# United States Department of Labor
# Employees' Compensation Appeals Board

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| **J.K., Appellant** | ) | |
| **and** | ) | **Docket No. 09-665** |
| | ) | **Issued: October 6, 2009** |
| **U.S. POSTAL SERVICE, BULK MAIL CENTER, Jersey City, 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 January 8, 2009 appellant filed a timely appeal from a May 6, 2008 decision of the Office of Workers' Compensation Programs adjudicating her claim for a 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 three percent impairment to her right upper extremity, for which she received a schedule award.

### ***FACTUAL HISTORY***

This is the second appeal in this case.[1] By decision dated March 7, 2006, the Board affirmed a November 8, 2004 Office decision denying appellant's claim for a recurrence of disability on September 2, 2003.

[1] *See* Docket No. 06-78 (issued March 7, 2006).

On April 1, 1998 appellant, then a 45-year-old clerk, filed a traumatic injury claim alleging that she strained her right arm while processing mail. The Office accepted her claim for a right arm strain and a lesion of the right ulnar nerve. On January 23, 2002 appellant underwent surgery for her ulnar nerve compression neuropathy, consisting of right ulnar nerve submuscular transposition at the elbow. On June 11, 2003 she filed a claim for a schedule award.

In a March 18, 2003 report, Dr. David Weiss, an osteopathic physician specializing in orthopedic medicine, reviewed appellant's medical history and provided findings on physical examination. He diagnosed right arm post-traumatic ulnar nerve neuropathy with surgical right ulnar nerve transposition on January 23, 2002. Dr. Weiss stated that appellant had right elbow numbness extending to the right hand and a burning sensation in her right upper arm. She had a well-healed surgical scar over the medial aspect of the elbow joint. There was exquisite tenderness over the medial epicondyle. Tinel's sign was localized over the medial aspect of the elbow joint. Range of motion of the right elbow was normal with 0 degrees of extension, 145 degrees of flexion and 80 degrees both of pronation and supination. The wrist hyperextension sign was negative. Manual muscle strength testing revealed a grade of 5/5. Grip strength testing performed via Jamar Hand Dynamometer at level 3 revealed 14 kilograms (kg) of force in the dominant right hand compared to 30 kg in the left hand which equated to a 63 percent strength deficit index in the right hand.[2] Sensory examination failed to reveal any perceived dermatomal abnormalities involving the right upper extremity. Dr. Weiss calculated 23 percent right upper extremity impairment, including 20 percent for grip strength deficit, based on Table 16-34 at page 509 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and 3 percent for pain-related impairment, based on Figure 18-1 at page 574.

In a November 12, 2003 report, Dr. Irving D. Strouse, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on physical examination. He diagnosed a right elbow sprain with secondary ulnar neuropathy and status post anterior transposition of the right elbow ulnar nerve. Dr. Strouse stated that appellant had right arm pain and numbness along the ulnar aspect of the right forearm. The pain occurred daily and appellant had difficulty lifting with her right arm and driving a motor vehicle because of the pain. She had full range of motion of the right shoulder. There was full range of motion of the right elbow in flexion, extension and rotation. There was full range of motion of the right wrist and hand. Measurements of both arm and forearm areas approximately five inches above and below the elbow joint revealed no upper extremity atrophy. There was full muscle strength in the right upper extremity. There was no hypesthesia in the fingers of the right hand. Appellant had no atrophy of the small muscles of the hand. There was full motion of all

[2] It appears that, in applying the mathematical formula for determining strength loss index percentage on page 509, Dr. Weiss subtracted 14 kg of force (limited strength) in appellant's dominant right hand from 30 kg in the left hand (normal strength) and then divided the result by the normal strength number of 30 kg. However, the resulting strength loss index is 53 percent, not 63 percent as indicated by Dr. Weiss (30 minus 14 equals 16, divided by 30 equals 53 percent). Because he calculated 20 percent upper extremity impairment based on Table 16-34 on page 509, which includes a range of 31 to 60 percent strength loss index, the incorrect 63 percent appears to be a typographical error in his report. A 53 percent strength loss index equals 20 percent upper extremity impairment, based on Table 16-34.

small joints of the right hand. Dr. Strouse calculated three percent right upper extremity for pain based on Figure 18-1 at page 574 of the A.M.A., *Guides*.

On July 25, 2006 an Office medical adviser, calculated 1 percent right upper extremity impairment for sensory deficit, based on Table 16-15 at page 492 and Table 16-10 at page 482 of the fifth edition of the A.M.A., *Guides* (5 percent maximum for sensory deficit of the medial brachial cutaneous nerve from Table 16-15 multiplied by 20 percent for Grade 4 deficit from Table 16-10 equals 1 percent).[3] He stated that the physical examination reported by Dr. Strouse was normal except for some hypothesia posterior to the surgical scar. There were no residuals in the ulnar nerve. The Office medical adviser indicated that the three percent impairment for pain calculated by Dr. Strouse based on Chapter 18 was not in accordance with the A.M.A., *Guides* but did not explain.

By decision dated October 16, 2007, the Office granted appellant a schedule award based on three percent right upper extremity for 9.36 weeks, from November 12, 2003 to January 16, 2004.[4]

On October 19, 2007 appellant requested an oral hearing that was held on February 26, 2008. By decision dated May 6, 2008, the Office affirmed the October 16, 2007 decision.

## ***LEGAL PRECEDENT***

Section 8107 of the Act[5] 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*.[6]

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 [of Labor] shall appoint a third physician who shall make an examination."[7] Where a case is

[3] Table 16-10 at page 482 of the A.M.A., *Guides* provides for a range of 1 to 25 percent impairment of the upper extremity for Grade 4 impairment, described as "Distorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensations or pain, that is forgotten during activity."

[4] The Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of the upper extremity. 5 U.S.C. § 8107(c)(10). Multiplying 312 weeks by three percent equals 9.36 weeks of compensation. The schedule award decision was reissued on October 16, 2007 because the Office did not send a copy of an August 4, 2006 decision to appellant's representative. It appears that the Office based the schedule award on the three percent impairment calculation of Dr. Strouse rather than the Office medical adviser's one percent calculation.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[7] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.

## ***ANALYSIS***

The Board finds that this case is not in posture for a decision. There is a conflict in the medical opinion evidence necessitating referral to an impartial medical specialist.

Dr. Weiss diagnosed right arm post-traumatic ulnar nerve neuropathy with surgical right ulnar nerve transposition on January 23, 2002. Appellant had right elbow numbness extending to the right hand and a burning sensation in her right upper arm. She had a well-healed surgical scar over the medial aspect of the elbow joint. There was exquisite tenderness over the medial epicondyle. Tinel's sign was localized over the medial aspect of the elbow joint. Range of motion of the right elbow was normal with 0 degrees of extension, 145 degrees of flexion and 80 degrees both of pronation and supination. Manual muscle strength testing revealed a grade of 5/5. Grip strength testing performed via Jamar Hand Dynamometer at level 3 revealed 14 kg of force in the dominant right hand compared to 30 kg in the left hand. Sensory examination failed to reveal any perceived dermatomal abnormalities involving the right upper extremity. Dr. Weiss calculated 23 percent right upper extremity impairment, including 20 percent for grip strength deficit, based on Table 16-34 at page 509 of the fifth edition of the A.M.A., *Guides* and 3 percent for pain-related impairment, based on Figure 18-1 at page 574. The A.M.A., *Guides* provides, however, that in compression neuropathies additional impairment values are not given for decreased grip strength.[8] Appellant sustained a compression of the ulnar nerve for which she underwent surgery. Dr. Weiss did not explain why he did not calculate impairment due to sensory deficit or pain based on Chapter 16 (The Upper Extremities) and Table 16-10 at page 482 and Table 16-15 at page 492. He calculated three percent for pain-related impairment based on Figure 18-1 in Chapter 18.[9] However, the A.M.A., *Guides* warns that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters.[10] Moreover, as the A.M.A., *Guides* explains: "The impairment ratings in the body organ system chapters make allowance for expected accompanying pain."[11] Dr. Weiss did not adequately explain why appellant's condition could not be rated in other chapters of the A.M.A., *Guides* or how her condition falls within one of the several situations identified under section 18.3a (When This Chapter Should Be Used to Evaluate Pain-Related Impairment).[12] For these reasons, the calculation of Dr. Weiss is not sufficient to establish appellant's right upper extremity impairment.

[8] A.M.A., *Guides* 494.

[9] The A.M.A., *Guides* provides for a maximum of three percent impairment for pain in Chapter 18 at page 573.

[10] A.M.A., *Guides* 571.

[11] *Id*. at 20.

[12] *Id*. at 570-71.

Dr. Strouse stated that appellant had right arm pain and numbness along the ulnar aspect of the right forearm. The pain occurred daily and appellant had difficulty lifting with her right arm and driving because of the pain. Dr. Strouse calculated three percent right upper extremity for pain based on Figure 18-1 at page 574 of the A.M.A., *Guides*. However, he also did not adequately explain why appellant's condition could not be rated in other chapters of the A.M.A., *Guides* or how her condition falls within one of the several situations identified under section 18.3a. Dr. Strouse stated that there was full muscle strength in the right upper extremity. He found full range of motion of the right elbow in flexion, extension and rotation and full range of motion of the right wrist and hand. However, Dr. Strouse did not provide range of motion measurements. He stated that measurements of both arm and forearm areas revealed no upper extremity atrophy but he did not provide the measurements taken. For these reasons, the impairment calculation of Dr. Strouse is not sufficient to establish appellant's right upper extremity impairment.

An Office medical adviser, calculated 1 percent right upper extremity impairment for sensory deficit, based on Table 16-15 at page 492 and Table 16-10 at page 482 of the fifth edition of the A.M.A., *Guides* (5 percent maximum for sensory deficit of the medial brachial cutaneous nerve from Table 16-15 multiplied by 20 percent for Grade 4 deficit from Table 16-10 equals 1 percent).[13] He stated that the physical examination reported by Dr. Strouse was normal except for some hypothesia posterior to the surgical scar and that there were no residuals in the ulnar nerve. However, Dr. Strouse noted that appellant had pain and numbness along the ulnar aspect of the forearm. The Office medical adviser did not explain why she did not have impairment based on sensory deficit or pain related to the ulnar nerve.[14] He did not provide sufficient medical rationale for his assignment of a Grade 4 classification of sensory deficit or pain from Table 16-10 to appellant's medial brachial cutaneous nerve sensory deficit. The Office medical adviser did not explain why he calculated 20 percent impairment from Table 16-10 for Grade 4 sensory deficit of the medial brachial cutaneous nerve when the range for Grade 4 is 1 to 25 percent. For these reasons, the impairment calculation of the Office medical adviser is not sufficient to determine appellant's right upper extremity impairment.

On appeal, appellant states that she continues to have right arm aches and pain. She asserts that there is a conflict in the medical opinion evidence between Dr. Weiss on one side and Dr. Strouse and the Office medical adviser on the other side. As explained above, the Board has determined that there is a conflict in this case and the case is remanded for further development of the medical evidence. On appeal, appellant states that her right arm surgical scar is "horrible to look at." The Act provides that, for serious disfigurement of the face, head or neck likely to handicap an individual in securing or maintaining employment, proper and equitable compensation not to exceed $3,500.00 shall be awarded in addition to any other compensation

[13] Table 16-10 at page 482 of the A.M.A., *Guides* provides for a range of 1 to 25 percent impairment of the upper extremity for Grade 4 impairment, described as "Distorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensations or pain, that is forgotten during activity."

[14] Table 16-15 at page 492 provides for seven percent impairment for ulnar nerve sensory deficit. The seven percent maximum for the ulnar nerve is multiplied by the appropriate grade from Table 16-10 at page 482 of the A.M.A., *Guides* to determine the upper extremity impairment based on peripheral nerve sensory deficit or pain.

payable under this schedule.[15] There is no provision under the Act for impairment due to disfigurement of the arm. Therefore, this argument is without merit.

## ***CONCLUSION***

The Board finds that this is not in posture for a decision. On remand, the Office should refer appellant to an appropriate Board-certified specialist for an independent examination and evaluation of her right upper extremity impairment. After such further development as the Office deems necessary, it should issue an appropriate decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 6, 2008 is set aside and the case is remanded for further action consistent with this decision.

Issued: October 6, 2009
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

[15] 5 U.S.C. § 8107(c)(21).