United States Department of Labor
Employees' Compensation Appeals Board

C.F., Appellant	)	
and	)	**Docket No. 08-1364**
	)	**Issued: November 12, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Cape May, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 8, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 16, 2007 regarding her schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a two percent right upper extremity impairment.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By order dated August 6, 2007, the Board set aside a September 1, 2006 Office decision and remanded the case.[1] The Board noted that the Office had received a supplemental report from Dr. George Glenn, Jr., a Board-certified orthopedic surgeon selected as a referee examiner, prior to the September 1, 2006 decision, but

[1] Docket No. 07-953 (issued August 6, 2007).

did not consider the evidence. The case was remanded for proper consideration of the evidence of record.

With respect to the development of the case prior to the Board's August 6, 2007 order, the Office had found a conflict in the medical evidence under 5 U.S.C. § 8123(a) regarding the degree of permanent impairment in the right arm.[2] The Office accepted right lateral epicondylitis and right cubital tunnel syndrome causally related to appellant's work as a letter carrier. An attending physician, Dr. David Weiss, an osteopath, opined in a November 18, 2003 report that appellant had a 39 percent right arm impairment, based on sensory and motor deficits, loss of grip strength and pain. An Office medical adviser opined in a September 28, 2004 report that appellant had a 13 percent right arm permanent impairment.

Dr. Glenn was selected as the referee physician and submitted a report dated May 26, 2005. He provided a history, results on examination and reviewed the medical evidence. Dr. Glenn provided range of motion results, noted normal grip strength and found no motor weakness or sensory deficit in the ulnar nerve. He stated that he agreed with the Office medical adviser that any reported strength deficit involving the biceps or triceps was not related to an ulnar nerve problem. Dr. Glenn stated that while he found no objective evidence of sensory deficits, appellant did report subjective complaints. He identified Table 16-15 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.) and found the maximum impairment for the sensory deficit/pain was seven percent. The maximum was graded at 25 percent under Table 16-10 for a 2 percent right arm impairment. An Office medical adviser concurred in a June 19, 2005 report that appellant had a two percent right arm permanent impairment.

By decision dated October 5, 2005, the Office issued a schedule award for a two percent right upper extremity impairment commencing May 26, 2005. In a decision dated May 31, 2006, an Office hearing representative affirmed the October 5, 2005 decision.

On June 19, 2006 appellant submitted a June 6, 2006 report from Dr. Weiss, who stated that he agreed the ulnar nerve did not enervate the biceps or triceps, but stated these muscles are involved in flexing the elbow and if the elbow is not properly flexed, it could lead to biceps and triceps weakness. Dr. Weiss stated that appellant did have reduced grip strength, and reiterated his opinion that she had a 39 percent right arm impairment.

By letter dated July 12, 2006, the Office requested that Dr. Glenn review Dr. Weiss' June 6, 2006 report. In a report dated August 17, 2006, Dr. Glenn indicated that he had reviewed the report but found no reason to change his opinion. He stated that he found no residual

[2] The Employees' Compensation Act provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

weakness in the upper extremity on his examination, no atrophy and no lack of grip strength. Dr. Glenn also indicated that he did not find a biceps or triceps deficit. In a report dated August 30, 2007, an Office medical adviser opined that Dr. Glenn did address the concerns of Dr. Weiss and the Office could accept the opinion of Dr. Glenn that appellant had a two percent arm impairment.

By decision dated November 16, 2007, the Office reviewed the medical evidence and found that appellant was not entitled to more than a two percent permanent impairment to the right arm.

LEGAL PRECEDENT

Section 8107 of the 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.[3] 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 A.M.A., *Guides* as the uniform standard applicable to all claimants.[4]

It is well established that, when a case is referred to a referee physician for the purpose of resolving a conflict under 5 U.S.C. § 8123(a), the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5]

ANALYSIS

There was a conflict in the medical evidence between Dr. Weiss and an Office medical adviser regarding the degree of permanent impairment to the right arm as a result of the employment-related conditions. The referee physician, Dr. Glenn, provided a rationalized medical opinion based on a complete background. He provided a detailed report and explained that his physical examination did not establish any motor weakness or loss of strength resulting in a permanent impairment. As to sensory deficit, Dr. Glenn properly identified Table 16-15, which provides for a maximum of a seven percent permanent impairment for sensory deficit/pain in the ulnar nerve above the midforearm.[6] The impairment is then graded under Table 16-10 based on the severity of the impairment.[7] Dr. Glenn graded the impairment as a Grade 4

[3] 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. § 10.404(a).

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

[5] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[6] A.M.A., *Guides* 492, Table 16-15.

[7] *Id.* at 482, Table 16-10.

impairment,[8] or 25 percent of the maximum 7 percent. An Office medical adviser concurred with the opinion of Dr. Glenn. In his August 17, 2006 report, Dr. Glenn reiterated that his findings did not establish any additional impairment. He noted the issues raised by Dr. Weiss in the June 6, 2006 report, and explained why his examination findings did not result in an additional impairment.

The Board finds that Dr. Glenn's opinion represents the weight of the evidence. Dr. Glenn provided a rationalized opinion based on his examination, medical records and the appropriate tables of the A.M.A., *Guides.* Dr. Glenn's report is entitled to special weight in this case. There is no probative evidence of a greater impairment of the right arm.

CONCLUSION

The weight of the medical evidence was represented by the referee physician Dr. Glenn and did not establish more than a two percent right upper extremity permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 16, 2007 is affirmed.

Issued: November 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[8] Grade 4 is described as "distorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensations or pain, that is forgotten during activity." *Id.*