abduction, this results in seven percent impairment for loss of range of motion. For loss of strength and sensory deficit (pain) in the distribution of the suprascapular nerve, the Office medical adviser referred to Table 16-10 and noted that, for the right, appellant was classified as Grade 4, which represented a 25 percent deficit.[23] She referred to Table 16-15[24] and noted that the maximum impairment for combined motor and sensory deficit of the suprascapular nerve was 20 percent. The Office medical adviser multiplied the 25 percent deficit by the maximum impairment value of 20 percent to find 5 percent impairment due to combined motor and sensory deficit related to the suprascapular nerve. Regarding sensory deficit in the median nerve for both the left and right arms, the Office medical adviser referred to Table 16-10[25] and opined that appellant had a Grade 4 deficit which represented 25 percent. She determined that the maximum impairment for sensory loss of the median nerve below the mid forearm was 39 percent under Table 16-15.[26] The Office medical adviser multiplied the 25 percent deficit by 39 percent to find 9.75 percent for sensory to each arm loss involving the median nerve. She rounded this up to 10 percent.[27] The Office medical adviser referred to the Combined Values Chart[28] and found that the total impairment for the right upper extremity was 21 percent and 10 percent for the left upper extremity. As noted, a harmless error occurred with regard to her finding of 3 percent for abduction for the right arm, instead of 2 percent as the combined total under the Combined Values Chart remains at 21 percent for the right arm.

Appellant has not submitted medical evidence conforming with the A.M.A., *Guides* establishing that she has greater impairment.[29] As she previously received schedule awards for 34 percent impairment of the right arm and 20 percent impairment of the left arm, she is not entitled to an additional schedule award.

[23] *Id*. at 482. Table 16-10 pertains to grading impairment for sensory deficit or pain. Table 16-11, at page 484, pertains to grading impairment for motor deficits. Table 16-11 also provides a maximum 25 percent motor deficit for a Grade 4 classification and the procedure for determining impairment in this table is similar to procedure in Table 16-10.

[24] A.M.A., *Guides* 492.

[25] *Id*. at 482.

[26] *Id*. at 492.

[27] *See Marco A. Padilla*, 51 ECAB 202 (1999); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter, 3.700.3.b (October 1990) (the policy of the Office is to round the calculated percentage of impairment to the nearest whole point).

[28] A.M.A., *Guides* 604.

[29] The Board notes that appellant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

CONCLUSION

The Board finds that appellant has not established that she has sustained more than 34 percent permanent impairment of her right upper extremity and 20 percent permanent impairment of her left upper extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 8, 2008 is affirmed.

Issued: March 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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