United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
and	)	**Docket No. 08-2290**
	)	**Issued: July 28, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Chapin, SC, Employer	)	

Appearances:
M. Rita Metts, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's July 22, 2008 merit decision determining the permanent impairment of her right upper extremity. 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 more than 12 percent impairment of her right upper extremity for which she received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case. On July 28, 2003 appellant sustained injury to her low back while reaching in the performance of duty. The Office accepted her claim for herniated disc at L3-4. On January 28, 2004 Dr. William T. Felmly, a Board-certified orthopedic surgeon, performed an excision of the left L3-4 disc due to severe effacement of the exiting left L3 nerve root and distal root ganglion. The Office entered appellant on the periodic rolls on

March 23, 2004. It authorized additional surgery on August 9, 2004. On August 27, 2004 Dr. Brett C. Gunter, a Board-certified neurosurgeon, performed a left L4-5 partial hemilaminectomy, medial facetectomy and decompression of the L5 nerve root. The Office subsequently accepted a right shoulder rotator cuff tear on May 16, 2005. Dr. Bernard G. Kirol, a Board-certified orthopedic surgeon, performed an arthroscopic rotator cuff tendon repair, subacromial decompression and distal clavicle resection on August 9, 2005. On July 24, 2006 the Office reduced appellant's compensation benefits to reflect that her actual earnings fairly and reasonably represented her wage-earning capacity.

In a note dated February 8, 2006, Dr. Gunter found that appellant had 160 degrees of forward elevation and 85 degrees of abduction as well as internal rotation to T10. He noted that she reported mild tenderness to palpation about the shoulder. Dr. Gunter determined that appellant had 12 percent permanent impairment of her right upper extremity. Appellant requested a schedule award on August 8, 2006.

In a decision dated January 3, 2007, the Office denied appellant's claims for compensation for intermittent periods from August 21 to November 10, 2006. Appellant requested an oral hearing on January 16, 2007. By decision dated April 13, 2007, the hearing representative affirmed the January 3, 2007 decision. The Board issued a decision on December 12, 2007[1] affirming the April 13, 2007 hearing representative's finding that appellant had established a period of disability. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

The district medical adviser reviewed appellant's schedule award claim on August 9, 2007 and agreed with a right shoulder impairment rating of 12 percent. By decision dated October 17, 2007, the Office granted appellant a schedule award for 12 percent of her right upper extremity.

Appellant requested an oral hearing. She testified on March 27, 2008 and submitted an April 20, 2008 report from Dr. Blake H. Moore, a Board-certified surgeon, who examined appellant on April 19, 2008 and found that she had 52 percent impairment of the whole person based on the 6th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* However, Dr. Blake also advised that she had not reached maximum medical improvement. Dr. Moore provided appellant's history of injury and provided appellant's back impairment of 27 percent of the whole person, 10 percent impairment due to an emotional condition and 3 percent impairment due to diabetes. He found that appellant had 12 percent upper extremity impairment due to her rotator cuff injury and loss of range of motion. Dr. Moore also found 12 percent of the lower extremity due to appellant's ankle impairment.

In a letter dated April 24, 2008, appellant's attorney clarified that appellant requested compensation for impairment to her back, shoulder and ankle. She stated that there was a causal relationship between appellant's accepted back condition and her ankle fracture.

By decision dated July 22, 2008, the hearing representative found that appellant had no more than 12 percent impairment to her right upper extremity for which she had received a

[1] Docket No. 07-1407 (issued December 12, 2007).

schedule award. He stated that there was no medical evidence in accordance with the 5th edition of the A.M.A., *Guides*, which substantiated more than 12 percent impairment of the right shoulder. The hearing representative concluded that the evidence was not sufficient to establish entitlement to a schedule award for the lower extremities.[2]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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 regulations as the appropriate standard for evaluating schedule losses.[5] 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.[6]

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.[7] 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.[8]

ANALYSIS

The Office accepted that appellant sustained a low back injury and a right shoulder injury in the performance of duty. Appellant underwent an arthroscopic rotator cuff tendon repair, subacromial decompression and distal clavicle resection of the right shoulder. She requested a schedule award. Appellant submitted the February 8, 2006 report of Dr. Gunter, a Board-

[2] The Office issued a decision on February 26, 2009 finding that appellant had 14 percent impairment of her left leg and 0 percent impairment of her right leg. As this decision was issued after appellant filed her appeal with the Board on August 19, 2008 it is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990); *Oren E. Beck*, 33 ECAB 1551 (1982).

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id.*

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

[7] *George E. Williams*, 44 ECAB 530, 533 (1993).

[8] *Id.*

certified neurosurgeon, who reported that she had 160 degrees of forward elevation and 85 degrees of abduction as well as internal rotation to T10. Dr. Gunter noted that appellant reported mild tenderness to palpation about the shoulder and found that she had 12 percent permanent impairment of her right upper extremity. The district medical director reviewed this report on August 9, 2007 and agreed with a right shoulder impairment rating of 12 percent.

The fifth edition of the A.M.A., *Guides* provide that a resection arthroplasty is 10 percent impairment of the upper extremity.[9] Shoulder flexion of 160 degrees is one percent impairment[10] and abduction of 85 degrees is four percent impairment.[11] Decreased motion is combined with arthroplasty impairment to reach the impairment rating in accordance with the A.M.A., *Guides*.[12] Combining these impairment ratings, appellant has 15 percent impairment of the right shoulder in accordance with the A.M.A., *Guides*. The Board finds that the Office's decision should be modified to reflect impairment of the right upper extremity of 15 percent.

In regard to appellant's claim for schedule awards for her lower extremities, as noted above, if the evidence establishes that her accepted back injury results in impairment to her lower extremities she would be entitled to a schedule award. However, she is not entitled to a schedule award for any impairment to her back or spine.

The evidence regarding appellant's lower extremities consists of the reports from Dr. Moore, a Board-certified surgeon, and Dr. Gunter, a Board-certified neurosurgeon. In his August 18, 2005 report, Dr. Gunter stated that she had back and leg pain with intact lower extremity strength. He stated that appellant had reached maximum medical improvement and that she had 25 percent impairment in accordance with the A.M.A., *Guides*. Dr. Gunter did not provide a description of her impairment. In order to establish appellant's entitlement to a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[13] As Dr. Gunter did not provide necessary findings and details in support of his impairment rating, his report is not sufficient to meet appellant's burden of proof in establishing lower extremity impairment as a result of her accepted back injury.

Dr. Moore examined appellant on April 19, 2008 and found that she had 52 percent impairment of the whole person based on the 6th edition of the A.M.A., *Guides*, but that she had not reached maximum medical improvement. The Board has defined maximum medical

[9] A.M.A., *Guides* 506, Table 16-27.

[10] *Id.* at 476, Figure16-40.

[11] *Id.* at 477, Figure 16-43.

[12] *Id.* at 505, 604.

[13] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

improvement as meaning "that the physical condition of the injury member of the body has stabilized and will not improve further." The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[14] As Dr. Moore did not find that appellant had reached maximum medical improvement, she would not be entitled to any schedule award based on his report. The Board also notes that Dr. Moore did not apply the appropriate edition of the A.M.A., *Guides*.[15]

CONCLUSION

The Board finds that appellant has 15 percent impairment of her right shoulder for which she received a schedule award. The Board further finds that appellant has not established entitlement to an additional impairment rating.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: July 28, 2009
Washington, DC

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

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

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

[14] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[15] The Board notes that the Office did not adopt the 6th edition of the A.M.A., *Guides* until May 1, 2009, which was after the issuance of the Office hearing representative's decision. *See* FECA Bulletin No. 09-03 (issued March 15, 2008).