United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 06-1592**
	)	**Issued: February 6, 2007**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION AGENCY, Atlantic City, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 5, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 14, 2006 merit decision concerning her entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has more than a 27 percent impairment of her left arm, a 14 percent impairment of her right arm and a 6 percent impairment of her right leg.

FACTUAL HISTORY

On September 16, 1998 appellant, then a 63-year-old computer specialist and systems engineer, filed a traumatic injury claim alleging that she sustained injury on September 15, 1998 when she fell on a cement floor and cut her hand on a coffee cup. She stopped work on

September 15, 1998 and returned to work on September 28, 1998. The Office accepted that appellant sustained right arm and right buttock contusions, laceration of the right index finger, C5 radiculopathy and C4-5 and C5-6 disc bulges. The Office paid appropriate compensation for periods of disability.

The February 10, 1999 magnetic resonance imaging scan showed C4-5 and C5-6 bulges without evidence of cord compression. The June 5, 2000 nerve conduction studies showed bilateral sensory median neuropathy across the wrists and bilateral C5-6 radiculopathy.

In a report dated December 20, 2001, Dr. Jeffrey D. Petersohn, an attending Board-certified orthopedic surgeon, stated that appellant reported worsening of her right arm pain and that her low back pain was most prominent in the right sacroiliac region. He diagnosed cervical facet syndrome, probable right C5-6 degenerative osteophytes disease with foraminal stenosis and right sacroiliac arthropathy. Dr. Petersohn indicated that examination showed that the C4-5 and C5-6 facets were moderately tender and noted that sensory and motor testing of both arms was normal. Dr. Petersohn stated that the Neer test of the right shoulder was equivocal, but that there was no tenderness of the glenohumeral joint on palpation. He indicated that, appellant had hypoesthesia to pinprick in both L5 nerve distributions of the legs.

In a report dated February 12, 2002, Dr. David Weiss, an attending osteopath and Board-certified orthopedic surgeon, provided findings on his examination of appellant. He indicated that she complained of numbness and tingling in both hands, greater on the right, pain and burning sensation in her right elbow, pain in both anterior thighs and pain and swelling in her right knee. Dr. Weiss detailed appellant's complaints that her symptoms made it difficult for her to complete her activities of daily living. He noted that range of motion and strength testing of all extremities showed normal results, but that she had abnormal grip strength testing of 20 kilograms of force strength in the right hand and 15 kilograms of force strength in the left hand. Dr. Weiss indicated that sensory examination revealed a perceived sensory deficit over the C6 nerve distribution on the right and a perceived sensory deficit over the C5-6 nerve distribution on the left. He noted that appellant exhibited tenderness over the medial midline of the right knee and that his right leg displayed a one centimeter atrophy. Dr. Weiss diagnosed chronic post-traumatic cervical and lumbosacral sprains and strains, C4-5 and C5-6 bulging discs, cervical radiculopathy, radial tunnel syndrome and post-traumatic patellofemoral arthralgia of the right knee.

Dr. Weiss provided impairment calculations for the right arm, left arm and right leg. For the right arm, he found that appellant had a 10 percent impairment under Tables 16-31 and 16-34 on page 509 of the (fifth edition 2001) American Medical Association, *Guides to the Evaluation of Permanent Impairment* for grip strength deficit; a 6 percent impairment under Tables 15-15 and 15-17 on page 424 for sensory loss associated with the C6 nerve distribution; and a 3 percent impairment under Figure 18-1 on page 574 for pain. Dr. Weiss concluded that she had an 18 percent impairment of his right arm by using the Combined Values Chart on pages 604 to 606 to combine the 10 and 6 percent values to equal 15 percent and then adding the 3 percent value. For the left arm, he found that appellant had a 20 percent impairment under Tables 16-31 and 16-34 for grip strength deficit; a 4 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C5 nerve distribution; a 6 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C6 nerve distribution and a 3 percent impairment

under Figure 18-1 for pain. Dr. Weiss concluded that appellant had a 31 percent impairment of her left arm by using the Combined Values Chart to combine the 20, 4 and 6 percent values to equal 28 percent and then adding the 3 percent value. For the right leg, he found that she had an eight percent impairment under Table 17-6 on page 530 for her one centimeter leg atrophy and a three percent impairment under Figure 18-1 for pain. Dr. Weiss indicated that appellant reached maximum medical improvement on February 12, 2002.

By decision dated June 18, 2002, the Office granted appellant a schedule award for a six percent impairment of his right leg. The award was calculated using the 66 2/3 percentage of pay rate.

By decision dated July 28, 2003, the Office set aside its June 18, 2002 decision on the grounds that it had not adequately identified the basis for the granting of the award.

In a report dated November 25, 2003, an Office medical adviser stated that he felt that Dr. Weiss' calculations for sensory loss associated with the C5 and C6 nerve distributions were too generous. He indicated that appellant's one centimeter atrophy of the right leg entitled her to a three percent impairment rating rather than an eight percent impairment rating. The Office medical adviser indicated that adding the three percent rating for atrophy to the three percent rating for pain calculated under Figure 18-1 meant that appellant had a six percent impairment of her right leg.

By decision dated December 3, 2003, the Office granted appellant a schedule award for a six percent impairment of her right leg. The award was calculated using the 66 2/3 percentage of pay rate.

By decision dated June 22, 2004, the Office hearing representative remanded the case to the Office for evaluation of the impairment of appellant's right and left arms to be followed by an appropriate decision.

In a report dated December 6, 2004, the Office medical adviser calculated impairment ratings for appellant's right and left arms. For the right arm, he found that she had a 10 percent impairment under Tables 16-31 and 16-34 for grip strength deficit and a 4 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C6 nerve distribution.[1] The Office medical adviser concluded that appellant had a 14 percent impairment of her right arm by adding the 10 and 4 percent values. For the left arm, he found that she had a 20 percent impairment under Tables 16-31 and 16-34 for grip strength deficit; a 3 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C5 nerve distribution; and a

[1] For the right C6 nerve distribution, the Office medical adviser used a 50 percent grade under Table 15-5 rather than the 75 percent grade used by Dr. Weiss. He indicated that appellant was not entitled to the three percent impairment rating for pain because that deficit was included in the rating for sensory loss.

4 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C6 nerve distribution.[2] The Office medical adviser concluded that appellant had a 27 percent impairment of her left arm by adding the 20, 3 and 4 percent values.

By decision dated February 10, 2005, the Office granted appellant a schedule award for a 27 percent impairment of her left arm and a 14 percent impairment of her right arm. The award was calculated using the 66 2/3 percentage of pay rate.[3]

Appellant requested a hearing before an Office hearing representative. At the hearing held on November 30, 2005, she claimed that there was a conflict in the medical evidence regarding the extent of her impairment. She also argued that her daughter was a dependent and, therefore, her schedule award should have been calculated at the 75 percentage of pay rate rather than the 66 2/3 percentage of pay rate. The Office hearing representative stated that it appeared that appellant's daughter was at least 18 years old at the time of the September 15, 1998 injury and that there was no evidence she was a student or incapable of self-support due to physical or mental disability within the meaning of section 8110 of the Federal Employees' Compensation Act.

By decision dated and finalized February 14, 2006, the Office hearing representative affirmed the Office's February 10, 2005 decision with respect to appellant's schedule award entitlement. The Office hearing representative further found that appellant had not shown that she had a dependent within the meaning of section 8110 of the Act and, therefore, was only entitled to the 66 2/3 percentage of pay rate.

LEGAL PRECEDENT

The schedule award provision of the Act[4] and its implementing regulation[5] 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.[6]

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[2] For the left C5 nerve distribution, the Office medical adviser used a 60 percent grade under Table 15-5 rather than the 80 percent grade used by Dr. Weiss. For the left C6 nerve distribution, he used a 50 percent grade under Table 15-5 rather than the 80 percent grade used by Dr. Weiss. The Office medical adviser again indicated that appellant was not entitled to the three percent impairment rating for pain because that deficit was included in the rating for sensory loss.

[3] The award was offset by the remainder from a third party damage claim.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

Under section 8110 of the Act a claimant is entitled to augmented schedule award compensation at 3/4 of her weekly pay if she has one or more dependents.[7] A child is entitled to be considered a dependent if he or she is under 18 years of age, is over 18 but is incapable of self-support because of a physical or mental disability, or is an unmarried student under 23 years of age who has not completed 4 years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college or university.[8]

Proceedings under the Act are not adversary 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. It has the obligation to see that justice is done.[9] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[10]

ANALYSIS

The Office accepted that appellant sustained right arm and right buttock contusions, laceration of the right index finger, C5 radiculopathy and C4-5 and C5-6 disc bulges. Appellant received schedule awards for a 27 percent impairment of her left arm, a 14 percent impairment of her right arm and a 6 percent impairment of her right leg.

The Office medical adviser calculated that appellant had a 27 percent impairment of her left arm, a 14 percent impairment of her right arm and a 6 percent impairment of her right leg. The Office awarded her a schedule award based on the impairment rating of the Office medical adviser, but the Board finds that this rating is of diminished probative value because it was not derived in accordance with the relevant standards of the A.M.A., *Guides*.[11]

The Office medical adviser determined that appellant was entitled to a 10 percent impairment rating under Tables 16-31 and 16-34 of the A.M.A., *Guides* for right grip strength deficit and a 20 percent impairment rating for left grip strength deficit.[12] The A.M.A., *Guides* provides that a strength evaluation under these tables should only be included in the calculation of an upper extremity impairment if such a deficit has not been considered adequately by other

[7] 5 U.S.C. § 8110.

[8] 5 U.S.C. § 8101(17).

[9] *Russell F. Polhemus,* 32 ECAB 1066 (1981).

[10] *See Robert F. Hart,* 36 ECAB 186 (1984).

[11] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that 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).

[12] *See* A.M.A., *Guides* 509, Tables 16-31 and 16-34.

impairment rating methods.[13] The Office medical adviser provided no explanation of why the identified strength impairment in this case could not be adequately considered by the other impairment rating methods for the upper extremity. Therefore, he has not properly assessed appellant's strength deficits under the standards of the A.M.A., *Guides*.

The Office medical adviser determined that appellant had a four percent impairment of her right arm under Tables 15-15 and 15-17 for sensory loss associated with the C6 nerve distribution, a three percent impairment of her left arm for sensory loss associated with the C5 nerve distribution and a four percent impairment of her left arm for sensory loss associated with the C6 nerve distribution. He also found that appellant was entitled to a three percent impairment rating for right leg pain calculated under Figure 18-1 of Chapter 18.[14] However, this was an error as Chapter 18 should not be used to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides.*[15] The Office medical adviser did not explain why appellant's pain could not be adequately rated through other rating methods for pain. He also indicated that her one centimeter atrophy of the right leg entitled her to a three percent impairment rating,[16] but Table 17-2 provides that an impairment rating for a limb atrophy may not be combined with a rating for pain.[17]

For these reasons, it was not appropriate to base the granting of appellant's schedule award on the opinion of the Office medical adviser.

The record also contains a February 12, 2002 report in which Dr. Weiss, an attending osteopath and Board-certified orthopedic surgeon, calculated that appellant had a 31 percent impairment of her left arm, an 18 percent impairment of her right arm and an 8 percent impairment of her right leg. However, his impairment rating is of diminished probative value because it was not derived in accordance with the relevant standards of the A.M.A., *Guides*.

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[13] The A.M.A., *Guides* provides that an example of an impairment that would not be adequately considered by other rating methods would be loss of strength caused by a severe muscle tear that healed leaving "a palpable muscle defect." If the rating physician determines that loss of strength should be rated separately in an extremity that presents other impairments, "the impairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence*." (Emphasis in the original.) The A.M.A., *Guides* further provides that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximum force. A.M.A., *Guides* 508, section 16.8a. *See also* FECA Bulletin No. 01-05 (issued January 29, 2001) regarding the limited use of grip strength to measure weakness.

[14] A.M.A., *Guides* 574, Figure 18-1.

[15] *See* FECA Bulletin No. 01-05; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (June 2003). *See also Philip A. Norulak*, 55 ECAB 690 (2004) (a separate pain calculation under Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain as outlined in Chapters 13, 16 and 17 of the fifth edition of the A.M.A., *Guides*).

[16] *See* A.M.A., *Guides* 424, Table 17-6.

[17] *Id.* at 526, Table 17-2. Section 17.2d further provides that an atrophy rating should not be combined with any of the other three ratings of diminished muscle function -- gait derangement, muscle weakness and peripheral nerve injury. *Id.* at 530.

Dr. Weiss found that appellant was entitled to a 10 percent impairment rating under Tables 16-31 and 16-34 of the A.M.A., *Guides* for right grip strength deficit and a 20 percent impairment rating for left grip strength deficit. He also provided no explanation of why the identified strength impairment could not be adequately considered by the other impairment rating methods. Dr. Weiss found that appellant had right and left arm impairment under Tables 15-15 and 15-17 for sensory loss associated with the C5 and C6 nerve distributions and also awarded an additional three percent pain rating under Chapter 18 for her left arm, right arm and right leg. He did not provide any justification for his award of pain ratings under Chapter 18. Dr. Weiss listed an impairment rating for appellant's right leg atrophy, but such a rating could not be added to a rating for pain.[18]

As noted above, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[19] Appellant's impairment has not been adequately evaluated in accordance with the relevant standards of the A.M.A., *Guides*.[20] Consequently, the case must be remanded to the Office for further development of this matter. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she has more than a 27 percent impairment of her left arm, a 14 percent impairment of her right arm and a 6 percent impairment of her right leg.

[18] *See* A.M.A., *Guides* 530, Table 17-6. Moreover, Dr. Weiss appears to have given appellant a rating for a two centimeter atrophy rather than a one-centimeter atrophy. Appellant claimed that there was a conflict in the medical evidence regarding the extent of her impairment between the Office medical adviser and Dr. Weiss. 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." 5 U.S.C. § 8123(a). 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. *William C. Bush*, 40 ECAB 1064, 1975 (1989). Given the diminished probative value of the reports of the Office medical adviser and Dr. Weiss regarding appellant's impairment, there is no conflict in the medical evidence on this matter.

[19] *See supra* notes 9 and 10 and accompanying text.

[20] The Board notes that the Office hearing representative properly found that appellant had not shown that she had a dependent within the meaning of section 8110 of the Act and, therefore, she would only be entitled to the 66 2/3 percentage of pay rate. It appears from the record that her daughter was at least 18 years old at the time of the September 15, 1998 injury and there is no evidence that she was a student or incapable of self-support due to a physical or mental disability within the meaning of the Act. *See supra* notes 7 and 8 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 14, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 6, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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