

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBIN L. JAMES and U.S. POSTAL SERVICE,
POST OFFICE, Boston, Mass.

*Docket No. 97-605; Submitted on the Record;
Issued December 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant had any injury residuals on or after May 1, 1995, causally related to her January 6, 1994 accepted head contusion or neck sprain injuries; and (2) whether appellant has established that she has permanent impairment entitling her to a schedule award.

Appellant received compensation for temporary total disability due to a head contusion and neck sprain from January 7 to April 4, 1994 when she returned to light duty. On April 11, 1994 appellant was cleared to work eight hours per day, but since she was a part-time employee she continued to work four hours per day. On April 25, 1994 appellant filed a Form CA-7 claiming entitlement to a schedule award.

In a report dated May 24, 1994, Dr. Edwin B. Faulkner, a family practitioner, noted that appellant had full retained active flexion and extension, but had acute tenderness and rigidity in the right trapezius area with a 60 percent restriction of lateral movement, which he speculated caused generalized weakness of flexion and extension of the right upper extremity. Dr. Faulkner diagnosed spasm of the cervical bilateral paravertebral muscles and right trapezius group of muscles; pain and limited motion contusion top of head. He opined that appellant's condition was permanent; that she reached maximum medical improvement on April 4, 1994, and that there was an impairment of function of the arm due to sensory deficit, pain or loss of strength estimated at 40 percent. Dr. Faulkner recommended a 60 percent impairment of the right upper extremity due to muscular weakness arising from injury to the right trapezius muscles. He did not refer to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* or explain how the trapezius muscle was injured from a head contusion and a neck sprain.

The Office of Workers' Compensation Programs' medical adviser determined that the evidence was insufficient to document that appellant sustained permanent impairment as a result of her accepted head contusion and neck sprain. He noted that the diagnoses provided by

Dr. Faulkner were soft tissue entities, which were temporary and self-limiting conditions without any permanent residuals. He opined that the medical evidence of record failed to document or substantiate any significant or permanent condition arising out of appellant's January 6, 1994 injury, that appellant had recovered fully from any and all residuals attributable to that incident and that according to the A.M.A., *Guides* there was no basis for permanent impairment.

The Office determined that a second opinion was required and referred appellant to Dr. Anthony J. Chaplik, a Board-certified orthopedic surgeon, for evaluation.

By report dated November 22, 1994, Dr. Chaplik found that appellant had no evidence of residual weakness of the upper limbs but had a limitation of full right and left lateral cervical flexion. He found no present active symptomatic or physical impairment of the right upper limb but concluded that appellant still had partial minor impairment of the cervical spine, guarding of terminal lateral cervical motion and recommended reevaluation in three to six months. Dr. Chaplik found no verifiable evidence of permanent partial impairment.

Appellant continued to work part-time light duty during the next few months without documented problems and work clearance forms were completed and submitted by Dr. Faulkner's office.

On April 14, 1995 the Office again referred appellant to Dr. Chaplik for reexamination and reevaluation of the status of any injury residuals.

By report dated May 1, 1995, Dr. Chaplik found that appellant had full cervical flexion without complaint and he noted that all tests of the neck and right upper extremity were negative. Dr. Chaplik opined that appellant's history and examination did not support that she had any permanent impairment and that her right upper limb was physically fully recovered. Dr. Chaplik found no need for work restrictions or for any continued excessive, inappropriate medical treatment.

No further probative medical evidence, narrative medical reports, or medical treatment notes were submitted to the record by appellant supporting that she had any difficulty performing her duties or had any permanent impairment.

By decision dated June 21, 1995, the Office rejected appellant's claim for a schedule award finding that the weight of the medical evidence supported that she had no residuals of the January 6, 1994 injury or any permanent impairment. The Office found that no diagnostic tests with objective findings were submitted in support that appellant had any condition continuing for more than one year or any permanent impairment. The Office further found that Dr. Faulkner offered no current information regarding appellant's condition but merely reiterated his findings and opinions from early 1994. The Office found that Dr. Chaplik's opinion was based upon a complete and accurate history and a review of the entire case record, and upon a thorough examination during which he found no evidence of any permanent impairment. It found that his report was well rationalized and also supported that appellant had recovered fully from her January 1994 injuries and had no injury residuals. The Office found that Dr. Chaplik's reports constituted the weight of the rationalized medical opinion evidence.

Appellant subsequently requested an oral hearing by letter postmarked July 22, 1995.

By decision dated August 9, 1995, the Branch of Hearings and Review denied appellant's request for a hearing noting that, it was untimely made, such that she was not, by right, entitled to a hearing, and finding that, considering the issue involved, she could equally well have the matter resolved by requesting reconsideration from the Office and submitting evidence which established that she continued to have residual disability or permanent impairment.

In an undated letter received on October 3, 1995, appellant again requested an oral hearing stating that she had moved and did not receive the denial decision until two weeks after it was issued such that she did not have 30 days within which to request a hearing. In support appellant submitted a September 19, 1995 letter from Dr. Faulkner, which stated that appellant still suffered from a chronic, traumatic cervical strain accompanied by limited motion and moderate to severe headaches.

By letter dated October 31, 1995, the Branch of Hearings and Review explained that the June 21, 1995 decision was mailed to the address as it appeared in her case file, that there was no evidence that she advised the Office of any address change, that her request was untimely postmarked, and that the Office denied her request by exercising its discretion in determining that the issue involved could be equally well addressed by requesting reconsideration and by submitting evidence supporting that she had continuing injury residuals or permanent impairment.

By letter dated June 20, 1996, appellant requested reconsideration. In support she submitted a June 20, 1996 letter, claiming that denial of her claim should not be based upon the reports of Dr. Chaplik. Appellant complained that Dr. Chaplik had not performed surgery in over 30 years, that he had severe arthritis and used a wheelchair and a cane, that his examinations consisted only of verbal questioning and no physical examination, that his behavior was grossly unacceptable and unprofessional because he asked her if she was having an affair with her treating physician, and whether or not her mother had fooled around with an Indian because of her dark hair, and because he insisted that there was nothing wrong with her because of her physical appearance, which he referred to as a "great shape." Appellant also alleged that Dr. Chaplik told the nurse to put down in the report that appellant had nice, firm buttocks.

By decision dated October 3, 1996, the Office denied modification of the prior decision finding that the evidence submitted in support was not sufficient to warrant modification. The Office found that Dr. Chaplik's reports indicated that he did perform a physical examination, and that appellant's claim of unprofessional behavior was not substantiated by any other factual information. The Office further noted that appellant had not submitted any medical evidence to support her contentions that she had injury residuals or any permanent impairment.

The Board finds that appellant has no injury residuals on or after May 1, 1995, causally related to her January 6, 1994 accepted head contusion or neck sprain.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

The Office met its burden in this case through the well-rationalized report of Dr. Chaplik, who examined appellant on May 1, 1995 and determined that she had fully recovered from her January 6, 1994 injuries. Dr. Chaplik found no injury-related residuals and the Office noted that none of the other rationalized medical evidence of record supported ongoing or continuing injury residuals after Dr. Chaplik's November 22, 1994 report, such that Dr. Chaplik's May 1, 1995 opinion constituted the weight of the medical opinion evidence on this issue. Accordingly, the Office met its burden of proof to terminate appellant's compensation entitlements.

The Board further notes that the September 19, 1995 letter, from Dr. Faulkner is unrationalized and unsupported by objective evidence of such permanent impairment or disability due to the accepted injury.

The Board also finds that appellant has failed to establish that she has permanent impairment entitling her to a schedule award.

A claimant seeking compensation under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.⁴ Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵

Appellant has not established that she has any permanent impairment in this case, as she has presented no rationalized medical evidence supporting or documenting any permanent impairment of a schedule member. Dr. Faulkner estimated that appellant had an impairment of the right upper extremity due to sensory deficit, pain or loss of strength of 40 percent and he recommended a 60 percent impairment of the right upper extremity due to muscular weakness from injury to the right trapezius muscles. The Board notes, however, that the 60 percent impairment rating for weakness was not supported by any objective evidence and was not

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² See *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁵ 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury; see *Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

determined using any identifiable procedures or tables in the A.M.A., *Guides*. Therefore, Dr. Faulkner's impairment estimate was not obtained in accordance with the A.M.A., *Guides* and is not probative with respect to establishing appellant's entitlement to a schedule award under the Act. Further, the Board notes that Dr. Faulkner attributed this muscular weakness as arising from injury to the right trapezius, but that he failed to explain how the right trapezius was injured due to a head contusion and a neck sprain, the only accepted employment-related injuries. As appellant submitted no other medical evidence addressing an impairment rating entitling her to a schedule award, she has failed to meet her burden of proof to establish her schedule award claim.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 3, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 4, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member