

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

DORIS VELAZQUEZ, Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF CENSUS, Bridgeton, NJ, Employer**

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**Docket No. 05-1955
Issued: February 2, 2006**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 22, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit schedule award decision dated March 23, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than a 20 percent permanent impairment of the left upper extremity.

FACTUAL HISTORY

On March 26, 2001 appellant, then a 48-year-old temporary enumerator, filed a traumatic injury claim alleging that, on July 3, 2000, she fell and injured her left arm, wrist and back. The Office accepted her claim for comminuted displaced fractures of the left distal radius and ulna and paid appropriate compensation. Appellant stopped work on July 3, 2000 and was terminated from employment on July 8, 2000.

Appellant came under the treatment of Dr. Mark K. Levitsky, a Board-certified orthopedic surgeon, who treated her on July 3, 2000 for an injury to her left arm after a fall. X-rays of the wrist and forearm revealed posteriorly displaced fractures of the distal radius and ulna. Dr. Levitsky performed a closed reduction of the displaced fractures of the left distal radius and ulna with pins and plaster fixation. He diagnosed comminuted displaced fractures of the left distal radius and ulna with an open fracture of the ulna. In a report dated July 14, 2000, Dr. Levitsky noted that appellant was post surgery with minimal swelling of the fingers, excellent finger motion and her skin was intact. On August 28, 2000 he removed the pins and plaster of the left wrist and diagnosed healing fracture of the left distal radius. Dr. Levitsky advised in reports dated August 28 to December 21, 2000 that appellant complained of occasional pain in the left wrist with extension and flexion of 50 degrees, full finger flexion and extension, minor grasp weakness on the left, full range of motion of the left shoulder without pain or impingement with minor tremor of her left hand.

On June 18, 2002 appellant's attorney claimed that she was entitled to a schedule award. In support of the request, appellant submitted a report from Dr. David Weiss, an osteopath, dated April 5, 2002. He noted that appellant reached maximum medical improvement on April 5, 2002. Physical examination of the left hand and wrist revealed three well-healed puncture scars from the percutaneous pinning, tenderness over the ulnar styloid, the ulnar carpal articulation and radial ulnar articulation, pain involving the palmar flexion, and crepitation within the ulnar metacarpal articulation on radial and ulnar deviation. Dr. Weiss noted that grip strength revealed 30 kilograms (kg) of force strength involving the right hand versus 18 kg of force strength involving the left hand, lower arm circumference measures 31 centimeters on the right versus 30.5 centimeters on the left, wrist joint circumference measures 17 centimeters on the right versus 18 centimeters on the left for a 1 centimeter increase. Dr. Weiss noted subjective factors of left wrist pain and stiffness daily which waxed and waned, swelling of the left wrist, numbness and tingling in the left fourth and fifth fingers, decreased grip strength in her left hand and hand tremors. He diagnosed comminuted displaced fracture to the left distal radius and ulna, status post open fracture of the left ulna, status post closed reduction of the displaced fractures of the left distal radius and ulna with percutaneous pin fixation and post-traumatic osteoarthritis to the left elbow. Dr. Weiss stated that, based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ (A.M.A., *Guides*) appellant had a 20 percent impairment on the right for loss of grip strength,² 6 percent impairment for left wrist swelling,³ and 3 percent impairment for pain-related impairment,⁴ or a total impairment of 28 percent of the left upper extremity. In a note dated August 8, 2002, Dr. Levitsky concurred with Dr. Weiss' impairment rating.

The medical evidence was referred to an Office medical adviser who, in a report dated May 2, 2003, determined that appellant sustained a 20 percent impairment of the left upper

¹ A.M.A., *Guides* (5th ed. 2001).

² *Id.* at 509, Table 16-34.

³ *Id.* at 499, 570, Table 16-18, 16-19.

⁴ Figure 18-1, page 574.

extremity. The Office medical adviser determined that appellant reached maximum medical improvement on April 5, 2002. He noted that appellant had 20 percent impairment for grip strength deficit,⁵ based on Dr. Weiss' findings of grip strength of 30 kg of force strength involving the right hand versus 18 kg of force strength involving the left hand. The Office medical adviser noted that, although Dr. Weiss provided six percent impairment for left wrist swelling,⁶ and three percent impairment for pain-related impairment,⁷ neither of these ratings complied with the A.M.A., *Guides*.

By decision dated March 30, 2004, the Office granted appellant a schedule award for 20 percent impairment of the left upper extremity. The period of the award was from April 5 to June 15, 2002.

On April 8, 2004 appellant requested a hearing before an Office hearing representative. The hearing was held on December 14, 2004.

In a decision dated March 23, 2005, the hearing representative affirmed the March 30, 2004 schedule award but modified the pay rate. The hearing representative determined that the Office incorrectly calculated appellant's weekly pay rate to be \$145.75 and that the correct pay rate when appellant was injured on July 3, 2000 was \$220.32. The hearing representative instructed the Office to recalculate the amount of compensation due based on the correct pay rate.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁸ and its implementing regulation⁹ sets forth the number of weeks of compensation payable to employees sustaining permanent 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 uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

ANALYSIS

On appeal, appellant contends that she is entitled to an impairment rating of 28 percent for the left upper extremity as set forth by Dr. Weiss.

⁵ *Supra* note 2.

⁶ *Supra* note 3.

⁷ *Supra* note 4.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

The Board notes that the report of Dr. Weiss is not in conformance with the relevant standards of the A.M.A., *Guides*.¹⁰

Dr. Weiss noted findings upon physical examination with regard to grip strength 30 kg of force strength involving the right hand versus 18 kg of force strength involving the left hand. He determined that appellant sustained a 20 percent impairment for grip strength deficit, citing Table 16-34 of the A.M.A., *Guides*,¹¹ which sets forth index of loss of strength formula (normal strength minus limited strength divided by normal strength) which provides a 40 percent strength loss index percentage for a 20 percent upper extremity impairment.

Dr. Weiss further calculated 6 percent impairment for left wrist swelling, and cited Table 16-19, joint impairment from synovial hypertrophy, page 500, of the A.M.A., *Guides*. This table is within section 16.7 of the A.M.A., *Guides*. However, section 16.7 of the fifth edition of the A.M.A., *Guides*, “Impairment of the Upper Extremities Due to Other Disorders,” addresses impairment of the upper extremity due to synovial hypertrophy:

“Impairments from the disorders considered in this section under the category of ‘other disorders’ are usually estimated by using other impairment evaluation criteria. *The criteria described in this section should be used only when the other criteria have not adequately encompassed the extent of the impairment.*”¹² (Emphasis in the original.)

Section 16.7a, “Bone and Joint Deformities,” indicates that, to avoid a duplication of ratings, “Joint swelling due to synovial hypertrophy is rated only when no other findings are present.”¹³

The A.M.A., *Guides* further provide, with regard to joint impairment due to synovial hypertrophy:

“Synovial hypertrophy is a sign of an inflammatory arthritic process that can progress through varying the manifestations listed above, including decreased motion. If synovial hypertrophy is the only finding, the joint impairment is rated according to Table 16-19 and multiplied by the relative maximum value of the joint involved (Table 16-18). It cannot be combined with impairment due to decreased joint motion or other findings.”¹⁴

The Office correctly found that appellant may not receive an impairment rating for both joint swelling due to synovial hypertrophy and decreased grip strength. The A.M.A., *Guides*

¹⁰ See *Tonya R. Bell*, 43 ECAB 845, 849 (1992).

¹¹ *Supra* note 2.

¹² *Id.* at 499. (Emphasis in the original.)

¹³ *Id.*

¹⁴ See A.M.A., *Guides* 500. (Emphasis in the original.)

makes clear that joint swelling due to synovial hypertrophy is rated only when no other findings are present. In this case, Dr. Weiss made findings of decreased grip strength.¹⁵ Appellant's schedule award should be based, therefore, on findings of decreased grip strength. Dr. Weiss found three percent impairment for pain for the left upper extremities and referenced Figure 18-1 in Chapter 18 of the A.M.A., *Guides*.¹⁶ However, the Board has held that Chapter 18 should not be used to rate pain-related impairment when conditions are adequately rated in other chapters of the A.M.A., *Guides*.¹⁷ Dr. Weiss did not provide any explanation as to why any pain-related impairment could not be adequately rated under Chapter 16 of the A.M.A., *Guides* which pertains to the upper extremities. Therefore, there is insufficient justification to allow application of Figure 18-1 of the A.M.A., *Guides*.

The Office medical adviser reviewed the medical evidence and correlated the findings from Dr. Weiss to specific provisions in the A.M.A., *Guides*. The Office medical adviser concurred with Dr. Weiss regarding 20 percent impairment for grip strength deficit.¹⁸ As noted, the Office medical adviser discounted Dr. Weiss' finding of six percent impairment for left wrist swelling and three percent impairment for pain-related impairment as these ratings do not comply with the A.M.A., *Guides*. The Office medical adviser properly applied the A.M.A., *Guides* to the evidence of record to determine that appellant had a 20 percent permanent impairment of the left upper extremity.

CONCLUSION

The Board therefore finds that appellant has no more than a 20 percent permanent impairment of the left upper extremity.¹⁹

¹⁵ Cf. *Julio C. Feliciano-Perez* (Docket No. 03-766, issued 2003) (where the Board found that the Office correctly found that appellant may not receive an impairment rating for both joint swelling due to synovial hypertrophy and decreased motion under Table 16-18 and 16-19, page 499-500 of the A.M.A., *Guides*, noting that the A.M.A., *Guides* makes clear, that joint swelling due to synovial hypertrophy is rated only when no other findings are present, and in this the physician made findings of decreased motion).

¹⁶ A.M.A., *Guides* 574.

¹⁷ *Philip A. Norulak*, 55 ECAB ___ (Docket No. 04-817, issued September 3, 2004); *Mark A. Holloway*, 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

¹⁸ *Supra* note 2.

¹⁹ The Board notes that appellant, through counsel, appealed the schedule award granted in the Office decision dated March 23, 2005, but did not appeal the pay rate aspect of that determination. Therefore this issue is not before the Board on this appeal.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board