

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

SHARON D. STATEN, Appellant

and

**U.S. POSTAL SERVICE, LAKE HIGHLAND
STATION, Dallas, TX, Employer**

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**Docket No. 04-1963
Issued: October 26, 2005**

Appearances:
Sharon D. Staten, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On August 4, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated February 10, 2004, finding that she had established entitlement to a schedule award and a July 1, 2004 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant has any impairment entitling her to a schedule award; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 22, 1998 appellant, then a 35-year-old letter carrier filed a traumatic injury claim alleging that on that date she injured her right wrist trying to open a mail box.

Appellant filed an occupational disease claim on January 4, 1999 alleging that on October 22, 1998 she realized that she had developed pain and tingling in her wrist and neck which she attributed to her employment duties on that date. On October 14, 1999 she filed a second claim for occupational disease noting that on October 8, 1999 she developed pain and tingling in her hands and wrists. The Office accepted this claim for tendinitis of the left wrist.

On May 21, 1999 appellant filed a second traumatic injury claim alleging that on May 19, 1999 she developed a burning in her left shoulder and arm. The Office accepted her claim for left shoulder sprain. By decision dated March 26, 2001, the Office denied appellant's claim for a schedule award due to impairment of her left upper extremity due to joint crepitation.

Appellant requested a schedule award on November 13, 2001. In support, she submitted a report dated November 8, 2001 from Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, evaluating her right and left wrists. By decision dated February 28, 2002, the Office denied appellant's request for a schedule award on the grounds that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* did not provide for an impairment due to tendinitis.

The Office referred appellant for a second opinion evaluation on June 26, 2002. In a report dated August 29, 2002, Dr. Luiz C. Toledo, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome.

The Office accepted appellant's claim for carpal tunnel syndrome and enthesopathy of the left wrist.

Appellant underwent an endoscopic carpal tunnel release of the left wrist on November 12, 2002. On January 7, 2003 she underwent a carpal tunnel release of the right wrist.

In a report dated May 16, 2003, Dr. Shade noted appellant's complaints of mild to moderate left wrist pain and found that she had reached maximum medical improvement on May 13, 2003. He based his impairment rating on loss of range of motion of 17 percent of the upper extremity. Appellant requested a schedule award on May 19, 2003.

The Office medical adviser reviewed Dr. Shade's report on July 17, 2003 and found that appellant was not entitled to a schedule award as there were no sensory or motor deficits and no evidence of complex regional pain syndrome.

By decision dated July 23, 2003, the Office denied appellant's claim for a schedule award as there was no ratable impairment to her left upper extremity.

By decision dated August 8, 2003, the Office found that appellant's light-duty position fairly and reasonably represented her wage-earning capacity. The Office reduced her compensation benefits to zero based on her earnings in this position.¹

¹ As appellant did not discuss this decision in her appeal to the Board, the Board will not review this decision.

By decision dated August 12, 2003, the Office granted appellant a schedule award for nine percent impairment of the right upper extremity.²

In a report dated August 19, 2003, Dr. Shade stated that appellant's loss of range of motion should be considered as she had both a diagnosis of carpal tunnel syndrome and left wrist tendinitis. He stated that a surgical release combined with left wrist tendinitis was sufficient to require a rating based on lack of range of motion.

Appellant requested reconsideration of the Office's July 23, 2003 decision on September 11, 2003. The Office found a conflict of medical opinion between Dr. Shade and the Office medical adviser and referred her to Dr. Audrey Stein-Goldings, a Board-certified neurologist, for an impartial medical examination regarding whether an impairment existed in appellant's left upper extremity. She completed a report on December 12, 2003, finding full range of motion in the extremities, but did not address appellant's impairment rating.

The Office medical adviser reviewed Dr. Stein-Golding's report on February 4, 2004 and concluded that, as she found no loss of range of motion, appellant had no ratable impairment of her left upper extremity.

By decision dated February 10, 2004, the Office declined to modify its prior decision.

In a report date March 29, 2004, Dr. Shade disagreed with appellant's zero percent impairment rating noting that Dr. Stein-Goldings' report did not indicate that she had actually measured her range of motion with a goniometer or otherwise obtained an accurate measurement and that there were no actual measurement numbers stated in the report. She requested reconsideration of the February 10, 2004 decision on April 1, 2004.

By decision dated July 1, 2004, the Office declined to reopen appellant's claim for consideration of the merits, finding that Dr. Shade's report was not relevant new evidence.³

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ sets forth the number of weeks of compensation payable to employees sustaining impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

² The Board notes that appellant did not request review of this decision on appeal. The Board further notes this carpal tunnel impairment rating was based on loss of range of motion.

³ Following the Office's July 1, 2004 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

The 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 an examination.⁶ 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 of an Office medical adviser or consultant, 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 had no prior connection with the case.⁷

ANALYSIS -- ISSUE 1

In this case, the Office medical adviser found that appellant was not entitled to a schedule award based on loss of range of motion due to carpal tunnel syndrome.⁸ Her attending physician, Dr. Shade, stated that as appellant's accepted conditions included both left carpal tunnel syndrome and left wrist tendinitis, under the A.M.A., *Guides* she was entitled to an impairment rating due to loss of range of motion.⁹ As there is a conflict of medical opinion evidence in the record as to whether there was an employment-related impairment and if so, the degree of the impairment under the A.M.A., *Guides*. The Office, therefore, properly found that there was a conflict of medical opinion and referred appellant to Dr. Stein-Golding, a Board-certified neurologist, to resolve this conflict. However, the record does not contain a statement of accepted facts or list of specific questions provided to Dr. Stein-Golding requesting that she address appellant's impairment of the left upper extremity. She submitted a report dated December 12, 2003 which did not offer an opinion as to the percentage of an impairment.

The Office then referred the case to the same Office medical adviser who originally created the conflict for an opinion on the percentage of impairment. The Office's procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.¹⁰ In the instant case, there was a conflict under section 8123(a) that must be resolved by the impartial medical specialist. In order to properly resolve the conflict it is the impartial medical specialist who should provide a reasoned opinion as to an impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*.¹¹ An Office medical adviser may review the opinion, but the resolution of the

⁶ 5 U.S.C. §§ 8101-8193, 8123.

⁷ 20 C.F.R. § 10.321.

⁸ A.M.A., *Guides* 494 section 16.5d.

⁹ A.M.A., *Guides* 507, section 16.7(d).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

¹¹ *Thomas J. Fragale*, 55 ECAB ____ (Docket No. 04-835, issued July 8, 2004).

conflict is the responsibility of the impartial medical specialist.¹² Dr. Stein-Goldings neither indicated that she had reviewed the appropriate edition of the A.M.A., *Guides*, nor did she provide an opinion as to the percentage of impairment in this case. Accordingly, the case will be remanded to the Office to properly resolve the conflict.

CONCLUSION

The Board finds that the report of Dr. Stein-Goldings is not sufficient to resolve the conflict in the medical evidence with respect to the percentage of impairment to the left upper extremity. The case will be remanded to secure an appropriate report from Dr. Stein-Goldings.¹³

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 1 and February 10, 2004 be set aside and the case remanded for action consistent with this decision of the Board.

Issued: October 26, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

¹² *Id.*

¹³ Due to the disposition of this issue, it is not necessary for the Board to address whether the Office properly declined to reopen appellant's claim for consideration of the merits under 5 U.S.C. § 8128(a).