

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

C.V., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Dallas, TX,
Employer**)

**Docket No. 08-370
Issued: October 21, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 9, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated October 2, 2007, finding that she was not entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has any permanent impairment of a scheduled member entitling her to a schedule award.

FACTUAL HISTORY

This case has been before the Board on four occasions.¹ On July 12, 2000 appellant, then a 39-year-old clerk, filed a traumatic injury alleging that a rest bar collapsed while she was sitting on it injuring her low back. The Office initially denied appellant's claim on February 14, April 7 and June 5, 2000. The Board affirmed the June 5, 2000 decision on July 12, 2001.² The Office accepted appellant's claim for lumbar strain on August 7, 2000. It authorized compensation benefits on July 13, 2001. The Office accepted the additional conditions of bilateral sprain of the hip and thigh and aggravation of lumbar degenerative disc disease as related to appellant's employment injury. By decision dated July 20, 2001, it terminated appellant's compensation benefits only. Appellant repeatedly requested reconsideration of this decision and the Office denied modification on September 25, 2001, December 11, 2001 and March 13, 2002. She appealed these decisions to the Board and in a decision dated May 6, 2003³ the Board reversed the July 20, 2001 termination finding that the Office had not submitted sufficient medical evidence to meet its burden of proof to terminate appellant's compensation benefits. In a decision dated January 16, 2007, the Board affirmed the Office's April 18, 2006 decision terminating appellant's compensation benefits effective December 25, 2005.⁴ The Office on April 6, 2006 determined that appellant had forfeited her compensation benefits for the period July 13, 2004 to August 27, 2005 in the amount of \$18,031.15. It ruled that appellant had received an overpayment in this amount for which she was at fault on September 15, 2006 and affirmed this decision on reconsideration on December 18, 2006. Appellant requested reconsideration of this decision and the Office declined to reopen appellant's claim for consideration of the merits on May 9, 2007. The Board reviewed these decisions at appellant's request and by decision dated May 19, 2008 affirmed the September 15 and December 18, 2006 overpayment decisions as well as the May 9, 2007 nonmerit decision of the Office.⁵ The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

In a report dated August 5, 2005, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, noted appellant's history of injury and evaluated her back pain radiating to her left lower extremity for schedule award purposes. He noted that appellant reported mild to moderate back pain. She demonstrated decreased muscle strength in the left extensor hallucis longus, extensor digitorum and tibialis anterior. Dr. Shade diagnosed lumbar disc degeneration and lumbar strain/sprain. He opined that appellant had reached maximum medical improvement on

¹ Appellant also appealed a separate claim for an emotional condition which the Office denied on June 5, 2007 and September 8, 2006. The Board affirmed these decisions on December 28, 2007. Docket No. 07-1724 (issued December 28, 2007).

² Docket No. 01-79 (issued July 12, 2001).

³ Docket No. 02-1373 (issued May 6, 2003).

⁴ Docket No. 06-1259 (issued January 16, 2007).

⁵ Docket No.07-1557 (issued May 19, 2008).

July 29, 2005. Dr. Shade concluded that appellant had 11 percent impairment of the left lower extremity due to a Grade 4 impairment of the peroneal nerve.⁶

Appellant requested a schedule award on March 15, 2007. The District medical adviser reviewed Dr. Shade's report on April 25, 2007 and found that this report did not conform with the A.M.A., *Guides*. He noted that Dr. Shade did not base appellant's impairment rating on the appropriate chapter of the A.M.A., *Guides*.⁷ The district medical adviser recommended that the Office obtain a report from a second opinion physician.

In a report dated August 15, 2007, Dr. Richard N. Brown, a physician Board-certified in physical medicine and rehabilitation, noted appellant's history of injury. Appellant's symptoms included numbness and weakness in the left leg. Dr. Brown reviewed x-rays of appellant's spine and hips and found slight disc space narrowing at L5-S1. He examined nerve conduction studies and found that these tests were normal. On physical examination Dr. Brown found no evidence of neuropathy or radiculopathy of the left leg. He diagnosed bilateral greater trochanteric bursitis. Dr. Brown listed appellant range of motion on the right as 74 degrees of flexion, 0 degrees of extension, 30 degrees of abduction, 20 degrees of adduction, 20 degrees of internal rotation and 20 degrees of external rotation. On the left appellant demonstrated 70 degrees of flexion, 0 degrees of extension, 20 degrees of abduction, 15 degrees of adduction, 20 degrees of internal rotation and 20 degrees of external rotation. Dr. Brown concluded that appellant had loss of range of motion in her hips of 10 percent on the left and 5 percent on the right.

The District medical adviser reviewed this report on September 10, 2007 and found that impairments due to sprains and strains were not considered permanent and could not form the basis for a schedule award. He further found that Dr. Brown's report did not support a schedule award due to injury of the spine resulting in impairment of the lower extremity as there was no evidence of radiculopathy in the lower extremities. The district medical adviser stated, "There is not any probative medical evidence that justifies impairment award of the lower extremities."

By decision dated October 2, 2007, the Office denied appellant's claim for a schedule award finding that the medical evidence did not support permanent impairment of a scheduled member.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁸ and its implementing regulation⁹ 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

⁶ Dr. Shade cited to Tables 17-35, page 549 and 16-11, page 484 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) pertaining to the lower and upper extremities respectively.

⁷ A.M.A., *Guides*, 5th ed, 423-25, Tables 15-15 and 15-18 (2000).

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

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.¹⁰ Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.¹¹

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.¹² However, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹³

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the protocols of the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. In such cases, the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.¹⁴

ANALYSIS

The Office accepted that appellant sustained a lumbar strain, bilateral sprain of the hip and thigh and aggravation of lumbar degenerative disc disease as a result of her July 12, 2000 traumatic injury claim. Appellant requested a schedule award and submitted a report from Dr. Shade, a Board-certified orthopedic surgeon, who found that appellant had 11 percent impairment of the left lower extremity based on impairment of the peroneal nerve due to her accepted back condition.

As noted above, appellant is not entitled to a schedule award due to any permanent impairment of her spine, as this is not a scheduled member. However, to the extent that the weight of the medical evidence establishes that her back injuries resulted in any permanent impairment of her lower extremity, she may receive a schedule award. As appellant's accepted employment injury was to her spine, any permanent impairment resulting from this condition should be evaluated in accordance with the A.M.A., *Guides* chapter addressing the spine, Chapter 15.¹⁵ The Office medical adviser properly found that Dr. Shade had not properly

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

¹² *George E. Williams*, 44 ECAB 530, 533 (1993).

¹³ *Id.*

¹⁴ *See John L. McClanic*, 48 ECAB 552 (1997); *see also Paul R. Evans*, 44 ECAB 646, 651 (1993).

¹⁵ A.M.A., *Guides* 423-26.

applied the A.M.A., *Guides* to his findings on examination and requested that the Office refer appellant for a second opinion evaluation.

Dr. Brown, a physician Board-certified in physical medicine and rehabilitation, examined appellant and found that he had no symptoms of radiculopathy during physical examination or diagnostic testing. He diagnosed bilateral greater trochanteric bursitis. As found by the Office medical adviser, this report does not support a permanent impairment of the lower extremity due to spinal injury.

The Board finds that there is an unresolved conflict of medical opinion evidence regarding appellant's left lower extremity impairment. Appellant's attending physician, Dr. Shade found evidence of nerve impairment in the form of radiculopathy impacting her left lower extremity, but failed to properly apply the A.M.A., *Guides* to his findings. The Office's second opinion physician, Dr. Brown, found that appellant had no radiculopathy and therefore no permanent impairment of her lower extremity due to her spine injury.¹⁶ The Act provides that if there is a 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.¹⁷ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.¹⁸

On remand, the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to determine the extent of any permanent impairment of her lower extremities due to her accepted employment injuries. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that there is an unresolved conflict of medical opinion evidence regarding the nature and extent of appellant's permanent impairment due to her accepted employment injuries requiring referral to an impartial medical examiner and a *de novo* decision.

¹⁶ The Board notes that as found by the Office, appellant is only entitled to a schedule award for permanent impairment of a scheduled member, not for a temporary impairment due to a condition such as transient sprains, strains, tendinitis or bursitis.

¹⁷ 5 U.S.C. §§ 8101-8193, 8123.

¹⁸ 20 C.F.R. § 10.321.

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2007 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: October 21, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board