

On December 13, 2004 appellant underwent a second opinion examination with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, who set forth his findings on examination and diagnosed left wrist sprain with possible tear of the ulnar ligamentous structures. On September 6, 2005 Dr. Hanley opined that appellant was not at maximum medical improvement.

On December 29, 2005 appellant filed a Form CA-7 claim for a schedule award. In a December 19, 2005 report, Dr. Robert W. Macht, a general surgeon, noted the postoperative state of the left wrist after traumatic injury to the left hand. Under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),¹ he rated appellant's impairment as 60 percent of the left arm. Citing to Figures 16-28 and 16-31, Dr. Macht found range of motion impairments of 22 percent impairment of the wrist. Citing to Figures 16-12, 16-18B, 16-21, 16-23, and 16-25, he found additional range of motion impairments of 12 percent of the thumb and 65 percent of the other fingers. Dr. Macht stated that, under Tables 16-1 and 16-2, those figures translate to 41 percent arm impairment due to loss of range of motion of the hand. He then combined the 22 percent range of motion impairment of the wrist with the 41 percent range of motion of the hand to find a total range of motion impairment of 54 percent. Dr. Macht noted that appellant continued to have pain, weakness, loss of function and loss of endurance and attributed 13 percent impairment due to those factors. He combined this with the range of motion figures to get 60 percent permanent impairment of the left arm.

Dr. Arnold Berman, an Office medical adviser, reviewed the medical evidence and found that appellant had 25 percent left arm impairment under the A.M.A., *Guides*. He agreed that appellant had a 22 percent loss of range of motion impairment of the left wrist, but eliminated the range of motion findings pertaining to the digits based on the second opinion evaluation of Dr. Hanley, who found no limitations of motion and who advised in a December 13, 2004 report that appellant was able to "make a fist indicating full range of motion." Under Figure 18-1, Dr. Berman provided an additional three percent impairment for pain. He found that December 19, 2005 was the date of maximum medical improvement.

By decision dated March 7, 2006, the Office granted appellant a schedule award for 25 percent permanent impairment of the left upper extremity. The period of the award was from January 8, 2006 through July 7, 2007. Appellant requested an oral hearing which was held on November 28, 2007.

By decision dated February 9, 2007, an Office hearing representative affirmed the March 7, 2006 schedule award.

On May 16, 2007 appellant requested reconsideration. In a January 25, 2007 letter, Dr. Macht noted that appellant underwent surgery on December 29, 2004 and the date of maximum medical improvement was December 19, 2005. He contended that the Office medical adviser incorrectly used information from a December 13, 2004 examination in calculating 25 percent impairment. A copy of Dr. Macht's December 19, 2005 report was resubmitted. A January 8, 2006 functional capacity evaluation report was also submitted.

¹ A.M.A., *Guides* (5th ed. 2001).

In a May 6, 2007 report, Dr. James M. Carlton, a Board-certified plastic surgeon and appellant's physician, noted reduced range of motion of the wrist and reduced grip strength measurements, but normal finger range of motion. He opined that appellant reached maximum medical improvement. Dr. Carlton opined that, under the A.M.A., *Guides*, appellant had a 51 percent impairment of the left upper extremity.

The Office found a conflict of medical opinion arising in the impairment ratings of Dr. Macht and Dr. Berman, the Office medical adviser. It referred appellant, along with the case record, a list of questions and a statement of accepted facts, to Dr. Larry Becker, a Board-certified orthopedic specialist, for an impartial medical examination.

In an August 6, 2007 report, Dr. Becker reviewed the history of injury and medical treatment. Examination of the left wrist revealed a virtually fixed position, with no motion in dorsiflexion, palmar flexion, supination, pronation, abduction or adduction. Ulnar deviation of the hand and wrist were noted. Appellant was not able to make a fist or extend her fingers. There was marked atrophy in the left palm and a tingling sensation when her fingers were palpated. Appellant's fixed position was noted to be in a position of function. There was no instability in her fingers, hand or wrist or any signs of swelling. Dr. Becker opined that appellant reached maximum medical improvement. Based on the A.M.A., *Guides*, he opined that appellant had a 56 percent permanent impairment of her left arm.² Dr. Becker noted that his rating was based on appellant's complaints of pain, weakness, atrophy, loss of endurance and loss of function. He further noted that Dr. Carlton's February 19, 2007 rating of 51 percent impairment was reasonable and it was basically in agreement with his rating.

On September 1, 2007 Dr. Berman, the Office medical adviser, noted that Dr. Becker discussed the lack of range of motion at the wrist but did not provide any specific degrees of loss of range to motion of the fingers.

In a September 14, 2007 letter, the Office requested a supplemental report from Dr. Becker addressing specific range of motion finding and the specific calculations used to rate appellant's impairment. In a September 18, 2007 response, Dr. Becker advised that appellant had no motion of her hand as a result of her ankylosed wrist. He stated that he was unable to provide ranges of motion for appellant's fingers as there was no motion in any of them.

On October 13, 2007 Dr. Berman noted that Dr. Becker's finding that appellant had no motion of the wrist or fingers was in contrast to Dr. Hanley's findings that there was full motion. He recommended that this discrepancy be resolved.

In an October 19, 2007 report, Dr. Morley Slutsky an the Office medical adviser stated that Dr. Becker did not document the actual goniometric measurements that were used to calculate the left wrist impairment which was required under the A.M.A., *Guides*. He noted that Dr. Becker's statement that appellant's wrist was in an ankylosed function position did not allow for any measurements. Dr. Slutsky also noted that Dr. Carlton had found left wrist motion and opined that Dr. Becker needed to address what material change had caused the left wrist

² Dr. Becker noted that he used Figures 16-28, 16-31 and 16-37 as well as Tables 16-1, 2, 3, 6, 9, 12, 21, 23 and 25, as well as Figures 16 and 18 in determining appellant's permanent impairment.

ankylosis to occur between Dr. Carlton's May 6, 2007 examination and his examination of August 6, 2007.

The Office referred appellant to Dr. John C. Gordon, a Board-certified orthopedic specialist, for an impartial medical examination. In a November 28, 2007 report, Dr. Gordon reviewed appellant's history and set forth findings on examination of the left arm. He found that appellant's elbow was tender with 10 degrees of flexion and 10 degrees of extension. While appellant's wrist had an ulnar deviation deformity, Dr. Gordon advised that the x-rays showed intact carpus and radial joints with some disuse osteoporosis. Appellant was able to pronate to 90 degrees and supinate to 30 degrees. Flexion was 10 degrees and extension was 15 degrees. Appellant was able to flex her fifth finger, but not the second or fourth finger. All of her fingers and thumb were tender. Appellant could not make a fist or extend her fingers fully and resisted all movement in her hands, fingers, wrist and elbow due to pain. Tenderness was noted over the ulnar styloid, as well as the rest of the wrist. Tinel's sign was positive along the ulnar nerve. Dr. Gordon advised that his examination found less motion than when she was seen by either Dr. Macht or Dr. Carlton. He advised that appellant had significant disability of her left hand with pain, decreased motion of the wrist, fingers and the elbow, hypersensitivity and lack of any ability to make a fist or extend her fingers. Dr. Gordon discounted the evaluation of Dr. Becker, because of the lack of specific measurements. He agreed with the evaluations by Dr. Carlton's and Dr. Macht's. Dr. Gordon advised that maximum medical improvement occurred in the spring of 2006 and concurred with Dr. Macht's 60 percent disability rating. He stated that he recommended using Dr. Macht's evaluation and "referencing the appropriate tables that he has presented."

On December 28, 2007 Dr. Slutsky advised that Dr. Gordon's range of motion measurements did not correlate with a 60 percent impairment of the left arm. Rather, he found that appellant had 21 percent impairment under the A.M.A., *Guides*. The medical adviser set forth the findings of both Dr. Gordon's November 28, 2007 and Dr. Carlton's May 6, 2007 examinations and cited to the A.M.A., *Guides*. He advised that Dr. Gordon's left wrist and elbow range of motion measurements equaled 19 percent arm impairment³ and were similar to Dr. Carlton's rating of 18 percent arm impairment. Dr. Slutsky recommended using Dr. Carlton's May 6, 2007 measurements over those of Dr. Gordon, as Dr. Carlton provided actual measurements for the joints. For the left elbow range of motion impairment, the Office medical adviser found pronation of 60 percent equaled 1 percent impairment and supination of 80 degrees equaled 0 percent impairment under Figure 16-37 at page 474. For the left wrist range of motion impairment, the Office medical adviser found a total impairment of 17 percent. Under Figure 16-28 at page 467, 5 degrees flexion equated to nine percent impairment and 30 degrees extension equated to five percent impairment. Under Figure 16-31 at page 469,

³ Three percent impairment is found for left elbow range of motion. Under Figure 16-34 page 472, flexion of 10 degrees equates to one percent impairment and extension of 10 degrees equates to 1 percent impairment for 2 percent total impairment. Under Figure 16-37 at page 474, pronation of 90 percent equates to 0 percent impairment and supination of 30 degrees equates to 1 percent impairment. Total impairment of 16 percent is found for left wrist range of motion impairment. Under Figure 16-28 at page 467, 10 degrees flexion equates to 8 percent impairment and 10 degrees extension equates to 8 percent impairment for 16 percent impairment. The left elbow range of motion impairment of 3 percent is combined to the left wrist range of motion impairment for a total of 19 percent.

5 degrees of radial deviation equated to three percent impairment and 30 degrees of ulnar deviation equated to zero impairment. The left elbow range of motion impairment of 1 percent was added to the left wrist range of motion impairment for a total of 18 percent. The Office medical adviser further noted that all the physicians noted that appellant was significantly limited by pain and accorded an additional three percent allowance for pain under Chapter 18.3(a) of the A.M.A., *Guides*. He added the 18 percent range of motion extremity impairment with the 3 percent pain impairment to get the 21 percent upper extremity impairment.

By decision dated January 18, 2008, the Office denied modification of its prior decisions as there was no additional schedule award compensation due appellant.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁴ 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 A.M.A., *Guides*.⁵

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.⁶ Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.⁷

Section 8123(a) of the Act provides that, 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.⁸ When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹ The Board case precedent provides that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a

⁴ 5 U.S.C. § 8107.

⁵ See 20 C.F.R. § 10.404. Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001). See also *Linda Beale*, 57 ECAB 429 (2006).

⁶ See *Paul A. Toms*, 28 ECAB 403 (1987).

⁷ A.M.A., *Guides* 433-521, Chapter 16, The Upper Extremities, (5th ed. 2001).

⁸ 5 U.S.C. § 8123(a).

⁹ See *Darlene R. Kennedy*, 57 ECAB 414 (2006).

supplemental report from the specialist to correct the deficiency in his original report. Only when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is incomplete, vague, speculative or lacking in rationale, should the Office refer the claimant to a second impartial specialist.¹⁰

The Board has held that, to properly resolve a conflict in medical opinion, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An Office medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.¹¹

ANALYSIS

The Office accepted appellant's claim for dislocation of the left wrist and sprain, for which she underwent arthroscopy with debridement of torn triangular fibrocartilage complex on December 29, 2004. On March 7, 2006 appellant was granted a schedule award for 25 percent permanent impairment of the left arm. The Office subsequently found that a conflict in medical opinion arose between Dr. Macht, who found that appellant had a 60 percent left arm impairment, and Dr. Berman, the Office medical adviser, who found no additional left arm impairment. It referred appellant to Dr. Becker for an impartial medical examination.

The Board has reviewed the impairment rating by Dr. Becker and finds that, while he opined that appellant had 56 percent permanent impairment of the left upper extremity, he did not adequately explain his rating in accordance with the relevant standards of the A.M.A., *Guides*.¹² On his August 6, 2007 Dr. Becker noted that his impairment rating of the left upper extremity was based on appellant's complaints of pain, weakness, atrophy, loss of endurance and loss of function. While he cited to tables and figures in the A.M.A., *Guides*, he failed to provide any active range of motion in degrees or explain how he calculated impairment rating. The Office requested that Dr. Becker explain his impairment calculations. In a September 18, 2007 supplemental report, Dr. Becker advised that appellant had zero motion of her hand as a result of her ankylosed position and no motion in any of her fingers. However, a proper evaluation under the A.M.A., *Guides* requires actual goniometer readings or linear measurements.¹³ Because Dr. Becker did not provide any further measurements for a proper evaluation under the A.M.A., *Guides*, his opinion is not sufficient to resolve the conflict in medical opinion or be and is not entitled to special weight afforded a referee physician. His supplemental report did not correct

¹⁰ See *Nancy Keenan*, 56 ECAB 687 (2005); *Margaret Ann Connor*, 40 ECAB 214 (1988).

¹¹ See *Richard R. LeMay*, 56 ECAB 341 (2005); *Thomas J. Fragale*, 55 ECAB 619 (2004).

¹² See *Tonya R. Bell*, 43 ECAB 845, 849 (1992).

¹³ A.M.A., *Guides* at 451, 453.

the deficiency noted in his original report. The Office properly referred appellant to Dr. Gordon, for a second impartial examination.¹⁴

In a November 28, 2007 report, Dr. Gordon reviewed appellant's medical history and set forth his findings for the left arm. He agreed with Dr. Macht's opinion that appellant had 60 percent impairment of the left arm; however, he did not provide any calculations under the A.M.A., *Guides*. Dr. Slutsky, the Office medical adviser, subsequently reviewed the medical evidence and opined that appellant had 21 percent arm impairment which consisted of 18 percent range of motion impairment for the elbow and wrist and 3 percent impairment for pain. He applied Dr. Gordon's range of motion measurements and found that they equated to a 19 percent upper extremity impairment. The Board notes that this is proper under the A.M.A., *Guides*.¹⁵ The Office medical adviser found that Dr. Gordon's range of motion impairments were similar to Dr. Carlton's May 6, 2007 range of motion measurements and improperly used Dr. Carlton's measurements to find a 18 percent range of motion impairment. It is well established that, when the Office directs an employee to undergo a referee examination to resolve a conflict, it is to rely on the opinion of the medical referee in determining the issue.¹⁶ An Office medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.¹⁷ The Office medical adviser improperly used Dr. Carlton's range of motion impairments and should have used Dr. Gordon's range of motion impairments of 19 percent.

The Office medical adviser also attributed three percent impairment for pain under Chapter 18 of the A.M.A., *Guides*. The Board has noted that examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.¹⁸ While Dr. Gordon noted that appellant was significantly limited by pain, he did not address whether a pain-related impairment was warranted or necessary or specifically why other, more objective, methods of rating impairment under the A.M.A., *Guides* were inadequate. As noted, while an Office medical adviser may review Dr. Gordon's opinion, the resolution of the conflict is the responsibility of Dr. Gordon, the impartial medical specialist, who did not evaluate whether an additional impairment rating for pain is appropriate under Chapter 18 of the A.M.A., *Guides*.

¹⁴ See *supra* note 10. The Board notes that Dr. Berman, the Office medical adviser, who was on one side of the conflict Dr. Becker was appointed to resolve, should not have reviewed any of Dr. Becker's reports. See *John W. Slonaker*, 35 ECAB 997 (1984) (the Board found that the Office acted inappropriately, in a schedule award situation, in referring an impartial medical specialist's report for review to an Office medical consultant who was on one side of the medical conflict in question). This error is harmless, however, as the Office ultimately referred appellant to another impartial medical examiner, Dr. Gordon.

¹⁵ See *supra* footnote 3.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(g) (April 1993) (provides that while a district medical adviser may create a conflict in medical opinion, he or she may generally not resolve it); *id.* at 2.810.11(c)(2) (April 1993) (the referee specialist's report, once received, must actually fulfill the purpose for which it was intended, *i.e.*, it must resolve the conflict in medical opinion).

¹⁷ *Richard R. LeMay*, *supra* note 11.

¹⁸ *Linda Beale*, *supra* note 5; A.M.A., *Guides* at 18.3(b).

In finding that appellant had 60 percent left arm impairment, Dr. Gordon merely noted his agreement with Dr. Macht's opinion that appellant had 60 percent impairment. In *Frederick Justiniano*,¹⁹ an impartial medical specialist indicated his agreement with a referral physician without providing a further medical explanation for his opinion. The Board found that the reports of the impartial medical specialist were of diminished probative value without supporting medical rationale.²⁰ Dr. Gordon's report does not provide sufficient medical explanation to support his conclusion. While his range of motion findings total 19 percent upper extremity impairment under the A.M.A., *Guides*, he did not otherwise explain how the 60 percent impairment rating was derived. Dr. Gordon must resolve the medical conflict and cannot simply defer to the opinion of another physician on the matter.²¹ The impartial medical specialist must provide a well-reasoned opinion to resolve this issue.

The Board will set aside the Office's January 18, 2008 decision and remand the case for a supplemental report from Dr. Gordon. If Dr. Gordon is unwilling or unable to explain the basis of his impairment rating pursuant to the A.M.A., *Guides*, the case should be referred to another impartial medical specialist. Following this and such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on the extent of impairment to appellant's left upper extremity.

CONCLUSION

The Board finds that this case is not in posture for decision. The medical evidence requires further development.

¹⁹ 45 ECAB 491 (1994). In that case, the impartial specialist made statements such as "I must agree with [the referral physician's] conclusion that the patient has an underlying personality disorder" and "I also agree such adjustment disorder would have long since resolved without residuals."

²⁰ *Id.* at 497.

²¹ See *Justiniano*, *supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2008 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this opinion.

Issued: November 17, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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