United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM S. COOPER, Appellant	)	
and	)	**Docket No. 06-86**
	)	**Issued: February 1, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, 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:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 13, 2005 appellant filed a timely appeal from the October 25, 2004 merit decision of the Office of Workers' Compensation Programs, which affirmed a schedule award for a five percent permanent impairment of his right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the schedule award issue.

ISSUE

The issue is whether appellant has more than a five percent permanent impairment of his right upper extremity.

FACTUAL HISTORY

On October 10, 2001 appellant, then a 56-year-old tractor-trailer operator, filed a claim alleging that he developed bilateral carpal tunnel syndrome in the performance of duty. The Office accepted his claim for bilateral carpal tunnel syndrome.

On April 24, 2002 the Office authorized a carpal tunnel release on the right. The surgery took place on May 28, 2002. Appellant filed a claim for a schedule award on May 31, 2002.

On February 6, 2003 Dr. Nicholas P. Diamond, an osteopath, reported that appellant had reached maximum medical improvement. From his findings on physical examination, Dr. Diamond reported that appellant had a 41 percent impairment of the right upper extremity due to grip strength deficit, sensory deficit of the median nerve and pain.

On April 1, 2003 Dr. Jeffrey S. Pollack, appellant's attending physician, reported that he had reviewed Dr. Diamond's evaluation and agreed with the finding that appellant had a 41 percent impairment of the right upper extremity.

On May 3, 2003 an Office medical adviser commented on Dr. Diamond's evaluation and reported that appellant's impairment from residual carpal tunnel syndrome should not exceed five percent.

The Office determined that a conflict existed between appellant's physician and the Office medical adviser on the extent of appellant's impairment. To resolve the conflict, the Office referred appellant, together with the record and a statement of accepted facts, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon specializing in hand surgery, for an evaluation of permanent impairment.

On October 31, 2003 Dr. Askin reported appellant's complaints and his findings on clinical examination, which included an equivocal Tinel's sign, two-point discrimination within 5 millimeters for all 10 digits and normal opposition strength. He noted that appellant did not bring any films for his review. He described appellant as a physically older diabetic gentleman with bilateral carpal tunnel and probable diabetic neuropathy, who was status post right carpal tunnel release. He explained the nature of carpal tunnel syndrome and stated that diabetic neuropathy could be another reason for appellant's complaints of shooting pains and some pins and needles. Dr. Askin reported that appellant had received sufficient care for his right carpal tunnel syndrome and appeared to have reached maximum medical improvement. He imposed no restriction for the accepted injury.

Dr. Askin noted that the condition of carpal tunnel syndrome received a separate treatment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), as follows:[1]

> "After optimal recovery time (and [appellant] is beyond that) three scenarios are described. If [appellant] had a postoperative EMG/NCV [electromyogram/nerve conduction velocity studies] he might fall within the third scenario wherein no impairment would be justified. Given that he does not presently have 'positive clinical findings of median nerve dysfunction' the first scenario does not apply. He does fall squarely within the four corners of the second scenario.
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> "The second scenario requires 'normal sensibility' (his is normal clinically), normal opposition strength (his is normal) such that if 'residual [carpal tunnel syndrome] is still present' (as opposed to diabetic neuropathy) 'an impairment

[1] A.M.A., *Guides* 495 (5th ed. 2001).

rating not to exceed 5 percent of the upper extremity may be justified.' These quotes are directly from page 495."

* * *

"Consequently, if an award is due to [appellant] for the condition of right carpal tunnel syndrome it would not exceed 5 percent of the upper extremity. Dr. Diamond's calculations in his February 6, 2003 report are quite creative but have no relationship to any condition understood to be [appellant's] work-related problem.

"The bottom line is that the 5 percent impairment limitation noted [by the Office medical adviser] is exactly so."

On December 18, 2003 the Office issued a schedule award for a five percent permanent impairment of appellant's right upper extremity. Appellant subsequently sought review before an Office hearing representative.

In a decision dated October 25, 2004, an Office hearing representative found that the rating given by Dr. Askin, the impartial medical specialist, constituted the weight of the medical evidence. He affirmed the December 18, 2003 schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] 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*.[3]

ANALYSIS

The fifth edition of the A.M.A., *Guides* gives separate treatment to the evaluation of impairment due to carpal tunnel syndrome. The A.M.A., *Guides* provide:

"If, after an *optimal recovery time* following surgical decompression, an individual continues to complain of pain, paresthesias and/or difficulties in performing certain activities, three possible scenarios can be present:

> 1. Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual [carpal tunnel syndrome] is rated according to the sensory and/or motor deficits as described earlier.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

> 2. Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual [carpal tunnel syndrome is still present and an impairment rating not to exceed five percent of the upper extremity may be justified.
>
> 3. Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength and nerve conduction studies: there is no objective basis for an impairment rating."[4]

Dr. Diamond, appellant's osteopath, rated appellant according to grip strength, sensory deficit of the median nerve and pain. But in compression neuropathies, additional impairment values are not to be given for decreased grip strength.[5] And the chapter on pain-related impairment should not be used for any condition that can be adequately rated on the basis of the body and organ impairment ratings given in other chapters of the A.M.A., *Guides*.[6] Dr. Diamond provided no explanation that a rating under Table 16-10, page 482, Determining Impairment of the Upper Extremity Due to Sensory Deficit or Pain Resulting from Peripheral Nerve Disorders, did not adequately address appellant's impairment.

Dr. Diamond rated appellant under the first scenario quoted above with no postoperative evidence of an electrical conduction delay. This is a condition precedent to rating sensory and motor deficits in the usual fashion. Because he misapplied the A.M.A., *Guides*, the Board finds that Dr. Diamond's rating is of diminished probative value. The April 1, 2003 report of Dr. Pollack, appellant's attending physician, adds nothing of value.

The Office medical adviser indicated that Dr. Diamond's rating was too high and that the total rating should not exceed five percent under the second scenario.

Dr. Askin, a Board-certified orthopedic surgeon specializing in hand surgery, rated appellant under the special treatment for carpal tunnel syndrome and cogently explained which scenario was appropriate. Appellant had no positive clinical findings of median nerve dysfunction, so the first scenario did not apply. As there was no postoperative EMG/NCV study, appellant could fall into the third scenario, where no impairment rating is justified or he could fall into the second, which allows no higher rating than five percent. Giving appellant the presumption of an abnormal sensory latency or abnormal EMG testing of the thenar muscles, Dr. Askin concluded that appellant could have no more than a five percent permanent impairment of his right upper extremity.

The Board finds that Dr. Askin's opinion is consistent with the A.M.A., *Guides*. And as it is the only medical opinion in this case that is well explained, the Board further finds that his

[4] A.M.A., *Guides* 495 (emphasis in the original).

[5] *Id*. at 494.

[6] *Id*. at 571.

opinion constitutes the weight of the medical evidence, irrespective of his status as an impartial medical specialist.[7] The Board will affirm the Office's October 25, 2004 decision.

CONCLUSION

The Board finds that appellant has no more than a five percent permanent impairment of his right upper extremity, for which he received a schedule award.[8]

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[7] *See Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980) (when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving a conflict under 5 U.S.C. § 8123(a), the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight).

[8] On appeal, appellant's attorney argues that preexisting impairments are to be included in the rating, but his grounds for error are insufficient. Neither Dr. Diamond nor Dr. Pollack reported that appellant had any preexisting impairment. Indeed, Dr. Diamond reported that appellant denied having any pain or difficulties with activities of daily living prior to his employment injury on or about September 11, 2000.