United States Department of Labor
Employees' Compensation Appeals Board

V.W., Appellant	)	
and	)	**Docket No. 11-211**
	)	**Issued: September 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 1, 2010 appellant filed a timely appeal from the September 17, 2010 Office of Workers' Compensation Programs' (OWCP) schedule award decision. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she is entitled to a schedule award.

FACTUAL HISTORY

On May 21, 2007 appellant, then 42-year-old mail handler filed a claim for a recurrence on May 16, 2007. She alleged that pulling and lifting in the performance of her duties

[1] 5 U.S.C. § 8101 *et seq.*

contributed to a neck condition.[2] Appellant stopped work on May 18, 2007 and returned on May 21, 2007 in a full-time limited-duty capacity. OWCP accepted her claim for cervical sprain. Appellant received appropriate compensation benefits.

On May 7, 2009 appellant claimed a schedule award. By letter dated July 24, 2009, OWCP requested that she obtain an opinion from her treating physician regarding her work-related condition and permanent impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (*hereinafter*, A.M.A., *Guides*).

In reports dated August 5 and 24, 2009, Dr. Nagaveni Rao, a Board-certified physiatrist, noted that appellant's history and advised that he examined her on August 5, 2009. His findings included that she had pain in the scale of 9 out of 10, tingling down the left arm, numbness in the thumb and index finger, pain in the neck on left rotation, pain on pushing and pulling and lifting objects over five pounds. Dr. Rao diagnosed cervical radiculopathy and opined that appellant reached maximum medical improvement. He advised continued symptomatic care for her shoulder and neck. Dr. Rao opined that appellant had 50 percent permanent loss of use of the left shoulder.

On January 26, 2010 OWCP denied appellant's claim for a schedule award finding that the medical evidence provided did not rate impairment under the A.M.A., *Guides*.

On February 16, 2010 appellant requested reconsideration and submitted additional evidence. In a March 19, 2010 report, Dr. Noel Smith, a Board-certified surgeon, noted her history and referenced the A.M.A., *Guides*. He opined that appellant reached maximum medical improvement around June 2009 and had 30 percent whole person impairment. In a March 30, 2010 report, OWCP's medical adviser noted that Dr. Smith's report was brief and had limited findings. He explained that whole person impairments could not be accepted and requested an amended report from Dr. Smith.

In a letter dated April 12, 2010, OWCP requested that appellant obtain an impairment rating from Dr. Smith for a scheduled body member. In reports dated April 22, 2010, Dr. Smith noted her history and examined her. He opined that appellant reached maximum medical improvement in June 2009. Dr. Smith referred to the left shoulder and provided findings for range of motion they included: flexion of 100 degrees, extension of 15 degrees, abduction of 36 degrees and adduction of 20 degrees. For the cervical spine, he determined that she had flexion of 40 degrees, extension of 10 to 15 degrees, left rotation of 40 degrees, right rotation of 50 degrees, left lateral bend of 15 to 20 degrees and right lateral bend of 30 degrees. Dr. Smith indicated that there was no atrophy or ankylosis, and diagnosed radiculopathy on the left C5-6 and 8, with myopathy, a C4-5 small central disc herniation, C3-4 mild disc bulge. He also noted that appellant had pain in the neck and left arm that was 9 out of 10 in severity at times. Dr. Smith referred to the A.M.A., *Guides* and completed a *Quick*Dash worksheet. He referred to Table 15-5[3] and noted that appellant had class 2 shoulder pain, for 24 percent impairment for the

[2] Appellant has a prior claim under File No. xxxxxx158, for a December 9, 2004 work injury which was accepted for a left rhomboid sprain. OWCP doubled both cases under the present claim.

[3] A.M.A., *Guides* 401.

left arm. Dr. Smith referred to Table 17-2[4] for a multilevel disc herniation and explained that appellant would be in a class 4, for 30 percent impairment. He combined the values for an impairment of 54 percent left arm impairment.

In a May 4, 2010 report, OWCP's medical adviser explained that Dr. Smith had not used the appropriate tables and charts from the A.M.A., *Guides*. He noted that Dr. Smith utilized June 2009 as the date of maximum medical improvement; however, he did not explain how he arrived at this date. The medical adviser noted that Dr. Smith did not explain why he used a class 2 in Table 15-5, as the highest class for a left shoulder sprain was a class 1 and resulted in a default value of one percent. Furthermore, he noted that, for the three grade modifiers, even if they moved the default value from C to E, would only provide two percent left arm impairment. The medical adviser explained that Dr. Smith should have used the range of motion method as there was considerable loss of motion in appellant's examination. He also noted that Dr. Smith referred to Table 17-2, under the cervical spine regional grid for cervical radiculopathy. However, the medical adviser explained that this grid only provided whole person impairments, which as previously noted, were not applicable. He recommended a second opinion.

On May 18, 2010 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Robert Orlandi, a Board-certified orthopedic surgeon. In a June 7, 2010 report, Dr. Orlandi described her history and utilized the A.M.A., *Guides.* He examined appellant and found no evidence of derangement of the left shoulder, left elbow or left wrist. Dr. Orlandi explained that an examination of the three areas of complaint revealed no abnormalities. He also determined that there was no measurable atrophy of the left versus the right upper arm or forearm. Sensation and motor function were intact and there was no epicondylitis. The left shoulder had a full and painless range of motion, including abduction and forward flexion. Dr. Orlandi opined that appellant did not have a musculoskeletal disability in the left arm. He explained that the rating provided by Dr. Smith was excessive. Additionally, Dr. Orlandi noted that he would examine the cervical spine on a separate date. He opined that appellant had no permanent impairment of her left shoulder, left elbow and left wrist.

In a July 12, 2010 addendum, Dr. Orlandi examined appellant's cervical spine on that date. He noted appellant's symptoms of paresthesias in the lateral arm and radial forearm and digits one and two of the left hand. Examination revealed no abnormality in the resting posture. Cervical lordosis was a normal 40 degrees and there was no fixed paraspinal spasm. Appellant had excellent cervical range of motion, which included 65 degrees of cervical extension, 85 degrees of lateral rotation to the right and left, 60 degrees of forward flexion and lateral bending to the right and 40 degrees on the left. There was no evidence of a myofascial sprain of appellant's right or left upper trapezius. Spurling's test of timed extension and external rotation produced no trapezial or upper extremity symptoms. There was no swelling or tenderness of the anterior musculature, deep tendon reflexes were normal 2+ and symmetric in the biceps, triceps and brachioradialis (C3, C6 and C7). Appellant had normal sensation in the upper extremities and normal strength including the interossei, the wrist extensors, the finger extensors, elbow flexors, elbow flexors and shoulder abductors on the right and left (C8 to C4). Dr. Orlandi

[4] *Id.* at 564.

diagnosed resolved cervical and shoulder strains. He explained that a cervical magnetic resonance imaging (MRI) scan revealed only a small central disc herniation that did not contact the thecal sac. Also, Dr. Orlandi advised that there was no nerve root or foraminal impingement and there was a normal lumbar lordosis. He opined that his examination indicated that appellant had a remarkably good and pain-free cervical range of motion, three upper extremity reflexes were normal as was sensation and motor function. Dr. Orlandi opined that no further treatment was warranted and there was no musculoskeletal disability.

On August 3, 2010 OWCP requested additional information from Dr. Orlandi regarding whether appellant had permanent impairment attributable to the cervical spine. In an August 24, 2010 addendum, Dr. Orlandi opined that appellant had no disability and that she had no permanent impairment of the cervical spine. He also noted that the cervical spine did not contribute to the left shoulder and left elbow strains which had resolved.

By decision dated September 17, 2010, OWCP denied modification of the January 26, 2010 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] 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, FECA 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, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[9] In 1960, amendments to FECA 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 FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] *Pamela J. Darling*, 49 ECAB 286 (1998).

impairment originated in the spine.[10] A schedule award is not payable for an impairment of the whole body.[11]

ANALYSIS

OWCP accepted appellant's claim for a left rhomboid sprain and a cervical sprain. However, the evidence of record is insufficient to establish that he is entitled to a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

In support of her claim, appellant submitted several reports from her treating physicians, Dr. Rao and Dr. Smith. In August 5 and 24, 2009 report, Dr. Rao noted findings and opined that appellant had 50 percent impairment of the left shoulder. However, this report is insufficient to establish any employment-related permanent impairment of the left arm as Dr. Rao did not rate impairment under the A.M.A., *Guides*.[12]

In his March 19, 2010 report, Dr. Smith opined that appellant had 30 percent whole person impairment. However, as noted above, a schedule award is not payable for impairment to the body as a whole.[13] In April 22, 2010 reports, Dr. Smith provided examination findings and noted that appellant had significant pain in the neck and left arm at times. He referred to Table 15-5, page 401, and noted that appellant had class 2 shoulder pain, for 24 percent impairment for the left arm. This finding does not comport with the A.M.A., *Guides* as no diagnosis on page 401 provides for class 2 impairment ranges. Furthermore, the highest rating for shoulder pain, on page 401 would be a class 1 with a maximum value of one percent. An attending physician's report is of diminished probative value where the A.M.A., *Guides* are not properly followed.[14] Additionally, Dr. Smith referred to Table 17-2[15] for a multilevel disc herniation and explained that appellant would be in class 4, for 30 percent impairment. However, as noted, whole person impairments are not provided under the A.M.A., *Guides*. The Board also notes that OWCP did not accept cervical disc herniations as being employment related.[16] Dr. Smith did not otherwise provide findings that correlated with the sixth edition of the A.M.A., *Guides* that showed a ratable permanent impairment due to the accepted conditions. Thus, his opinion is of diminished probative value.

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

[11] *N.M.*, 58 ECAB 273 (2007).

[12] *Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (a medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

[13] *Supra note* 11.

[14] *Supra* note 12.

[15] A.M.A., *Guides* 564.

[16] *See Veronica Williams*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury; the claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment).

In a May 4, 2010 report, OWCP's medical adviser reviewed Dr. Smith's April 22, 2010 report and, upon noting the deficiencies in Dr. Smith's impairment rating, recommended a second opinion examination.

In a June 7, 2010 report, Dr. Orlandi, the second opinion physician, found no evidence of derangement of the left shoulder, left elbow or left wrist. There were no abnormalities or atrophy. Sensation and motor function were intact and range of motion was full and painless. Dr. Orlandi opined that appellant had no permanent impairment of the left arm. In a July 12, 2010 addendum, Dr. Orlandi set forth detailed examination findings for appellant's cervical spine as well as additional findings for the left arm. He found no abnormalities to suggest any permanent impairment of the left arm. Resting posture and cervical lordosis were normal and there was no fixed paraspinal spasm. Cervical range of motion was normal as was sensation and strength. Dr. Orlandi opined that the cervical and shoulder strains had resolved. Dr. Orlandi explained that an MRI scan revealed only a small central disc herniation which did not contact the thecal sac. There was no nerve root or foraminal impingement. Dr. Orlandi opined that appellant had no musculoskeletal disability. In an August 24, 2010 addendum, he specifically opined that appellant had no permanent impairment of the cervical spine. Dr. Orlandi found no basis under the A.M.A., *Guides,* on which to attribute any permanent impairment of the left arm to appellant's accepted conditions.

The Board finds that the medical evidence does not establish that appellant has any permanent impairment of the left arm causally related to either her accepted cervical sprain or her left rhomboid sprain. Consequently, OWCP properly denied her claim for a schedule award.

CONCLUSION

The Board finds that OWCP properly denied appellant's claim for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2010 Office of Workers' Compensation Programs' decision is affirmed.

Issued: September 26, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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