United States Department of Labor
Employees' Compensation Appeals Board

MABEL HAYNES, Appellant	)	
	)	**Docket No. 04-1490**
and	)	**Issued: June 9, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 17, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 2, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than a 10 percent permanent impairment of the left upper extremity, for which she has received a schedule award.

FACTUAL HISTORY

On October 24, 1985 appellant, then a 38-year-old window clerk, filed a traumatic injury claim alleging that, on that date, she was struck on the head with a mail door and injured her neck. The Office accepted the claim for cervical sprain and left brachial plexopathy and paid appropriate compensation benefits. Appellant stopped work on October 24, 1985 and worked intermittently until she stopped on October 3, 2002.

Appellant came under the treatment of Dr. David S. Tabby, Board-certified in psychiatry and neurology, and Dr. Sara Tabby, Board-certified in physical medicine and rehabilitation. They treated appellant from December 21, 1989 to March 7, 1994. Dr. Sara Tabby noted treating appellant for a head injury sustained at work. She diagnosed cervical sprain and strain with C5 radiculopathy and recommended physical therapy. Dr. David Tabby treated appellant for continued symptoms of the work–related cervical injury and diagnosed chronic left brachial plexus compression injury with secondary sympathetic hyperactivity.

During the course of developing appellant's claim the Office referred appellant to several second opinion physicians.

On March 24, 1998 appellant filed a Form CA-7 claim for continuing compensation for three and a half hours on March 24, 1998. In a decision dated September 17, 1998, the Office denied appellant's claim for compensation. On September 24, 1998 appellant filed a Form CA-7 claim for continuing compensation for the period August 27 to September 24, 1998. In a decision dated February 25, 1999, the Office denied appellant's claim for compensation.

On February 18, 2000 appellant filed a claim for a schedule award and submitted reports from Dr. David Tabby. On October 28, 1999 he noted that appellant's symptoms had significantly improved. He diagnosed left sided pain syndrome resolved, left brachial plexopathy improved, left hip osteoarthritis stable, fibromyalgia and hypertension. An electromyogram (EMG) dated September 21, 1999, revealed no abnormalities and no evidence of carpal tunnel syndrome. Appellant was also seen in consultation with Dr. Ronald J. Potash, a Board-certified orthopedist, who in a report dated January 4, 2000 determined in accordance with the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] (A.M.A., *Guides*) that he sustained a 10 percent impairment of the left upper extremity. He noted findings upon physical examination of left grip strength deficit of 4.5 kilogram (kg) via Jamar hand dynamometer on the right versus 5.25 kg on the left for a 10 percent impairment.[2] Dr. Potash advised that maximum medical improvement occurred on December 28, 1999.

In a report dated March 9, 2000, an Office's medical adviser indicated that the date of maximum medical improvement was January 4, 2000. He concurred with Dr. Potash's determination that appellant sustained a 10 percent impairment of the left upper extremity.[3]

[1] A.M.A., *Guides* (4th ed. 1993).

[2] Table 32 and 43, page 65 (A.M.A., *Guides*).

[3] The record reveals that appellant filed a separate claim for a condition of the right wrist, which was accepted by the Office for right ganglion cyst in claim number 3176441. Appellant also filed a schedule award for the right upper extremity due to this accepted condition. Dr. Potash's report of January 4, 2000, addressed the right upper extremity and provided a rating of 24 percent permanent impairment of the right upper extremity for which the medical adviser concurred. However, claim number 3176441 for the right upper extremity is not before the Board at this time.

In a decision dated July 31, 2000, the Office granted appellant a schedule award for 10 percent impairment of the left upper extremity. The period of the schedule award was from January 4 to August 9, 2000.

Appellant filed a claim for an additional schedule award. She submitted a report from Dr. David Tabby dated December 13, 2000, which noted increased symptoms on the left side and diagnosed exacerbation of left brachial plexopathy from repetitive strain syndrome, mild left carpal tunnel syndrome and Guyon's canal syndrome. His reports of January 24 and April 19, 2001, noted limited cervical range of motion bilaterally and pain on range of motion of the left shoulder in all planes. An EMG dated September 14, 2000, revealed chronic right S1 radiculopathy, mild right median nerve entrapment neuropathy at the right, carpal tunnel syndrome and mild right ulnar nerve entrapment neuropathy at the wrist, Guyon's canal. An EMG report dated November 21, 2001, revealed chronic left and right S1 radiculopathy, mild left median nerve entrapment neuropathy at the right and carpal tunnel syndrome.

Dr. David Weiss, an osteopath, submitted a December 28, 2001, report finding that appellant reached maximum medical improvement on December 28, 2001. He diagnosed chronic post-traumatic cervical strain and sprain, bulging cervical disc at C5-6, degenerative osteoarthritis of the cervical spine involving the C5-6 level, left upper extremity radiculitis, left carpal tunnel syndrome and left ulnar nerve neuritis at Guyon's canal. Dr. Weiss noted that in accordance with the A.M.A., *Guides* fifth edition,[4] appellant sustained a 53 percent impairment of the left upper extremity. Dr. Weiss noted left grip strength deficit of 22 kg of force via Jamar hand dynamometer in the right hand versus 8 kg in the left for an impairment rating of 30 percent,[5] motor strength deficit of the left tricep graded at 4/5 for an impairment of 10 percent,[6] motor strength deficit of the left bicep graded at 4/5 for an impairment of 6 percent,[7] sensory deficit of the left C5 nerve root for an impairment of 4 percent,[8] sensory deficit of the left C5 nerve root for an impairment of 6 percent,[9] sensory deficit of the ulnar nerve for an impairment rating of 6 percent[10] and pain-related impairment for a 3 percent impairment rating.

In a report dated May 10, 2002, the Office medical adviser recommended that the case be referred to a second opinion physician. He noted that Dr. Weiss' impairment rating was based on diagnoses not accepted as work related.

The Office referred appellant for a second opinion to Dr. Richard H. Bennett, a Board-certified orthopedic surgeon, for an evaluation of the extent of permanent impairment arising

[4] A.M.A., *Guides* (5th ed. 2001).

[5] Table 16-34, page 509 (A.M.A., *Guides*).

[6] Table 16-15, Table 16-11, page 484, 492 (A.M.A., *Guides*).

[7] *Id.*

[8] Table 15-17, Table 15-15, page 424 (A.M.A., *Guides*).

[9] *Id*.

[10] Table 16-15, Table 16-10, page 482, 492 (A.M.A., *Guides*).

from her accepted employment injury. In a report dated June 4, 2002, Dr. Bennett noted that the motor examination was normal, there was some atrophy of the left thenar eminence, there was weakness of the left abductor pollicis brevis and opponen pollicis and pain when lifting the left arm above 90 degrees. He noted that he could find no evidence of residual injuries from the work-related accident of October 24, 1985 and, because there were no residuals of her accepted injury, there was no impairment related to the employment injury.

In a decision dated July 18, 2002, the Office denied appellant's claim for an additional schedule award.

On July 22, 2002 appellant requested a hearing before an Office hearing representative. The hearing was held on August 27, 2003. In a decision dated January 2, 2004, the hearing representative affirmed the July 18, 2002 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[11] and its implementing regulation[12] 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[13]

ANALYSIS

The Office accepted that appellant sustained a cervical sprain and left brachial plexopathy for which it granted a schedule award for 10 percent impairment of the left upper extremity. Appellant requested an additional schedule award and submitted a report from Dr. Weiss. The Board finds that there is a conflict in medical opinion between Dr. Bennett and Dr. Weiss.

In May 2002, the Office referred appellant for a second opinion evaluation to Dr. Bennett who opined in a report dated June 4, 2002, that he could find no evidence of residual injuries from the work-related accident of October 24, 1985. He noted the motor examination was normal, there was some atrophy of the left thenar eminence, weakness of the left abductor pollicis brevis and opponen pollicis and pain when lifting the left arm above 90 degrees. Dr. Bennett noted that the injuries at the time of the accident were described as related to a cervical strain and brachial plexus neuropathy and opined that there was no evidence that these conditions were present. He therefore concluded that there was no additional residual impairment attributable to these conditions. By contrast, Dr. Weiss in his report dated

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404 (1999).

[13] *See id.*; *Jacqueline S. Harris*, 54 ECAB ___ (Docket No. 02-203, issued October 4, 2002).

December 28, 2001, indicated that there were positive subjective and objective findings as well as the positive EMG, which he associated with a 53 percent impairment rating according to the A.M.A., *Guides.* Although, Dr. Weiss' calculations for grip strength and pain would be precluded in the impairment rating under the A.M.A., *Guides,*[14] he made findings with regard to impairment of the upper extremity due to peripheral nerve disorders including motor strength deficit of the left tricep graded at 4/5 for an impairment of 10 percent,[15] motor strength deficit of the left bicep graded at 4/5 for an impairment of 6 percent,[16] sensory deficit of the left C5 nerve root for an impairment of 4 percent,[17] sensory deficit of the left C5 nerve root for an impairment of 6 percent[18] and a sensory deficit of the ulnar nerve for an impairment rating of 6 percent.[19] He supported an increased impairment rating of the left upper extremity, while Dr. Bennett opined that there was no additional impairment attributable to the accepted conditions.

Section 8123(a) of the Act provides in pertinent part: "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."[20] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[21]

Therefore, the case will be remanded to the Office for referral of appellant to an impartial medical specialist for a determination regarding the extent of her left upper extremity impairment. After such further development as the Office deems necessary, an appropriate decision should be issued regarding her entitlement to a schedule award.

[14] Dr. Weiss noted measurements for grip strength but he did not explain why he attributed impairment to lost grip strength in light of the proviso in the A.M.A., *Guides* that grip strength should only be a basis for an impairment evaluation in "rare" cases and that objective anatomic findings take precedence. Also, page 508 states that motor weakness associated with disorders of the peripheral nervous system are evaluated per section 16.5 and Chapter 13, not on the basis of grip strength. *See* A.M.A., *Guides* at 508 (5th ed. 2001). Finally, Dr. Weiss noted a three percent impairment for pain for the left upper extremity; however, this is insufficient as he did not explain how this determination was calculated in accordance with applicable standards of the A.M.A., *Guides*.

[15] *Supra* note 6.

[16] *Id.*

[17] *Supra* note 8.

[18] *Id*.

[19] *Supra* note 10.

[20] 5 U.S.C. § 8123(a).

[21] *William C. Bush*, 40 ECAB 1064, (1989).

CONCLUSION

The Board finds that this case is not in posture for decision

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: June 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member