

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

D.C., Appellant)
and) Docket No. 10-449
U.S. POSTAL SERVICE, POST OFFICE,) Issued: October 18, 2010
Dayton, OH, Employer)

)

Appearances: Case Submitted on the Record
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2009 appellant filed a timely appeal from an October 20, 2009 decision of the Office of Workers' Compensation Programs denying her claim for a schedule award. 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 to establish that she sustained any impairment due to her accepted cervical strain and left jaw contusion.

FACTUAL HISTORY

On March 18, 2002 appellant, then a 48-year-old letter carrier, sustained a cervical strain and left jaw contusion when she was involved in an employment-related motor vehicle accident. She returned to modified duty on April 27, 2002.

On December 5, 2002 appellant's attorney filed a schedule award claim, and submitted a November 20, 2006 report from Dr. Martin Fritzhand, a Board-certified urologist, who reviewed

the history of injury and noted appellant's complaints of neck and jaw pain with upper extremity weakness. Dr. Fritzhand provided physical examination findings and advised that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),¹ appellant had a 20 percent left upper extremity impairment due to loss of shoulder range of motion, loss of motor strength and pain caused by an axillary nerve injury. In a December 30, 2006 report, Dr. Lutul D. Farrow, an orthopedic surgeon and Office medical adviser, reviewed Dr. Fritzhand's report and disagreed with the finding that appellant had an injury affecting the axillary nerve as it was not supported by diagnostic studies. He advised that Table 16-35 would be more appropriate to rate appellant's motor deficit.

On March 21, 2004 the Office referred appellant to Dr. Pietro Seni, Board-certified in orthopedic surgery, for a second opinion evaluation. In an April 11, 2007 report, Dr. Seni noted appellant's complaint of cervical and lumbar and left shoulder trapezius pain with tingling and numbness in the fingers of both hands. He provided findings on physical examination and advised that appellant was at maximum medical improvement with no ratable impairment to the upper extremities that could be attributed to a cervical strain. Dr. Seni found that neurological examination was normal, there were no restrictions of range of motion and she had adequate upper extremity strength.

On July 16, 2007 Dr. Fritzhand noted his disagreement with Dr. Seni's report. In a report dated November 11, 2007, Dr. Jason David Eubanks, an orthopedic surgeon and Office medical adviser, reviewed the medical record. He recommended an impartial evaluation.

The Office determined that a conflict in medical opinion arose between Dr. Fritzhand and Dr. Seni as to whether appellant had any permanent partial impairment as a result of the accepted conditions. It referred her to Dr. Jonathan Joseph Paley, a Board-certified orthopedic surgeon, for an impartial evaluation. In a January 22, 2009 report, Dr. Paley reviewed the history of injury and noted complaint of left neck pain and bilateral trapezial discomfort. Examination of both upper extremities demonstrated no shoulder instability, full functional range of motion, an intact sensory examination, and at least four over five motor strength that he advised could be graded five over five. No significant discrepancy was identified, with no evidence of atrophy or axillary nerve dysfunction in either upper extremity. Dr. Paley found that appellant had no residuals of the March 18, 2002 employment injury and had reached maximum medical improvement. He provided a minimal overhead lifting restriction of 10 pounds, advised that she was capable of performing the duties of the letter carrier position and had no ratable impairment.

In a March 26, 2009 report, Dr. Nabil F. Angley, a Board-certified orthopedic surgeon and Office medical adviser, agreed with the finding of Dr. Paley that appellant had no ratable impairment.

By decision dated April 28, 2009, the Office denied appellant's claim for a schedule award.

¹ A.M.A., *Guides* (5th ed. 2001).

On April 30, 2009 appellant, through counsel, requested a telephonic hearing. In a May 1, 2009 report, Dr. Fritzhand noted appellant's complaint of cervical spine soreness radiating to the left shoulder and arm with diminished muscle and grasp strength over the left upper extremity and occasional left hand numbness. Examination of the cervical spine demonstrated tenderness of the spinous processes. Left shoulder range of motion demonstrated forward flexion of 100 degrees, abduction of 100 degrees, extension of 40 degrees, and adduction of 20 degrees. External rotation was diminished to 90 degrees and internal rotation to 30 degrees with marked tenderness to palpation over the left shoulder. Sensory examination was normal, muscle strength was well preserved and the left forearm was measured as one-half inch smaller than the right. Dr. Fritzhand stated that it was not possible to rate impairment under the sixth edition of the A.M.A., *Guides* without using the range of motion rating. Under Table 15-34, appellant had a 3 percent impairment for loss of left shoulder flexion, a 1 percent impairment for loss of extension, a 3 percent impairment for loss of abduction, a 1 percent impairment for loss of adduction and a 4 percent impairment for loss of internal rotation, for a total 12 percent left upper extremity impairment.

At the hearing, held on August 5, 2009, appellant testified that she worked modified duties and described her symptoms since the 2002 motor vehicle accident. She stated that Dr. Paley did not conduct a physical examination.

By decision dated October 20, 2009, an Office hearing representative found the weight of the medical evidence rested with Dr. Paley and that Dr. Fritzhand's May 1, 2009 report was insufficient to create a new conflict. The April 28, 2009 decision was affirmed.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,² and its implementing federal regulations,³ 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁵ For decisions issued after May 1, 2009, the sixth edition will be used.⁶ It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.⁷

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.* at § 10.404(a).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁶ A.M.A., *Guides* (6th ed. 2008); FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ *Tammy L. Meehan*, 53 ECAB 229 (2001).

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.⁸ In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁹ A schedule award is not payable for an impairment of the whole body.¹⁰ It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.¹¹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹² Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).¹³ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁴

Section 8123(a) of the Federal Employees' Compensation Act¹⁵ provides that 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.¹⁶ When 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 on a proper factual background, must be given special weight.¹⁷

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *N.M.*, 58 ECAB 273 (2007).

¹¹ *Peter C. Belkind*, 56 ECAB 580 (2005).

¹² A.M.A., *Guides*, *supra* note 6 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

¹³ A.M.A., *Guides*, *supra* note 6 at 385-419.

¹⁴ *Id.* at 411.

¹⁵ 5 U.S.C. §§ 8101-8193.

¹⁶ *Id.* at § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁷ *Manuel Gill*, 52 ECAB 282 (2001).

ANALYSIS

The Board notes that the Act identifies members such as the arm, leg, hand, foot, thumb and finger, functions such as loss of hearing and loss of vision and organs to include the eye.¹⁸ Section 8107(c)(22) provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.¹⁹ 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.²⁰ Appellant is not entitled to a schedule award for the accepted jaw condition.

At the time the Office issued its April 28, 2009 decision, the fifth edition of the A.M.A., *Guides* was in effect.²¹ In a January 22, 2009 report, Dr. Paley, the referee physician, provided physical examination findings, noting no shoulder instability, full functional range of motion, and no evidence of axillary nerve dysfunction. He concluded that appellant had no ratable impairment. Dr. Angley, an Office medical adviser, agreed with the findings of the impartial specialist. In the April 28, 2009 decision, the Office found that appellant was not entitled to a schedule award for her cervical strain based on the impartial opinion of Dr. Paley.

Appellant submitted a May 1, 2009 report from Dr. Fritzhand with her request for a hearing. Dr. Fritzhand advised that he evaluated appellant in accordance with the sixth edition of the A.M.A., *Guides* and rated appellant's left upper extremity injury in accordance with Table 15-34, Shoulder Range of Motion.²² Section 15.2 of the sixth edition of the A.M.A., *Guides* provides that range of motion is used primarily as a physical examination adjustment factor and only used to determine actual impairment values when a grid permits its use as an option, and diagnosis-based impairment is the primary method of evaluation for the upper limb.²³ Dr. Fritzhand generally asserted "it is not possible to define impairment and assign a fair award without using the range of motion rating," but provided no further explanation in this case where the accepted condition is cervical strain. The Board concludes that he provided insufficient explanation or analysis such that appellant would be entitled to a schedule award for the accepted cervical strain or to establish a new conflict in medical evidence.

CONCLUSION

The Board finds that appellant did not establish that she has an impairment caused by her accepted cervical strain and left jaw contusion that would entitle her to a schedule award.

¹⁸ 5 U.S.C. § 8107.

¹⁹ *Id.* at § 8107(c)(22).

²⁰ S.K., 60 ECAB ____ (Docket No. 08-848, issued January 26, 2009).

²¹ *Supra* note 5.

²² A.M.A., *Guides*, *supra* note 6 at 475.

²³ *Id.* at 387.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 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