

FACTUAL HISTORY

This case has previously been before the Board. In an April 5, 2007 decision, the Board set aside a February 7, 2006 Office decision which found that appellant had no more than three percent impairment to her left arm and each leg for which she received schedule awards.¹ On the second appeal, the Board set aside a May 31, 2007 Office decision that found five percent impairment to appellant's left arm and four percent impairment to each leg. The case was remanded to the Office to refer appellant to a physician knowledgeable in the use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), for an impairment rating.² The facts of the claim are set forth in the prior decisions and are hereby incorporated by reference.

On December 2, 2008 the Office referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion. In a December 18, 2008 report, Dr. Stark examined appellant and reviewed her medical record. He concluded that appellant's right upper extremity showed no abnormal sensation. Dr. Stark noted no sensory or motor deficit to either upper extremity or atrophy. He noted that the only objective finding regarding appellant's left upper extremity was a chronic C6 radiculopathy. Pursuant to Table 15-17, page 424 of the A.M.A., *Guides*, the maximum amount loss of function due to sensory deficit or pain for the C6 nerve root was eight percent. Under Table 15-15 of the A.M.A., *Guides*, appellant had a Grade 4 sensory deficit, 25 percent.³ He found that appellant had 2 percent impairment of her left upper extremity by multiplying 8 percent by 25 percent. Regarding appellant's lower extremities, Dr. Stark noted that appellant had no clinical findings relating to her left lower extremity. He determined that subjective findings revealed reduced sensation to L2 and L3 dermatomes on the right, which were not supported by diagnostic testing. Therefore, Dr. Stark concluded that appellant sustained three percent impairment to each leg based on Table 18-3, page 575 of the A.M.A., *Guides*, for mild pain to both legs.

By letter dated December 31, 2008, the Office asked the Office medical adviser to provide his comments with regard to the Board's decision and Dr. Stark's report. On January 18, 2009 the Office medical adviser agreed with the impairment rating by Dr. Stark. He allowed three percent impairment for pain in the right and left lower extremities based on subjective findings of reduced sensation at L2-3 but not otherwise documented by electromyogram or nerve conduction studies. The Office medical adviser agreed that appellant had two percent impairment of her left upper extremity C6 radiculopathy based on Table 15-17 and Table 15-15 on page 424 of the A.M.A., *Guides*.

¹ Docket No. 06-1250 (issued April 5, 2007). Appellant's claim was accepted by the Office for contusions to her neck, back and shoulder following an employment-related automobile accident. She was treated for cervical and lumbar radiculopathy and a herniated disc at C5-6. On May 31, 2007 the Office issued a schedule award finding that appellant had a total impairment of five percent to the left arm and four percent impairment each to the right and left legs.

² 59 ECAB ____ (Docket No. 07-1940, issued June 17, 2008).

³ A Grade 4 sensory deficit is described as, "Distorted superficial tactile sensibility (diminished light touch) with or without minimal abnormal sensation or pain, that is forgotten during activity." A.M.A., *Guides* 424, Table 15-15. The A.M.A., *Guides* allow between 1 to 25 percent for percentage of sensory deficit for a Grade 4 classification.

By decision dated January 29, 2009, the Office denied appellant's claim for an increased schedule award as Dr. Stark did not find evidence of greater impairment.⁴

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of schedule 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.⁸ However, a claimant is entitled to a schedule award for permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the neck, shoulder or spine.⁹

ANALYSIS

The Office accepted appellant's claim for contusions to her cervical and lumbar spines and shoulder. It previously granted schedule awards for five percent impairment to the left arm and four percent impairment to both legs. As noted, appellant is not entitled to a schedule award for any impairment to her spine or back; however, she may receive schedule awards for any impairment originating in the spine affecting her upper or lower extremities. The Board previously remanded the case to the Office to further develop the medical evidence.

The Office referred appellant to Dr. Stark for a second opinion on the extent of appellant's employment-related impairment. The Board finds that Dr. Stark properly applied the A.M.A., *Guides* in evaluating appellant's degree of impairment. After examining appellant and reviewing her medical record, Dr. Stark noted that the only objective finding involving the left upper extremity was C6 radiculopathy. Pursuant to the A.M.A., *Guides* 424, Table 15-17, the maximum percentage of impairment due to sensory deficit or pain of the C6 nerve root is eight percent. Using Table 15-15, Dr. Stark noted that appellant had a Grade 4 deficit for which he

⁴ The hearing representative found that as appellant had been previously paid compensation based on five percent impairment of the left upper extremity and four percent impairment for each lower extremity, the Office would declare an overpayment of compensation at a later date.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ *George E. Williams*, 44 ECAB 530 (1993).

⁹ *Thomas J. Engelhart*, 50 ECAB 310 (1999).

allotted the maximum of 25 percent sensory deficit, as permitted by the A.M.A., *Guides*. He multiplied the 8 percent maximum impairment value by the 25 percent deficit grade to find 2 percent impairment of the left upper extremity.

With regard to appellant's lower extremities, the A.M.A., *Guides* 570, section 18.3a, provide that organ and body system ratings should be used whenever they adequately capture the actual deficits that a claimant experiences. However, Dr. Stark noted that appellant had no clinical findings in her lower extremities that allowed use of Chapter 57. He stated that appellant's subjective reduced sensation along the L2 and L3 dermatomes were not verified by diagnostic study and therefore he could not rate impairment under Chapter 17 of the A.M.A., *Guides*. The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, if an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly,¹⁰ for which no body and organ impairment ratings have been applied.¹¹ A formal pain assessment must be performed in accordance with Chapter 18.¹² In this case, Dr. Stark determined that appellant had no clinical findings with regard to her lower extremities. He made an impairment recommendation based on her subsequent complaints of pain. The Office medical adviser agreed that appellant had three percent impairment to each lower extremity based on subjective findings. Accordingly, the Board finds that the Office properly denied an additional schedule award as the medical evidence does not establish greater impairment.¹³

CONCLUSION

The Board finds that appellant has no more than five percent impairment to the left arm and four percent impairment to both legs, for which she received schedule awards.

¹⁰ *T.H.*, 58 ECAB 334 (2007).

¹¹ A.M.A., *Guides* 571, section 18.3b.

¹² *Id.* at 573.

¹³ On appeal, appellant argues that she should be given a greater award based on the opinion of Dr. Rodriguez or, at a minimum, that a conflict should be found in the medical evidence. Dr. Rodriguez found 22 percent impairment of appellant's upper extremity and 19 percent impairment in each lower extremity. However, as noted in the prior appeal, his impairment rating was not found to have conformed with the A.M.A., *Guides*. This finding is *res judicata* absent any additional report from the physician. See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2009 is affirmed.

Issued: March 16, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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