

**United States Department of Labor  
Employees' Compensation Appeals Board**

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T.C., Appellant )

and )

**DEPARTMENT OF JUSTICE, FEDERAL  
BUREAU OF INVESTIGATION,  
Philadelphia, PA, Employer** )

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**Docket No. 09-808  
Issued: February 24, 2010**

*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 February 3, 2009 appellant, through counsel, filed a timely appeal from a September 30, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a March 19, 2008 decision granting her schedule awards. 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 has more than a six percent permanent impairment of the left upper extremity and three percent impairment of the right lower extremity, for which she received schedule awards.

On appeal, appellant contends that there is a conflict in the medical opinion evidence.

**FACTUAL HISTORY**

On March 20, 2002 appellant, then a 34-year-old investigative specialist, sustained back, neck and leg injuries as a result of her car hydroplaning and hitting a cement barrier. The Office

accepted her claim for right ankle sprain, herniated cervical disc, fracture of the tarsal and metatarsal bones, laminotomy, foraminotomy and right-sided C6-7 disc excision. She subsequently claimed a schedule award.

In an October 9, 2007 report, Dr. David Weiss, an examining osteopath, provided findings on examination of appellant. She complained of cervical spine and right lower extremity pain, right ankle instability and weakness and difficulty in sitting or standing for prolonged periods. Dr. Weiss found tenderness and paravertebral muscle spasm over the posterior cervical spine midline. Range of motion for the cervical spine included 40/45 degrees flexion, 35/45 degrees backward extension, 70/80 degrees left rotation, 65/80 degrees right rotation, 30/25 degrees right lateral flexion and 30/45 degrees left lateral flexion. Dr. Weiss reported appellant's right ankle motion was 0-55/55 degrees plantar flexion, 0-35/35 degrees eversion, 0-15/15 degrees dorsiflexion and 0-35/35 degrees inversion. He noted a negative Talar tilt and reported her "[a]nterior drawer sign produces some joint laxity. On examination, the right ankle and foot revealed exquisite tenderness over the posterior medial and lateral aspects of the calcaneus and over the common peroneal tendon. Range of motion for plantar and dorsiflexion of 4/5, a grade of 3+/5 for eversion and inversion and a grade of 4/5 for the gastrocnemius. Dr. Weiss diagnosed C4-5, C5-6 and C6-7 herniated nucleus pulposus, chronic post-traumatic cervical sprain and strain, right C6 and C8 cervical radiculitis, left C6 radiculitis, chronic right foot posterior calcaneus contusion and chronic right ankle sprain and strain with common peroneal tendinitis.

In rating impairment, Dr. Weiss found a six percent left upper extremity impairment based on a Grade 2 left C6 sensory nerve root using Tables 15-15 and 15-17, page 424. As to the right lower extremity, he rated loss of strength under Table 17-8, page 532. Appellant had a 17 percent motor strength impairment for a Grade 4 plantar flexion; a 12 percent motor strength impairment for a Grade 4 dorsiflexion; a 12 percent motor strength impairment for a Grade 3 inversion; a 12 percent motor strength impairment for a Grade 3 eversion. He also found 3 percent for pain pursuant to Figure 18-1 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*. Combining these impairments resulted in a total 47 percent right lower extremity impairment. Dr. Weiss indicated that appellant reached maximum medical improvement on October 9, 2007.

On March 10, 2008 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, agreed with the six percent impairment rating provided by Dr. Weiss for the left arm. He concurred with the recommendation of a Grade 2 or 80 percent cervical nerve root deficit under Table 15-15, page 424. Under Table 15-17, page 424, the maximum impairment for the C6 sensory nerve is eight percent. He multiplied 8 percent by 80 percent to total 6 percent left upper extremity sensory impairment. As to appellant's right lower extremity impairment, Dr. Berman found that appellant had a three percent impairment for pain under Table 18-1 at page 574. He found that Dr. Weiss did not adequately explain his rating as examination revealed no atrophy, full right ankle range of motion and the other objective evidence was negative.

By decision dated March 19, 2008, the Office granted appellant schedule awards for six percent impairment of the left arm and a three percent impairment of the right leg.<sup>1</sup>

Appellant's counsel requested an oral hearing before an Office hearing representative, which was held on July 16, 2008.<sup>2</sup>

By decision dated September 30, 2008, the hearing representative affirmed the March 19, 2008 decision.<sup>3</sup>

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulations<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

### **ANALYSIS**

The Office accepted appellant's claim for right ankle sprain, herniated cervical disc, fracture of the tarsal and metatarsal bones, laminotomy, foraminotomy and right sided C6-7 disc excision. Appellant claimed schedule awards for permanent impairment and submitted an October 9, 2007 report from Dr. Weiss.

Both Dr. Weiss and Dr. Berman, the Office medical adviser, concluded that appellant had six percent impairment of the left arm. Under Table 15-17, the maximum sensory impairment

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<sup>1</sup> The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity and 312 weeks for compensation for 100 percent loss or loss of use of an arm. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by 3 percent equals 8.64 weeks of compensation and multiplying 312 weeks by 6 equals 18.72 for a total 27.36 weeks.

<sup>2</sup> Appellant submitted a report from Dr. Weiss which noted an original date October 9, 2007 and a revised date of July 31, 2008. The report was identical to the October 9, 2007 report except that it included a three percent impairment rating for the right upper extremity due to pain.

<sup>3</sup> The hearing representative remanded for a determination as to whether appellant was entitled to a schedule award for her right upper extremity based upon an October 7, 2007 report by Dr. Weiss.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). See *S.K.*, 60 ECAB \_\_\_\_ (Docket No. 08-848, issued January 26, 2009).

for the C6 nerve root is eight percent.<sup>8</sup> The impairment is then graded based on Table 15-15, according to the severity of the impairment.<sup>9</sup> The medical adviser agreed with Dr. Weiss, who classified the deficit at 80 percent or a Grade 2 under Table 15-15.<sup>10</sup> Multiplying 80 percent by 8 percent results in an upper extremity impairment of 6 percent. There is no probative medical evidence establishing greater impairment to the left upper extremity.

Regarding the right lower extremity, Dr. Weiss discussed the employee's complaints of right ankle/lower extremity pain, right ankle/lower extremity instability and weakness and difficulty sitting or standing for prolonged times. He found a total 47 percent right lower extremity impairment due to motor strength deficits of the right ankle and pain.<sup>11</sup> He applied Table 17-8 to rate muscle weakness. Dr. Weiss determined that appellant had 17 percent motor strength impairment for a Grade 4 right ankle plantar flexion; 12 percent motor strength impairment for a Grade 4 right ankle dorsiflexion; 12 percent motor strength impairment for a Grade 3 right ankle inversion; and 12 percent motor strength impairment for a Grade 3 right ankle eversion. Applying the Combined Values Chart, this totals 44 percent impairment for right ankle muscle weakness. To this, he allowed three percent for pain under Chapter 18. However, the A.M.A., *Guides* cautions examiners not to 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.<sup>12</sup> The A.M.A., *Guides* provide: "The impairment ratings in the body organ system chapters make allowance for expected accompanying pain."<sup>13</sup> Dr. Weiss did not adequately explain why pain or sensory loss could not be rated using the chapter on lower extremity impairment, Chapter 17. Furthermore, Table 17-2, the cross-usage chart, does not provide that a rating for pain may be combined with a muscle strength impairment rating. Absent any explanation of how his evaluation of the employee conformed to the *Guides*, Dr. Weiss' rating of 47 percent is of reduced probative value.<sup>14</sup> For these reasons, the Board finds that the impairment rating of Dr. Weiss is not sufficient to determine the extent of appellant's right lower extremity impairment.

Dr. Berman, an Office medical adviser, reviewed the case record and determined that there was no evidence that the employee experienced any right ankle muscle weakness, atrophy or loss of range of motion. He found the rating by Dr. Weiss insufficient to support that the employee had any impairment due to loss of strength. The Office medical adviser found that

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<sup>8</sup> A.M.A., *Guides* 424, Table 15-17.

<sup>9</sup> *Id.* at 424, Table 15-15.

<sup>10</sup> A Grade 2 impairment is decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility), with abnormal sensations or moderate pain, that may prevent some activities. The impairment is 61 to 80 percent of the maximum impairment for the identified nerve

<sup>11</sup> A.M.A., *Guides* 532, 574, Tables 17-8 and 18-1.

<sup>12</sup> A.M.A., *Guides* 571; *see D.N.*, 59 ECAB \_\_\_\_ (Docket No. 07-1940, issued June 17, 2008); *Mark A. Holloway*, 55 ECAB 321 (2004).

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *R.H. (B.H.)*, 59 ECAB \_\_\_\_ (Docket No. 07-2286, issued September 19, 2008); *Laura Heyen*, 57 ECAB 435 (2006).

pain could be possible with the employee's injury and allowed three percent impairment under Chapter 18 of the A.M.A., *Guides*. Dr. Berman, however, provided no explanation as to why Chapter 17 of the A.M.A., *Guides*, the chapter for evaluating impairment of the lower extremities, could not be used in making an impairment determination of appellant's right lower extremity. The Board finds that the impairment rating of Dr. Berman is not sufficient to determine the extent of appellant's right lower extremity impairment

The case will be remanded to the Office for further development of the medical evidence on the issue of appellant's right lower extremity impairment. After such further development as the Office deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds that appellant did not establish that she has more than a six percent impairment of the left upper extremity, for which she received a schedule award. The Board finds that the case is not in posture for a decision on the issue of her right lower extremity impairment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision dated September 30, 2008 is affirmed in part and set aside, in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 24, 2010  
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