

On December 3, 2002 appellant filed a claim for a schedule award. By letter dated December 18, 2002, the Office requested an impairment rating from Dr. J. Kevin Kaufman, her treating Board-certified neurosurgeon. In a report dated February 5, 2003, he indicated that he would like for appellant to get an impairment rating as she continued to experience burning in her cervical area and numbness and tingling to both hands.

Dr. Kaufman referred appellant to Dr. Bryan S. Drazner, an internist. In a report dated February 28, 2003, he noted:

“Dr. Kaufman has asked that I also consider an impairment rating, but I have discussed with [appellant] after a thorough history and physical examination that the United States Department of Labor does not recognize impairment ratings for the spine, be it cervical, thoracic or lumbar. I explained to the patient that she is entitled to the medical treatment which she requires and that she currently appears to be doing quite well, though there is not an impairment rating to be rendered as there is no significant sensory loss. [Appellant] has progressed to a functional range of motion about the cervical spine and has certainly had an excellent surgical result. I have advised her that she may contact her claims manager in this regard, but that it is my understanding that the United States Department of Labor places impairment on the fifth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, but that there is no impairment for injuries relative to the spine.”

In a report dated April 1, 2003, Dr. Drazner noted:

“Peripheral sensory examination was unremarkable for significant sensory loss along all dermatomes. Deep tendon reflexes of the biceps, triceps and brachial radialis were within normal limits (2+) bilaterally. [Appellant] was able to maintain full active muscle strength upon exertion revealing a 5/5 for the bilateral upper extremities.

Dr. Drazner indicated that appellant’s ranges of motion for the cervical spine were as follows: flexion: 38 percent; extension: 40 percent; left lateral flexion: 32 percent; right lateral flexion: 30 percent; left cervical rotation: 55 percent; and right cervical rotation: 58 percent. He then indicated:

“Today’s impairment rating is calculated using the [A.M.A., *Guides* (5th edition)].

“Using [T]able 15-5, page 392, [appellant] clear[ly] falls into a [diagnosis-related estimates method] cervical category two, yielding a [five percent] whole person impairment. The patient continues to complain of intermittent burning in the cervical area and numbness and tingling to the hands, which has been corroborated most recently on March 6, 2003 via usage of electrodiagnostic examination. It should further be noted that this is a Department of Labor employee and it is possible that the Department of Labor does not honor spinal categories. However, it is the professional opinion of this examiner that [appellant] does clearly have permanent impairment of the cervical spine and is,

therefore, deemed to be placed at a [five percent] whole person impairment for injuries sustained during her course of employment on May 20, 1999. [She] is deemed to have reached maximum medical improvement as of this date.

On May 15, 2003 the Office accepted appellant's claim for a ruptured herniated nucleus pulposus at the C5-6 level and also authorized surgery at C5-6 for an anterior cervical discectomy and fusion.

On June 6, 2003 the Office asked the Office medical adviser to review Dr. Drazner's report and determine the percentage of impairment to her upper extremity. On June 22, 2003 the Office medical adviser noted that there was no indication that appellant sustained any loss of motion, atrophy/decreased strength, change in sensation, pain/subjective complaints or amputation of either upper extremity and that she had sustained a zero percent loss of use, of her left and right upper extremities. He noted that Dr. Drazner's conclusion that appellant had a five percent whole person impairment was not probative for adjudication because the spine is not a scheduled member.

In a report dated June 24, 2003, a different Office medical adviser noted that he also reviewed the record and that, as the spine is not a scheduled member, he could not recommend impairment for the claimant based on impairment of the spine. The Office medical adviser determined that Dr. Drazner did not provide description of any abnormality in the upper extremities that was adequate to allow impairment of the upper extremities. Because he found that Dr. Drazner's report did not meet the requirements of the Office, he requested a second opinion impairment evaluation from another Board-certified specialist. No such report was requested.

By decision dated July 21, 2003, the Office denied appellant's claim for a schedule award as the medical evidence did not support a permanent impairment to a member or function of the body.

Appellant requested reconsideration and submitted a July 17, 2003 report by Dr. Kaufman, wherein he made general comments about her progress. By decision dated February 6, 2004, the Office denied her request for reconsideration after reviewing the case on the merits.

On February 9, 2004 appellant again requested reconsideration. In support thereof, she submitted a December 9, 2003 medical report by Dr. Robert A. Helsten, a specialist in emergency medicine, wherein he noted that she had limited range of motion of her cervical spine, intact sensation to the fingers of both hands (although appellant described paresthesias to the fingers of both hands), weakness in her left hand compared to her right and three plus bilateral biceps and triceps deep tendon reflexes. He noted that the circumference of the right arm was 32 centimeters and the circumference of the left arm was 31.5 centimeters. Dr. Helsten also evaluated appellant under the A.M.A., *Guides*:

“[Appellant] received an impairment for her cervical spine using Table 15-5, page 392. [Diagnosis-related estimates] [c]ervical [c]ategory [number] 3 allows a 15 to 18 [percent] impairment if a patient has had clinically significant

radiculopathy, verified by an imaging study that demonstrates a herniated disc at the level and on the site expected from objective clinical findings with radiculopathy or with improvement of radiculopathy following surgery.

“[Appellant] still has bilateral radiculopathy that has improved by her history with surgery. Therefore, using the A.M.A., *Guides* 5th ed. appellant was awarded a 15 percent cervical impairment.

“Because it was difficult to determine whether appellant fit in [diagnosis-related [e]stimates] [c]ategory two or [c]ategory three range of motion testing was done on [her] neck. This was not done for the impairment but was done as a differentiating test to determine [her] [diagnosis-related estimates] category. According to range of motion testing done in this office on [December 9, 2003 appellant] would have received a 16 [percent] cervical impairment if range of motion testing alone had been used. This helped determine that [her] most closely fits [diagnosis-related estimates] [c]ategory three.”

By decision dated April 22, 2004, the Office reviewed appellant’s claim on the merits but determined that the report of Dr. Helstan was not sufficient to overcome the prior decisions.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act¹ and its implementing regulation,² 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.³

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulation.⁴ As neither the Act nor its regulation provide for the payment of a schedule award for the permanent loss of use of the neck, back or the body as a whole, no claimant is entitled to such a schedule award.⁵ The Board notes that section 8101(19) specifically excludes the back from the definition of “organ.”⁶ 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.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ 20 C.F.R. § 10.404(a).

⁴ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁵ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

⁶ 5 U.S.C. § 8107.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁷

ANALYSIS

In the instant case, appellant is not entitled to a schedule award for impairment to her neck or back. She is only entitled to a schedule award if the injury to her back affects one of her extremities or another part of the body covered by the schedule.⁸ Although the first Office medical adviser indicated that there was no indication that appellant sustained impairment to her upper extremities, the second Office medical adviser noted that Dr. Drazner's report did not meet the requirements of the Office, as he failed to provide a description of the abnormality in the upper extremity demonstrating the impairment and requested a second opinion impairment evaluation from another Board-certified specialist in keeping with the Office's requirements. However, it does not appear from a review of the record that the Office ever referred appellant for a second opinion evaluation before denying her claim for a schedule award. As the Office undertook further development, it must do so in a fair and impartial manner.⁹ The Board further notes that Dr. Helsten discussed limitations in appellant's upper extremities. He noted that she described paresthesias to the fingers of both hands and noted that her left hand was weaker than her right. Dr. Helsten's also measured the circumference of appellant's arms and her reflexes.¹⁰ The Office has a responsibility to see that justice is done. Accordingly, this case will be remanded for the Office to determine whether appellant sustained an impairment to either upper extremity. Following this and any necessary further development, the Office should issue an appropriate decision on appellant's schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the issue of appellant's entitlement to a schedule award. The case is remanded for the Office to determine if she has any impairment of her upper extremities.

⁷ *William J. Cantrell*, 34 ECAB 1223 (1983).

⁸ *See Gordon C. McNeil*, 42 ECAB 140 (1990); *Billy Ray Beasley*, 28 ECAB 74 (1976).

⁹ *See generally, Mary A. Geary*, 43 ECAB 300 (1991); *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

¹⁰ *See generally Charles A. Sciulli*, 50 ECAB 488 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 22 and February 6, 2004 and July 21, 2003 are set aside and this case is remanded to the Office for further consideration pursuant to this opinion.

Issued: March 7, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member