

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITTA E. MILLER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, MO

*Docket No. 00-1625; Submitted on the Record;
Issued November 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has more than a 13 percent permanent impairment of her right thumb, for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further merit review on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on May 1, 1997 appellant, then a 52-year-old registered nurse, sustained a deep laceration of her right thumb as she removed her right hand from a metal shelf. Appellant stopped work on the date of injury, returned to limited duty on May 2, 1997 and to regular duty on June 11, 1997.

On September 2, 1999 appellant filed a claim for a schedule award for permanent impairment of her right thumb.

In support of her claim, appellant submitted a September 5, 1998 report from Dr. Bruce Schlafly, a Board-certified orthopedic hand surgeon, who noted that appellant had had some gradual improvement since the injury, which left a healed scar over the dorsum of her right thumb. Dr. Schlafly measured 0 to 31 degrees of motion at the MCP joint, 0 to 36 degrees at the IP joint, a 3 centimeter gap between the right thumb and the base of her small finger and normal 2-point discrimination at 5 millimeters over the pulp with no thenar atrophy. Dr. Schlafly found 45 degrees of right thumb radial abduction, opposition of 5 centimeters and thumb adduction of 5 centimeters. Grip strength was noted to be 28 pounds on the right when compared with 52 pounds on the left, with right hand pinch strength of 5 pounds compared to 15 pounds on the left.

Dr. Schlafly, using Table 34, page 65 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, determined that appellant had a 30 percent impairment of the right upper extremity for loss of strength. He found a four percent thumb impairment based on the range of motion of appellant's IP joint (Figure 10, page 26), a three percent impairment of the thumb based on range of motion of MCP joint (Figure 13, page 27), a six percent impairment of the thumb based on limited adduction (Table 5, page 28) and a five percent impairment of the thumb based on limitation of opposition (Table 7, page 29).

Dr. Schlafly added these values and determined that appellant had an 18 percent impairment of the thumb based on range of motion which translated into a 6 percent impairment of the right upper extremity (Table 2, page 19)¹. He then combined this range of motion impairment with impairment for decreased strength and arrived at a 34 percent permanent impairment of the right upper extremity.

On September 12, 1999 an Office medical adviser reviewed Dr. Schlafly's report and opined that a laceration on the dorsum of the right thumb would not be expected to cause severe upper extremity weakness. He recommended evaluation by a physician skilled in the application of the A.M.A., *Guides*.

On September 14, 1999 the Office referred appellant to Dr. John Gragnani, a Board-certified physiatrist, for impairment evaluation.

By report dated October 7, 1999, Dr. Gragnani reviewed appellant's complaints, opined that she had reached maximum medical improvement one year after the accident, which was May 1, 1998 and reported his physical examination results. He noted that lateral pinch was 3 kilograms on the right and 8 kilograms of the left, but noted after serial testing the numerical values were invalid. Two-point discrimination revealed six mm of sensitivity on both the ulnar and radial side of the thumb and decreased sharpness on the dorsal surface of the thumb, more in the radial distribution.

Dr. Gragnani measured range of motion of the thumb and found as follows: For the IP joint (Figure 10) flexion was 25 degrees and extension was 0 degrees, which constituted a 5 percent loss for flexion/extension; for the MP joint (Figure 13) flexion was 40 degrees and extension was 0 degrees, which constituted a 2 percent loss for flexion/extension; Figure 14 and 16 and Table 6 were used to evaluation adduction. Dr. Gragnani found that adduction at 6 centimeter (cm) was a 40 percent impairment of the right thumb; radial abduction was to 48 degrees which was a 0 percent impairment; opposition was measured at 5 cm which was equivalent to a 14 percent loss; and total loss of range of motion for the MP joint was noted as 56 percent. Dr. Gragnani added this 56 percent to the 5 percent for the IP joint resulting in a loss of range of motion of 61 percent for the right thumb, which included loss of range of motion and consideration of pain and sensory loss.

The Office medical adviser reviewed Dr. Gragnani's findings and noted that, using Figures 10 and 13 and Tables 5, 6 and 7, appellant's impairment due to losses in range of motion were as follows:

IP flexion	25 degrees	4 percent
IP extension	0 degrees	1 percent
MP flexion	40 degrees	2 percent
MP extension	0 degrees	0 percent

¹ Dr. Schlafly also combined the impairment for range of motion with an impairment for weakness to arrive at a whole body impairment. However, compensation is not payable for impairment to the body as a whole. See Gary L. Loser, 38 ECAB 673 (1987).

Adduction	6 cm	1 percent
Radial Abduction	48 degrees	0 percent
Opposition	5 cm	5 percent

He added the above impairments and obtained a total permanent impairment for appellant's right thumb of 13 percent. He opined that Dr. Gragnani's impairment percentages were invalid, that no lack of strength was found, and that therefore no rating for weakness was appropriate. Dr. Zimmerman also noted that since no impairment for the radial nerve loss on the dorsal aspect on the thumb was given, no additional percentage impairment for sensory loss was possible. He noted that this 13 percent impairment rating for the thumb conformed to FECA Bulletin 95-17 with explanations according to FECA Bulletin 96-17 and the A.M.A., *Guides*.

On November 2, 1999 the Office granted appellant a schedule award for a 13 percent permanent impairment of her right thumb from May 1 to July 8, 1998 for a total of 9.75 weeks of compensation.

On November 30, 1999 appellant requested reconsideration of her schedule award, claiming that Dr. Zimmerman's 13 percent impairment opinion was in conflict with Dr. Schlafly's opinion, which included impairment due to weakness.

By decision dated February 25, 2000, the Office denied appellant's application for further review of her case on its merits, finding that the medical evidence submitted in support of the request was repetitive and had already been considered.

The Board finds that this case is not in posture for decision.

The Federal Employees' Compensation Act² provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.³ In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.⁴

The schedule award provisions of the Act⁵ specify the number of weeks of compensation to be paid for permanent loss of use of various members of the body. The Act does not, however, specify the manner in which the percentage loss of use of a member shall be determined. The method used in making such a determination is a matter that rests with the sound discretion of the Office.⁶ For consistent results and to ensure equal justice under the law

² 5 U.S.C. §§ 8101-8193.

³ *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁴ *See Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

⁵ 5 U.S.C. § 8107.

⁶ *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.⁷ The Office has adopted the A.M.A., *Guides* as the standard for evaluating permanent impairment for schedule award purposes.

In this case, the three physicians rated fairly similarly appellant's permanent impairment due to range of motion loss. However, appellant's physician, Dr. Schlafly provided an impairment rating which consisted of multiple aspects of appellant's presentation including an additional measurement of weakness/grip strength loss. However, Dr. Gragnani found inconsistent strength testing results which, he opined, produced an invalid profile. Dr. Zimmerman reviewed Dr. Gragnani's results and he concluded that appellant had no ratable lack of strength, and therefore no rating for weakness can be offered.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "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 an examination."

In this case, Dr. Schlafly disagreed with Drs. Gragnani and Zimmerman on whether or not appellant had any permanent impairment due to injury-related loss of strength.

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether appellant is entitled to any schedule award for injury-related loss of strength.

The decisions of the Office of Workers' Compensation Programs dated February 25, 2000 and November 2, 1999 are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, DC
November 26, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

⁷ *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).