

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIE A. LENKOWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

*Docket No. 98-2143; Submitted on the Record;
Issued September 1, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a 20 percent impairment of her right upper extremity and a 20 percent impairment of her left upper extremity, for which she received a schedule award.

On April 3, 1981 appellant filed an occupational disease claim. The Office of Workers' Compensation Programs accepted her claim for bilateral carpal tunnel syndrome and appellant was placed on the automatic rolls for temporary disability effective January 1988. Appellant returned to limited-duty work on October 31, 1994.

On June 12, 1995 appellant filed a claim for a schedule award.

In a report dated May 18, 1995, Dr. David Weiss, an attending osteopathic physician, noted on physical examination that appellant had positive Tinel's and Phalen's signs bilaterally. He also noted appellant had a "positive Tinel's sign at the median nerve and the Guyon's Canal involving the ulnar nerve" and that her range of motion for dorsiflexion was 75/75 degrees, plamar flexion was 75/75 degrees, radial deviation was 20/20 an ulnar deviation was 35/35 degrees. Regarding appellant's grip strength, he noted that appellant was right hand dominant and advised that testing using the Jamar Dynamometer revealed two kilograms of force strength in the right hand and two kilograms of force strength in the left hand. Dr. Weiss stated that he utilized Table 16 at page 57 in concluding that left entrapment of the median nerve at the wrist represented a 20 percent loss and that left entrapment of the ulnar nerve at the wrist represented a 30 percent impairment for a total impairment of 50 percent of the left upper extremity. Regarding the right upper extremity, Dr. Weiss utilized Table 16 at page 57 to conclude a 20 percent loss for right entrapment of the median nerve at the wrist, a 30 percent impairment of the ulnar nerve at the right wrist which resulted in a total impairment of 50 percent.

On November 13, 1995 the Office referred appellant to Dr. Walter Poprycz, a Board-certified orthopedic surgeon, for a second opinion on the degree of her physical impairment.

In a report dated January 5, 1996, Dr. Joseph A.W. Kozielski,¹ a Board-certified orthopedic surgeon, concluded that there was:

“[N]o evidence of thenar atrophy, negative Phalen’s test and a full range of motion of the wrists, fingers and hands. She demonstrates negative Tinel’s, bilaterally over the surgical sites. Grip and pinch strength testing, bilaterally shows inconsistent patterns and readings given the historical fact that the patient is right-handed dominant.”

In a supplemental report dated March 21, 1996, Dr. Kozielski concluded that appellant had a 40 percent bilateral impairment of the upper extremities.

By letter dated July 22, 1996, the Office requested clarification as to the date of maximum medical improvement as well as how he arrived at a 40 percent impairment rating.

By letter dated November 5, 1996, Dr. Kozielski responded to the Office’s July 22, 1996 letter and opined that appellant had a 20 percent impairment of both upper extremities. In support of this conclusion, Dr. Kozielski noted that electromyogram (EMG) and nerve conduction studies he had reviewed indicated a “bilateral impairment of the medial nerves necessitating surgery.”

By letter dated February 3, 1997, the Office scheduled another second opinion examination with Dr. Bruce W. Wulfsberg, a Board-certified orthopedic surgeon, to make a determination as to the degree of appellant’s impairment, for the purpose of a schedule award.

In a report dated February 25, 1997, Dr. Wulfsberg noted that appellant had some Tinel’s sign at both carpal areas and concluded that appellant had a 20 percent impairment of each upper extremity. In support of his conclusion, Dr. Wulfsberg relied upon Table 15 and Table 16 in determining that appellant’s median nerve entrapment resulted in a 20 percent impairment in her right upper extremity and a 20 percent impairment in her left upper extremity.

In a June 20, 1997 report, the Office medical adviser reviewed Dr. Wulfsberg’s February 25, 1997 report and agreed with his impairment rating of 20 percent in each upper extremity due to moderate median nerve entrapment.

On June 24, 1997 the Office issued a schedule award for a 20 percent impairment of the right upper extremity and a 20 percent impairment for the left upper extremity.

By letter dated June 30, 1997, appellant’s counsel requested a hearing, which was held on January 29, 1998.

By decision dated March 30, 1998, the Office hearing representative found that the evidence of record established that appellant had a 20 percent impairment of her right upper extremity and a 20 percent impairment of her left upper extremity. The hearing representative relied upon the opinions of the Office medical adviser, Drs. Kozielski and Wulfsberg. He further

¹ Dr. Kozielski works in the same practice as Dr. Poprycz.

found that Dr. Weiss' estimate of 30 percent impairment due to ulnar nerve entrapment was not supported by the objective evidence.

The Board finds that this 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.² 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 Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association (A.M.A.) *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.³

The Office's determination that appellant had a 20 percent bilateral loss of use of each upper extremity was based upon the findings of the Office medical adviser who reviewed a report from Dr. Wulfsberg, an Office second opinion physician. Dr. Weiss concluded in his May 18, 1995 report, based upon Table 15 of the A.M.A., *Guides*, that appellant had a 20 percent impairment due to her median nerve entrapment in each extremity and a 30 percent impairment due to her ulnar nerve entrapment for each upper extremity for a total 50 percent impairment in each upper extremity. Utilizing Table 15 of the A.M.A., *Guides*, Dr. Wulfsberg explained that appellant's median nerve entrapment of the wrist resulted in a 20 percent impairment in her right upper extremity and a 20 percent impairment in her left upper extremity. Both Dr. Wulfsberg and Dr. Kozielski, the Office's second opinion examiners, however, concluded that appellant's median nerve entrapment resulted in a 20 percent impairment by utilizing Table 15 and did not consider that appellant had any ulnar nerve impairment. The Board concludes that the report of Dr. Weiss, appellant's treating physician, and the reports of Dr. Wulfsberg, Dr. Kozielski and the Office medical adviser are in conflict as to the degree of appellant's impairment resulting from the accepted carpal tunnel syndrome.

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) of the Act,⁴ to resolve the conflict in the medical opinion.

On remand, the Office shall refer appellant, along with the statement of accepted facts and the medical records, to an appropriate specialist for an impartial evaluation and report including a detailed description of appellant's permanent impairment and an evaluation of

² 5 U.S.C. § 8107(a).

³ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁴ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994); see *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

appellant's impairment pursuant to the appropriate edition of the A.M.A., *Guides*. After such further development as necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated March 30, 1998 is hereby set aside and the case remanded to the Office for further development in conformance with the above decision.

Dated, Washington, D.C.
September 1, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member