

On April 3, 2007 appellant filed a claim for a schedule award. On June 8, 2007 the Office denied her claim, finding that the Federal Employees' Compensation Act does not allow schedule awards for impairment to the back or brain. Appellant was advised that if she had any impairment to an upper extremity she could pursue her claim.

By letter dated July 13, 2007, appellant advised that she had scheduled an appointment with Dr. Robert P. Durning, a Board-certified orthopedic surgeon, to obtain an impairment rating. Dr. Durning examined appellant and reviewed her medical records. He diagnosed neck pain and limited motion from degenerative changes at C5-6 and C6-7 (present prior to August 11, 2006), status post discectomy and anterior spinal fusion at C4-5, which was related to the August 11, 2006 work incident. This resulted in left upper extremity symptoms and mild left C5 nerve dysfunction (left biceps muscle weakness and hyporeflexia). Dr. Durning also diagnosed right Horner's syndrome. He opined that the C4-5 disc herniation was due to the August 11, 2006 injury and that the anterior cervical surgery of December 8, 2006 was also made necessary by the work injury. Dr. Durning opined that the most recent surgery had reduced, but not eliminated appellant's neck and left upper extremity symptoms but that she continued to experience left C5 nerve root dysfunction. He opined that appellant had six percent impairment to the left upper extremity or four percent whole person impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th edition 2001) (A.M.A., *Guides*). Appellant experienced pain that interfered with some activities which was a Grade 3 sensory deficit.¹ Dr. Durning noted that the range of Grade 3 deficit was 26 to 60 percent, of which he allowed the maximum. He noted that the maximum upper extremity impairment allowed for C5 nerve root sensory loss was five percent.² Dr. Durning multiplied the 60 percent deficit by 5 percent to total 3 percent sensory impairment. He also found Grade 4 muscle deficit, for which a range of 1 to 25 percent motor deficit was allowed. Dr. Durning graded appellant's motor deficit as 10 percent.³ He noted a maximum of 30 percent upper extremity impairment for C5 motor weakness.⁴ Multiplying the motor deficit by the maximum impairment totaled 3 percent. Dr. Durning combined the sensory and motor impairment values to find a total of six percent. He also stated that appellant had 25 percent impairment of her cervical spine due to residual effects.

In an August 9, 2007 report, the Office medical adviser determined that appellant had four percent impairment to her left upper extremity. He agreed with Dr. Durning's determination that appellant had three percent impairment of the left upper extremity based on C5 motor deficit. However, the Office medical adviser did not agree with Dr. Durning's rating of sensory impairment. He noted that Dr. Durning had assigned a Grade 3 deficit, but that in order to justify this there would have to be both reduced light touch and two-point discrimination. Although appellant had ongoing radiculopathy in the C5 nerve root distribution, the finding revealed normal two-point discrimination. Therefore, the Grade 3 was not justified. The Office medical

¹ A.M.A., *Guides* 482, Table 16-10.

² *Id.* at Table 16-13.

³ *Id.* at 484, Table 16-13.

⁴ *Id.* at 489, Table 16-13.

adviser stated that a Grade 4 sensory deficit should have been assigned, which allowed a maximum of 25 percent. He then rated sensory loss of the C5 nerve by multiplying the 25 percent deficit by 5 percent (the maximum for upper extremity impairment due to C5 sensory deficit).⁵ This totaled 1.25 which the Office medical adviser rounded to a one percent sensory deficit. Appellant's combined left upper extremity impairment due to sensory and motor loss was four percent.

By decision dated August 13, 2007, the Office issued a schedule award for four percent impairment of the left arm.

LEGAL PRECEDENT

The schedule award provision of the Act⁶ and its implementing regulations⁷ 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.

ANALYSIS

The Board notes that neither the Act nor the implementing federal regulations provide for the payment of a schedule award for whole body impairment to the back or cervical spine.⁸ The Office properly did not base the schedule award in this case on the 25 percent impairment to her cervical spine.

The Office granted a schedule award for four percent impairment to the left upper extremity based on the opinion of the Office medical adviser. However, the Board finds that the weight of the medical evidence rests with the opinion of Dr. Durning, the Board-certified orthopedic surgeon, who examined appellant and rated impairment of six percent. The Board has held that the impairment rating of an examining physician may take precedence over the opinion of an Office medical adviser when considering subjective factors.⁹ Dr. Durning considered the subjective factors of pain and supported his opinion with sound rationale and a proper application of the A.M.A., *Guides*.

⁵ *Id.* at 489, Table 16-10; 482, Table 16-13. .

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Tomas Martinez*, 54 ECAB 623, 625-26 (2003).

⁹ *Michelle L. Collins*, 56 ECAB 552 (2005); *Richard Giordano*, 36 ECABG 134 (1984).

Dr. Durning found that appellant had a three percent impairment based on C5 motor deficit. The Office medical adviser agreed with Dr. Durning's calculation in this matter. However, Dr. Durning also found that appellant had three percent impairment due to C5 sensory deficit. He properly applied the A.M.A., *Guides* and indicated that appellant had a Grade 3 deficit based on pain or sensory deficit that interfered with some activities. Dr. Durning allowed for 60 percent (the maximum amount for a Grade 3 impairment) which he multiplied by 5 percent (the maximum impairment for C5 nerve root sensory deficit or pain).¹⁰ The Office medical adviser disagreed stating that appellant had a Grade 4 deficit of 25 percent.

The Board will modify the Office's August 13, 2007 decision to allow the sensory rating recommended by Dr. Durning. Based on this evidence appellant has six percent impairment of her left arm.

CONCLUSION

The Board finds that appellant has six percent impairment to the left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 13, 2007 be affirmed, as modified.

Issued: September 23, 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

¹⁰ *Supra* note 5.