

Appellant came under the care of Dr. Thomas R. McTernan, a Board-certified orthopedic surgeon, from November 20, 2006 to February 1, 2007. Dr. McTernan diagnosed multiple disc herniations at C3, C4, C5 and found that appellant was totally disabled. A December 6, 2006 magnetic resonance imaging (MRI) scan of the cervical spine revealed a small central disc protrusion at C3-4 and diffuse bulging of the disc at C4-5, C5-6 and C6-7. Appellant was treated by Dr. John Pollina, Jr., a Board-certified neurosurgeon, from January 22 to September 28, 2007, for cervalgia and cervical radiculopathy with weakness in her left triceps which developed after the November 15, 2006 lifting incident at work. Dr. McTernan diagnosed left sided paracentral disc herniation at C6-7, cervalgia, cervical radiculopathy and diabetes and recommended surgical intervention. On March 13, 2007 he performed an anterior cervical discectomy and decompression of neural elements at C6-7 and diagnosed left C6-7 disc herniation. Dr. McTernan noted that appellant progressed well postoperatively and diagnosed status post C6-7 anterior cervical discectomy and fusion.

Appellant underwent an electromyogram (EMG) on May 20, 2008, which revealed left C6 and C7 motor radiculopathy, left carpal tunnel syndrome and left ulnar neuropathy at the elbow. An MRI scan of the cervical spine dated June 6, 2008 revealed C5-6 spinal stenosis secondary to a posterior vertebral body spur, C4-5 spinal stenosis secondary to a diffuse disc bulge, small central C3-4 disc herniation and status post C6-7 surgical cervical fusion.

On September 22, 2008 Dr. McTernan advised that appellant had permanent impairment to the left arm with numbness, tingling and weakness and had reached maximum medical improvement. On February 5, 2009 he noted findings of tenderness of the left trapezius in both upper and lower extremities, pain in the left supraclavicular fossa, moderated weakness in the serratus anterior, triceps and extensors and pronator teres, positive Phalen's and Tinel's signs over both carpal tunnels, paresthesia in the second and third fingers on the left hand with motor dysfunction with range of motion on the left side. Dr. McTernan advised that appellant sustained permanent marked disability pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ (A.M.A., *Guides*).

On February 10, 2009 appellant filed a claim for a schedule award. On February 19, 2009 the Office requested that she submit a detailed report from her treating physician which provided an impairment rating pursuant to the A.M.A., *Guides*.²

In a March 24, 2009 report, Dr. Pollina addressed appellant's complaints of left sided neck, shoulder, scapular pain and numbness in her fingers and decreased grip strength on the left with biceps/triceps weakness. He noted clinical findings of pain with rotation of the neck to the left with 25 percent loss of cervical spine range of motion, grip strength weakness on the left, mild weakness in the biceps/triceps on the left and decreased pinprick in the left finger. Dr. Pollina diagnosed status postanterior cervical discectomy and fusion, neck pain, cervical radiculopathy and cervical disc herniation and opined that appellant was permanently disabled.

¹ A.M.A., *Guides* (5th ed. 2001).

² *Id.* at (6th ed. 2009).

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. David C. Marzulo, an osteopath, for a second opinion evaluation. In a May 21, 2009 report, Dr. Marzulo reviewed appellant's history described his findings on examination. Appellant demonstrated normal gait, no limb drift or tremor, no limb ataxia, intact distal light touch, position sense, pinprick and vibratory sense in the lower extremities, intact pain sensation in the entire upper extremities, normal strength of the deltoids, biceps, triceps infra and supraspinati, wrist and finger dorsiflexors and intrinsic hand musculature as are the lower extremities, no evidence of focal muscle wasting, no scapular winging and normal muscle stretch reflexes at the biceps and both triceps. He diagnosed chronic left cervical radiculopathy, noting that the C7 nerve root was affected by the accepted injury. Dr. Marzulo opined that pursuant to Table 17-2 of the A.M.A., *Guides* cervical spine regional grid appellant was categorized as a class 18 percent impairment.³

In a June 23, 2009 report, an Office medical adviser stated that there was no basis for rating any impairment based on appellant's accepted conditions. He referenced Dr. Marzulo's rating of 18 percent based on the spinal chapter in the A.M.A., *Guides* and noted that it was not a proper basis for rating impairment as the spine was not a scheduled body member. The medical adviser noted that pursuant to FECA Bulletin No. 09-03 the Office did not provide a schedule award for impairment of the back and a diagnosed injury or medical condition originating in the back or spine could only be considered to the extent that it resulted in permanent impairment to the extremities. The medical adviser noted that Dr. Marzulo found no sensory or motor deficit to the upper extremities related to appellant's cervical spine pathology, status post C6-7 anterior cervical discectomy and fusion. Since Dr. Marzulo found no upper extremity clinical sensory or motor deficit related to the cervical spine, there was no demonstrated permanent impairment.⁴ The medical adviser rated the class of impairment as zero upper extremity impairment.⁵ He noted maximum medical improvement was on May 21, 2009.

On June 25, 2009 the Office requested that Dr. Marzulo review the medical adviser's June 23, 2009 report and submit a detailed report which addressed the impairment determination pursuant to the A.M.A., *Guides*. On June 26, 2009 Dr. Marzulo concurred that appellant had no impairment to the upper extremities. As the Office did not permit a schedule award for impairment of the spine, there was no basis for finding any impairment to her upper extremities based on the A.M.A., *Guides*.

On July 7, 2009 the Office medical adviser reviewed Dr. Marzulo's supplemental report and reiterated that appellant did not sustain any impairment to her upper extremities based on her accepted cervical condition and surgery.

On July 14, 2009 the Office denied appellant's claim for a schedule award.

³ *Id.* at 564, Table 17-2.

⁴ *Id.* at 425, Table 15-4.

⁵ *Id.* at 434-44, Table 15-20, 15-21.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulations⁷ 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 Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁸ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁹

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.¹⁰ The Act and the implementing regulations do not provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.¹¹ The Board notes that section 8101(19) specifically excludes the back from the definition of "organ."¹² However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹³

ANALYSIS

On appeal, appellant alleges that she is entitled to a schedule award. The Office accepted her claim for herniated cervical disc without myelopathy and authorized surgery. The Act does not provide for a schedule award based on impairment to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper extremities if such impairment is established as being due to her accepted cervical condition.

In support of her claim, appellant submitted a report from Dr. McTernan. The Board has carefully reviewed Dr. McTernan's report and notes that his findings do not support permanent partial impairment of the upper or lower extremities. Dr. McTernan noted findings of pain along

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition of A.M.A., *Guides*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁹ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁰ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹¹ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹² 5 U.S.C. § 8101(19).

¹³ *Thomas J. Engelhart*, *supra* note 10.

the left trapezius in both upper and lower extremities, pain in the left supraclavicular fossa, moderate weakness in the serratus anterior, triceps and extensors and pronator teres, positive Phalen's and Tinel's signs over both carpal tunnels, paresthesia in the second and third fingers on the left hand and motor dysfunction. He opined that appellant sustained permanent marked disability pursuant to the A.M.A., *Guides*. Although, Dr. McTernan determined that she sustained "marked disability" he failed to provide any impairment rating pursuant to the A.M.A., *Guides*. The report offered no basis on which to rate impairment under the A.M.A., *Guides*. Similarly, Dr. Pollina noted that appellant sustained permanent partial moderate disability and provided clinical findings of pain with rotation of the neck, 25 percent loss of cervical spine range of motion, grip strength weakness on the left, mild weakness in the biceps/triceps on the left and decreased pinprick in the left finger. He did not provide any impairment rating in conformance with the A.M.A., *Guides*. Neither physician explained how appellant's accepted cervical condition caused permanent impairment to the upper extremities. These reports are of limited probative value and are insufficient to establish a basis for the payment of a schedule award.¹⁴

The Office referred appellant to Dr. Marzulo who, determined that appellant had 18 percent impairment of her cervical spine. Dr. Marzulo referenced Table 17-2 of the A.M.A., *Guides* which pertains to impairment for a cervical spine injury.¹⁵ In a June 23, 2009 report, an Office medical adviser reviewed Dr. Marzulo's report and noted that impairment of the spine was not a basis for a schedule award. He noted that Dr. Marzulo found no sensory or motor deficit to the upper extremities related to appellant's cervical spine pathology.¹⁶ The medical adviser found that she had no impairment to her arms. The Office provided Dr. Marzulo with the Office medical adviser's report and requested a supplemental report. On June 26, 2009 Dr. Marzulo agreed that there was no basis under the A.M.A., *Guides* for rating any permanent impairment to appellant's arms. On July 7, 2009 the Office's medical adviser reviewed Dr. Marzulo's supplemental report. He reiterated that appellant had no ratable impairment of the upper extremities in accordance with the A.M.A., *Guides*. The Board finds that appellant has no permanent impairment to her arms based on the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant did not establish that she sustained permanent impairment of her arms based on her accepted cervical condition.

¹⁴ See *Carl J. Cleary*, 57 ECAB 563, 568 at note 14 (2006) (an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

¹⁵ A.M.A., *Guides* 564, Table 17-2.

¹⁶ *Id.* at 425, Table 15-4.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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