

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

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**T.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
McHenry, IL, Employer**

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**Docket No. 08-2079**

**Issued: April 9, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 21, 2008 appellant filed a timely appeal from December 3, 2007 and June 23, 2008 merit decisions of the Office of Workers' Compensation Programs granting her a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

**ISSUES**

The issues are: (1) whether appellant has more than three percent permanent impairment of the left upper extremity; and (2) whether she is entitled to a schedule award for a permanent impairment of the right upper extremity and/or either lower extremity.

**FACTUAL HISTORY**

On March 22, 2005 appellant, then a 35-year-old letter carrier, filed a claim for injuries sustained on March 19, 2005 in a motor vehicle accident. The Office accepted the claim for lumbar sprain/strain, cervicalgia and neck spasm. Appellant stopped work on March 19, 2005 and returned to work on April 21, 2006.

On July 13, 2007 the Office requested that appellant's attending physician evaluate her to determine the extent of any impairment of the upper or lower extremities due to her accepted work injury. On August 20, 2007 Dr. Wayne R. Gavino, a Board-certified neurologist, discussed appellant's history of injury and complaints of tingling in the left shoulder radiating into the arm and hand and left elbow pain. He reviewed a March 22, 2007 magnetic resonance imaging (MRI) scan of the cervical spine and noted that a disc herniation at C5-6 compressed the left aspect of the cervical cord and a disc bulge at C4-5 mildly compressed the cord. On examination Dr. Gavino stated, "It is hard to assess weakness in the left upper extremity because of pain. It seems that [appellant] may have a little bit of weakness in the left upper extremity." He found a loss of sensation in the left arm but an otherwise normal examination. Dr. Gavino stated, "[Appellant] has chronic neck, interscapular and left shoulder pain arising from the motor vehicular accident on March 19, 2005. She now has chronic pain disorder, probably from soft tissue injury and left cervical radiculopathy.... [Appellant] has gotten somewhat better, although I would estimate that the percentage of her loss is about 20 percent because she continues to have pain, numbness and loss of strength."

On November 7, 2007 the Office medical adviser noted that an MRI scan of the cervical spine showed a C5-6 left disc herniation and a "broad-based bulge at C4-C5." He noted that the Office had not accepted a right upper extremity or lower extremity condition and that consequently appellant had no employment-related permanent impairment of these extremities. The Office medical adviser found that, as "manual muscle testing is currently limited by pain, strength will not be included in this determination." He found that appellant had a one percent impairment due to Grade 4 pain in the left C5 nerve root distribution and a two percent impairment due to Grade 4 pain in the C6 nerve root distribution according to Tables 16-10 and 16-13 on pages 482 and 489 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*). The Office medical adviser combined the impairment ratings to total three percent permanent impairment of the left upper extremity. He opined that appellant reached maximum medical improvement on August 20, 2007.

By decision dated December 3, 2007, the Office granted appellant a schedule award for a three percent permanent impairment of the left upper extremity. It determined that she had no impairment of the right upper extremity or either lower extremity. The period of the award ran for 9.36 weeks from August 20 through October 24, 2007.

On December 10, 2007 appellant requested a telephonic hearing. On April 18, 2008 she related that she missed the hearing due to time zone confusion and requested a review of the written record. Appellant asserted that the Office medical adviser did not address the issue of loss of strength. She also noted that Dr. Lisa R. Ferley, a Board-certified neurologist, provided an opinion regarding her loss of strength.<sup>1</sup>

On May 9, 2008 appellant related that she was unable to find a physician with access to the A.M.A., *Guides*. She enclosed a functional capacity evaluation (FCE) performed by a physical therapist which she maintained measured her loss of strength.

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<sup>1</sup> In a report dated March 7, 2006, Dr. Ferley diagnosed cervical degenerative disc disease with left C7 radiculopathy, chronic neck pain and cervicogenic headaches. She found that appellant required a weight restriction for the left arm. On April 27, 2006 Dr. Ferley opined that appellant's lifting restriction was permanent.

By decision dated June 23, 2008, the Office hearing representative affirmed the December 3, 2007 decision. She noted that the opinion of the Office medical adviser constituted the weight of the evidence and established that appellant had no more than three percent impairment of the left upper extremity.

### **LEGAL PRECEDENT -- ISSUES 1 & 2**

The schedule award provision of the Federal Employees' Compensation Act,<sup>2</sup> and its implementing federal regulations,<sup>3</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 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.<sup>4</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>5</sup>

### **ANALYSIS -- ISSUES 1 & 2**

The Office accepted that appellant sustained lumbar sprain/strain, cervicgia and neck spasm due to a March 19, 2005 motor vehicle accident. Appellant requested a schedule award. The Office instructed appellant to submit an impairment evaluation from her attending physician. On August 20, 2007 Dr. Gavino diagnosed a chronic pain disorder most likely due to a soft tissue injury and left cervical radiculopathy. He noted that appellant experienced tingling from her left shoulder into her hand and pain in her left elbow. Dr. Gavino reviewed a March 22, 2007 MRI scan which showed a C5-6 disc herniation with cord compression and a C4-5 disc bulge with mild cord compression. He found diminished sensation of the left arm and noted that it was difficult to determine if she had weakness in the left upper extremity due to her pain. Dr. Gavino advised that appellant had 20 percent impairment due to pain, numbness and loss of strength. However, he did not reference the A.M.A., *Guides* in reaching his determination. As Dr. Gavino's report does not conform to the A.M.A., *Guides*, it is of diminished probative value.<sup>6</sup>

On November 7, 2007 an Office medical adviser reviewed the medical record and found that there was no evidence that appellant had an employment-related permanent impairment of either the right upper extremity or the lower extremities. He determined that appellant had a Grade 4, or 25 percent impairment due to sensory loss which he multiplied by 5 percent, the maximum impairment for sensory deficit of the C5 nerve root, to find 1 percent impairment.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> 20 C.F.R. § 10.404(a).

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

<sup>6</sup> *Mary L. Henninger*, 52 ECAB 408 (2001).

<sup>7</sup> A.M.A., *Guides* at 482, 489, Tables 16-10-16-13.

The Office medical adviser then multiplied the 25 percent graded pain by 8 percent, the maximum impairment of the C6 nerve root, to find 2 percent impairment.<sup>8</sup> He combined the impairment findings and concluded that appellant had three percent left upper extremity impairment. There is no evidence establishing that she has a greater impairment of the left upper extremity or any employment-related impairment of the right upper extremity or lower extremities.

Appellant submitted an April 23, 2008 FCE performed by a physical therapist. On appeal she contends that the Office medical adviser should review the FCE and apply the provisions of the A.M.A., *Guides* to the findings. The Board notes that a physical therapist is not a physician within the meaning of section 8101(2) of the Act and cannot render a medical opinion.<sup>9</sup> Further, the physical therapist did not provide sufficient findings such that a determination of the extent of any permanent impairment could be made in accordance with the provisions of the A.M.A., *Guides*.

### **CONCLUSION**

The Board finds that appellant has no more than three percent permanent impairment of the left upper extremity. The Board further finds that she is not entitled to a schedule award for the right upper extremity or either lower extremity.

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<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 23, 2008 and December 3, 2007 are affirmed.

Issued: April 9, 2009  
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