United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 09-2168**
	)	**Issued: August 10, 2010**
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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 28, 2009 appellant filed a timely appeal from a June 1, 2009 decision of the Office of Workers' Compensation Programs which affirmed a schedule award. 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 four percent impairment of the right arm for which she received a schedule award.

FACTUAL HISTORY

On December 21, 1999 appellant, then a 56-year-old manual distribution clerk, injured her right shoulder when lifting mail. The Office accepted her claim for right shoulder strain and cervical radiculitis and authorized arthroscopic surgery which was performed on September 29, 2000. Appellant returned to full-time limited-duty work and retired in March 2007.

Appellant was treated by Dr. Steven J. Valentino, an osteopath, from January 12 to September 6, 2000, for an acute onset of right shoulder pain while casing and lifting mail. He noted findings of right paracervical spasms, diminished sensation about the right fingers and mildly positive impingement sign over the right shoulder. A January 17, 2000 cervical x-ray revealed spondylotic changes at C4 through C6 and a magnetic resonance imaging scan of the right shoulder revealed a partial rotator cuff tear. Dr. Valentino diagnosed cervical radiculitis, right shoulder strain and exacerbation of cervical spondylosis and recommended a course of conservative treatment including physical therapy and cervical facet injections. On September 29, 2000 he performed a right shoulder arthroscopy for a rotator cuff tear with subacromial decompression of severe impingement syndrome, debridement of labral tear and extensive excision of subdeltoid bursitis. On January 31, 2001 Dr. Valentino returned appellant to work full-time restricted duty.[1]

On September 12, 2008 appellant filed a claim for a schedule award.

In a July 3, 2008 report, Dr. Nicholas Diamond, an osteopath, noted that appellant reached maximum medical improvement that day. He noted that right shoulder examination revealed a well-healed portal arthroscopy scar, focal acromioclavicular point tenderness, anterior and posterior cuff tenderness, circumduction produced a click and crepitus, range of motion revealed forward elevation of 180 degrees, abduction of 180 degrees, adduction of 75 degrees, external rotation of 90 degrees and internal rotation of 75 degrees. Grip strength testing on the right *via* Jamar Hand Dynamometer at Level 3 revealed 22.25 kilogram (kg) of force strength versus 16 kg of force strength on the left. Dr. Diamond noted manual muscle strength testing of the right upper extremity involving the supraspinatus musculature was a Grade 4 and deltoid muscle strength was a Grade 4 with no sensory deficit in either upper extremities. He diagnosed post-traumatic right shoulder rotator cuff tear, severe impingement syndrome, anterior superior labral tear, severe subdeltoid bursitis, status post right shoulder arthroscopy, rotator cuff repair, excision of subdeltoid bursitis, injection of the right shoulder, post-traumatic cervical facet syndrome, cervical disc syndrome with herniated discs at C2-3, C3-4 and C6-7, right C5 radiculopathy and status post cervical facet injections. Dr. Diamond noted that, based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*) appellant had right arm impairment of 23 percent. This was comprised of 4 percent impairment for Grade 4 motor strength deficit of the supraspinatus,[3] 8 percent impairment for Grade 4 motor strength deficit of the right deltoid,[4] 10 percent impairment for right shoulder resection arthroplasty[5] and 3 percent for pain-related impairment.[6]

[1] In a March 3, 2003 decision, the Office reduced appellant's compensation to zero to reflect his actual earnings as a full-time modified distribution clerk since January 31, 2001. It concluded the position of full-time modified distribution clerk fairly and reasonably represented appellant's wage-earning capacity.

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

[3] *Id.* at 484, 492, Figure 16-11, 16-15; note that the supraspinatus correlates to the suprascapular nerve.

[4] *Id.;* note that the deltoid correlates to the axillary nerve.

[5] *Id.* at 506, Table 16-27.

[6] *Id.* at 574, Figure 18-1.

The Office referred Dr. Diamond's report to an Office medical adviser. In a November 9, 2008 report, the medical adviser found that appellant had four percent impairment of the right arm. He noted that Dr. Diamond recommended a 23 percent impairment based upon strength deficit of the supraspinatus and deltoid muscles, a shoulder resection arthroplasty and pain-related impairment. However, the medical adviser noted that Dr. Valentino did not perform a distal clavicle resection, rather a rotator cuff debridement and labral tear resection was performed. Therefore, the 10 percent impairment rating for a distal clavicle resection was not accepted. The medical adviser noted that based on section 16.8, page 508 of the A.M.A., *Guides*, decreased strength cannot be rated in the presence of decreased motion or painful conditions and the electromyogram (EMG) noted weakness exhibited on the right side with pain from the shoulder surgery. He determined that the four percent impairment rating for right supraspinatus motor loss and eight percent impairment for deltoid weakness were inappropriate. The medical adviser further noted that pain-related impairment of three percent was not appropriate based on section 18.3a, page 570 of the A.M.A., *Guides*. He noted that Dr. Diamond found 75 degrees of internal rotation that was one percent impairment.[7] The Office medical adviser noted sensory deficit was present in C5 to T1 on an EMG dated February 6, 2007. He calculated one percent impairment for Grade 4 pain in the distribution of the C5 nerve[8] and two percent impairment for Grade 4 pain in the distribution of the C6 nerve[9] for a three percent impairment for sensory deficit or pain in the C5 and C6 nerve roots. The medical adviser noted that pursuant to the Combined Values Chart appellant had four percent impairment of the right upper extremity in accordance with the A.M.A., *Guides*. He noted the date of maximum medical improvement was July 3, 2008.

By decision dated December 17, 2008, the Office granted appellant a schedule award for four percent permanent impairment of the right upper extremity. The period of the award was from July 3 to September 28, 2008.

On December 24, 2008 appellant requested an oral hearing which was held on March 17, 2009.

In a decision dated June 1, 2009, the hearing representative affirmed the December 17, 2008 schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[10] and it 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

[7] *Id.* at 479, Figure 16-46.

[8] *Id.* at 482, 552, Table 16-10, 17-37.

[9] *Id.*

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

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.

ANALYSIS

On appeal, appellant contends that she has more than four percent permanent impairment of the right upper extremity. She asserts that there is a conflict in medical opinion between the medical adviser and Dr. Diamond with regard to the extent of impairment to her right arm. The Office accepted appellant's claim for sprain of the right shoulder strain and cervical radiculopathy and authorized arthroscopic shoulder surgery on September 29, 2000. The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Diamond, appellant's treating physician.

The Office medical adviser, in a report dated November 9, 2008, advised that based on the A.M.A. *Guides* appellant had four percent impairment of the right upper extremity. He noted that appellant's surgery did not qualify as a distal clavicle resection and advised that appellant had one percent impairment for 70 degrees of internal rotation,[12] one percent impairment for a Grade 4 sensory deficit or pain in the distribution of the C5 nerve root to the right upper extremity[13] and a two percent impairment for a Grade 4 sensory deficit or pain in the distribution of the C6 nerve root of the right upper extremity.[14] By contrast, Dr. Diamond in his report dated July 3, 2008, found that appellant sustained a 23 percent impairment rating for the right upper extremity. He determined that appellant would receive 4 percent impairment for a Grade 4 motor strength deficit of the supraspinatus nerve of the right upper extremity,[15] 8 percent impairment for a Grade 4 motor strength deficit of the deltoid nerve of the right upper extremity,[16] 10 percent impairment for right shoulder resection arthroplasty[17] and 3 percent for pain-related impairment.[18] Dr. Diamond determined that the work-related injury of December 21, 1999 was the competent producing factor for appellant's subjective and objective findings described above. He supported an increased impairment rating of the right upper extremity, noting the basis of his rating under the A.M.A., *Guides*, while the Office medical

[12] A.M.A., *Guides* 479, Figure 16-46.

[13] *Id.* at 482, 552, Table 16-10, 17-37.

[14] *Id.*

[15] *Id.* at 484, 492, Figure 16-11, 16-15.

[16] *Id.*

[17] *Id.* at 506, Table 16-27.

[18] *Id*. at 574, Figure 18-1. *See K.W.*, 59 ECAB ___ (Docket No. 07-1547, issued December 19, 2007) (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 other chapters). Dr. Diamond did not support this rating with sufficient explanation.

adviser opined that appellant sustained no more than a four percent permanent impairment of the right upper extremity pursuant to the A.M.A., *Guides*.

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."[19] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[20] The Board finds that the Office should have referred appellant to an impartial medical specialist to resolve the medical conflict regarding the extent of permanent impairment arising from appellant's accepted employment injury.

Therefore, in order to resolve the conflict in the medical opinions, the case will be remanded to the Office for referral of the case record, including a statement of accepted facts and, if necessary, appellant, to an impartial medical specialist for a determination regarding the extent of his right upper extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*.[21] After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of his right upper extremity impairment.

CONCLUSION

The Board finds that this case is not in posture for decision.

[19] 5 U.S.C. § 8123(a).

[20] *William C. Bush*, 40 ECAB 1064 (1989).

[21] *See Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2009 and December 17, 2008 decisions of the Office are set aside and the case is remanded for further action consistent with this decision.

Issued: August 10, 2010
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