U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERESA GOODE and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

Docket No. 99-1831; Submitted on the Record;
Issued September 12, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has more than a 20 percent permanent impairment to her left arm.

In the present case, the Office of Workers' Compensation Programs accepted that appellant sustained tenosynovitis of the left wrist and thumb, and left carpal tunnel syndrome. By decision dated March 24, 1997, the Office issued a schedule award for a 20 percent permanent impairment to the left arm. In a decision dated November 14, 1997, an Office hearing representative set aside the prior decision and remanded the case for further development of the evidence. In a decision dated March 23, 1998, the Office determined that appellant did not have more than the previously awarded 20 percent permanent impairment to the left arm. By decision dated February 8, 1999, an Office hearing representative affirmed the March 23, 1998 decision.

The Board has reviewed the record and finds that the case is not in posture for decision.

Section 8107 of the Federal Employees' Compensation Act 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.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[2]

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[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

[2] *A. George Lampo*, 45 ECAB 441 (1994).

In a report dated November 21, 1996, Dr. David Weiss, an osteopath, opined that appellant had a 30 percent impairment to the left arm. Dr. Weiss explained that, under the A.M.A., *Guides*, the maximum impairment for sensory deficit in the median nerve was 38 percent, and he graded the impairment at 80 percent, for a 30 percent impairment. In the November 14, 1997 decision, the Office hearing representative finds that this report is of no probative value because it does not explain how the maximum percentage of 38 percent was calculated. Although Dr. Weiss cited to specific tables and figures in the A.M.A., *Guides* for some of his calculations, he did not specifically identify the source for the maximum percentage of sensory deficit impairment for the median nerve. It is evident, however, that Dr. Weiss utilized Table 15, which provides a 38 percent maximum impairment for sensory deficit to the median nerve below the midforearm.[3] The Board finds that the November 21, 1996 report from Dr. Weiss does constitute probative medical evidence on the issue presented.

The hearing representative properly concluded that the original schedule award dated March 24, 1997 was improper, because it relied on a January 13, 1997 report from an Office medical adviser that is of little probative value. In that report, the medical adviser calculated a 20 percent permanent impairment based on grip strength, without explaining why the sensory deficit impairment was not considered, or otherwise providing any medical reasoning.[4]

On remand, the Office referred appellant to Dr. Richard D. Jacobs, an orthopedic surgeon, who opined in a January 28, 1998 report that he found no evidence of a permanent impairment. Dr. Jacobs apparently did not respond to requests for a supplemental report, and the Office then referred appellant to Dr. Kenneth Levitsky, an orthopedic surgeon. In a report dated February 28, 1998, Dr. Levitsky opined that appellant had a 23 percent permanent impairment. Dr. Levitsky found a 4 percent impairment due to loss of range of motion, and a 19 percent impairment for sensory deficit (based on a 50 percent grading for the maximum of 38 percent for the median nerve).

In a form report dated March 9, 1998, an Office medical adviser concluded that appellant had a four percent impairment due to loss of range of motion. Once again, the medical adviser failed to explain why the sensory deficit impairment was not considered. The March 23, 1998 and February 8, 1999 Office decisions also fail to address the issue of sensory deficit based on Dr. Levitsky's report.

The Board finds that the record requires further development of the evidence. The reports from the Office medical advisers are of little probative value in this case. The probative medical evidence consists of Dr. Weiss's opinion that appellant had a 30 percent permanent impairment based on sensory deficit of the median nerve, and the second opinion physician Dr. Levitsky, who found a 19 percent impairment based on sensory deficit, and a 4 percent impairment for loss of motion in the left wrist.

[3] A.M.A., *Guides* at 54, Table 15 (4th ed. 1993).

[4] The A.M.A., *Guides* state that strength measurement impairments are only used "in a rare case," noting that strength measurements are influenced by subjective factors that are difficult to control. A.M.A., *Guides* at 64.

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[5] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[6] Since there is a disagreement between an attending physician, Dr. Weiss, and a second opinion physician, Dr. Levitsky, as to the exact degree of permanent impairment to the left arm, a conflict under 5 U.S.C. § 8123(a) is created. On remand, the Office should refer appellant to an appropriate impartial specialist for a reasoned opinion as to the degree of permanent impairment to the left arm under the A.M.A., *Guides*.[7] After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated February 8, 1999 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
September 12, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[5] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[6] *William C. Bush*, 40 ECAB 1064 (1989).

[7] Appellant argues that the right arm should be considered as well, but the Office has not accepted a right arm injury, nor does the record contain a well-reasoned medical opinion as to causal relationship between a diagnosed right arm condition and appellant's federal employment.