

On March 6, 1992 appellant, then a 39-year-old distribution clerk, filed a claim alleging that she sustained an injury resulting from the repetitive motions in her job. The Office accepted her claim for de Quervain's tenosynovitis of the right wrist. She underwent multiple surgeries: on September 3, 2002, a release of the first dorsal extensor compartment and external neurolysis of the right radial sensory nerve; on March 18, 1993, an excision of the right radial sensory nerve

at the wrist and partial lateral epicondylectomy with release of the extensor carpi radialis brevis tendon origin; and on March 17, 1995, a decompression of the radial nerve at the radial tunnel.<sup>1</sup>

Appellant received schedule awards for a five percent permanent impairment of her right upper extremity. On the prior appeal of this case, the Board affirmed, finding that the opinion of the impartial medical specialist constituted the weight of the evidence and established that appellant's impairment was five percent.<sup>2</sup>

Appellant requested an increased award. She submitted the October 8, 2001 report of Dr. David Weiss, an osteopath, who examined appellant on August 30, 2001 and found a 20 percent impairment of the right upper extremity due to grip strength deficit, a 4 percent impairment due to weakness of the right supraspinatus, a 10 percent impairment due to weakness of the right triceps, a 4 percent impairment due to sensory deficit of the radial nerve, a 31 percent impairment due to sensory deficit of the median nerve, and a 3 percent pain-related impairment. Dr. Weiss concluded that appellant had a 58 percent total impairment of her right upper extremity.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Paul A. Foddai, an orthopedic surgeon, for a second opinion. Dr. Foddai examined appellant on June 29, 2005. He described his findings and reviewed the medical record and statement of accepted facts. Dr. Foddai noted that some of the physical findings differed from those of other physicians, and that appellant had reported that her symptomatology appeared to have lessened somewhat since she had stopped working. He found a two percent impairment due to decreased elbow pronation and a two percent impairment due to decreased radial deviation of the wrist. Dr. Foddai found a three percent impairment due to sensory deficit of the superficial dorsal branch of the radial nerve. He concluded that appellant had a seven percent total impairment of the right upper extremity. An Office medical adviser reviewed these findings and confirmed that appellant's impairment was seven percent.

On November 1, 2005 the Office issued a schedule award for an additional two percent impairment of appellant's right upper extremity. Appellant requested a hearing before an Office hearing representative, which was held on March 21, 2006.

In a decision dated May 23, 2006, the hearing representative affirmed the increased schedule award. She noted a large discrepancy between the findings of Dr. Foddai and Dr. Weiss, but she found that Dr. Foddai's more recent findings, which were consistent with those of the impartial medical specialist who examined appellant on March 9, 1999, held the weight of medical opinion.<sup>3</sup>

On appeal, appellant argues that there is a conflict in medical opinion between Dr. Weiss and Dr. Foddai warranting referral to an impartial medical specialist.

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<sup>1</sup> Appellant had a ganglionectomy of the right wrist in January 1990.

<sup>2</sup> Docket No. 00-1656 (issued January 25, 2002).

<sup>3</sup> The impartial medical specialist found a one percent impairment of the right upper extremity due to loss of elbow motion and a four percent impairment due to sensory deficit of the superficial branch of the right radial nerve.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>4</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>5</sup>

A claimant seeking compensation under the Act has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.<sup>6</sup>

If there is 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.<sup>7</sup>

### **ANALYSIS**

The Board finds no "disagreement" under 5 U.S.C. § 8123(a) between Dr. Weiss, appellant's evaluating physician, and Dr. Foddai, the Office referral physician. Dr. Weiss examined appellant in August 2001. His findings are therefore dated. By the time Dr. Foddai examined appellant nearly four years later, she had stopped working and she reported that her symptomatology had since improved somewhat. The Board notes that Dr. Weiss relied heavily on grip strength, manual muscle testing and pain-related impairment, none of which may be incorporated without a proper explanation under the A.M.A., *Guides*.<sup>8</sup> He also included shoulder impairments that are not accepted to be related to appellant's employment and are not shown to be preexisting.<sup>9</sup> For these reasons, the Board finds that Dr. Weiss' rating carries little weight.

Dr. Foddai reported 50 degrees of elbow pronation, which represents a two percent impairment of the upper extremity.<sup>10</sup> He reported 10 degrees of radial deviation, which also represents a two percent impairment of the upper extremity.<sup>11</sup>

Dr. Foddai further found a persistent loss of sensation in the superficial branch of the radial nerve. A sensory deficit of the radial nerve can impair the upper extremity by a maximum

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>6</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> A.M.A., *Guides* 507-08, 570, 20.

<sup>9</sup> *Michael C. Milner*, 53 ECAB 446, 450 (2002); *Raymond E. Gwynn*, 35 ECAB 247 (1983).

<sup>10</sup> *Supra* note 8 at 474 (Table 16-37).

<sup>11</sup> *Id.* at 469 (Table 16-31).

of 5 percent,<sup>12</sup> and Dr. Foddai found the severity of appellant's deficit to be 60 percent.<sup>13</sup> She therefore has a 3 percent impairment of her right upper extremity due to sensory deficit of the radial nerve (60 percent of 5 percent).

This evidence supports that appellant has a seven percent impairment of her right upper extremity, for which she has received schedule compensation. The Board will affirm the Office's May 23, 2006 decision.

### **CONCLUSION**

The Board finds that appellant has not met her burden to show that she has more than a seven percent permanent impairment of her right upper extremity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 23, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>12</sup> *Id.* at 492 (Table 16-15).

<sup>13</sup> *Id.* at 482 (Table 16-10).