

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

B.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Buffalo, NY, Employer**

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**Docket No. 06-1091
Issued: September 20, 2006**

Appearances:
B.P., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 4, 2006 appellant filed a timely appeal of the October 3, 2005 merit decision of the Office of Workers' Compensation Programs awarding appellant a schedule award for a five percent impairment of each upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this schedule award case.

ISSUE

The issue is whether appellant had more than a five percent impairment to each upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On June 5, 1998 appellant, then a 33-year-old machine operator, filed an occupational disease claim alleging that she suffered from carpal tunnel syndrome causally related to her federal employment. On January 8, 1999 the Office accepted her claim for carpal tunnel syndrome. On January 9, 2002 the Office accepted appellant's claim for bilateral carpal tunnel release. Appellant had a right carpal tunnel release on July 25, 2002 and a left carpal tunnel release on October 24, 2002. She returned to work full duty on February 3, 2003.

On November 13, 2003 appellant filed a claim for a schedule award.

By letter dated February 18, 2004, the Office asked Dr. A. Marc Tetro, appellant's treating Board-certified orthopedic surgeon with a subspecialty in surgery of the hand, for a permanent impairment assessment. In a medical report dated March 23, 2004, Dr. Tetro indicated:

"Examination of the median nerves demonstrates no atrophy or flattening of the thenar muscles. The sensation of the median nerve distribution is subjectively altered to light touch with slight decrease of two point discrimination to 5 [millimeters] -- 6 [millimeters]. The ulnar nerve distribution had a two point discrimination of 4 [millimeters]. Thenar motor strength (RL) was 5/5. Provocative test for carpal tunnel syndrome were improved from the presurgical test, however, included positive bilateral Tinel's, positive bilateral Phalen's, equivocal bilateral carpal compression and positive bilateral flexion compression.

"Ulnar nerve function is normal. No other abnormalities to exam[ination]."

After finding that appellant had reached maximum medical improvement, Dr. Tetro stated:

"Using the [American Medical Association, *Guides to Evaluation of Permanent Impairment*, 5th edition], Chapter 3, the evaluation was performed. This evaluation uses these guidelines pertaining to the appropriate injury and refers to these guides to reach a percentage of loss of use.

"[Appellant's] disability, primarily relates to the median nerve dysfunction. Her altered function is primarily on the basis of altered pain and sensory deficits. Referring to evaluation, under pain and sensory deficits, she has some decreased sensation with pain which does interfere with activities. Therefore, as noted in Table 15, she has mild to moderate impairment of both the right and left hands, due to the persistent altered sensation along with pain. This would therefore qualify [sic] as a 15 [percent] impairment of the right upper extremity and 15 [percent] impairment of the left upper extremity due to her persistent symptoms."

By memorandum dated June 17, 2005, the Office requested that the Office medical adviser make a determination of appellant's impairment under the A.M.A., *Guides*. On June 19, 2005 the Office medical adviser responded that, as Dr. Tetro documented good function after appellant's carpal tunnel surgery, she was entitled to a maximum impairment of five percent for each extremity under the A.M.A., *Guides* pursuant to page 495, Table 16.5d.

By letter dated August 30, 2005, the Office referred appellant to Dr. Michael Feinberg, a Board-certified orthopedic surgeon, to resolve the conflict between appellant's treating physician Dr. Tetro and the Office medical adviser with regard to the extent of appellant's impairment. In a medical report dated September 12, 2005, Dr. Feinberg noted that appellant "does not show

significant signs of typical carpal tunnel syndrome at this time but there are mild symptoms in complaints which may persist.” He then opined:

“In my opinion, further treatment is not required and she does have mild permanent residual. I believe she has reached maximum medical improvement in 2003 upon completion of therapy and approximately when she took her early retirement.

“According to the fifth edition of the A.M.A., *Guides*, as stated by Dr. Tetro, mentions residual symptoms or difficulty in performing activities postoperatively with ‘three possible scenarios’: 1. are positive clinical and electrical findings; 2. is normal findings with abnormal electrical studies which gives a rating not to exceed five percent of the upper extremity; and 3. there is normal sensibility with standardized testing in which there is no basis for an impairment rating. [Appellant] falls into category 2 of page 95 and thus Dr. Tetro states five percent of each upper extremity. I would agree.”

By memorandum dated September 21, 2005, the Office referred Dr. Feinberg’s report to the Office medical adviser for review. The Office medical adviser determined that appellant had a five percent impairment of each upper extremity pursuant to “(Table 16.5d, page 495).”

On October 3, 2005 the Office issued a schedule award for a five percent impairment of each upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act¹ and its implementing regulation² 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.³

Section 8123 of the Act provides that, if there is 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.⁴ In situations where 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 the conflict, the opinion of such

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.404 (2004).

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

⁴ 5 U.S.C. § 8123; see Charles S. Hamilton, 52 ECAB 110 (2000).

specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵ However, in a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.⁶

ANALYSIS

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is required.

Chapter 16 of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.⁷ With regard to carpal tunnel syndrome, the A.M.A., *Guides* provides:

“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 [in Tables 16-10a and 16-11a].
2. Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal [electromyogram] 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.”⁸

In order to resolve the conflict between the opinion of appellant’s surgeon and the Office medical adviser with regard to the degree of permanent impairment of the upper extremities, the Office referred appellant to Dr. Feinberg for an impartial medical examination. Dr. Feinberg’s opinion, however, does not resolve the issue. Dr. Feinberg, while citing the A.M.A., *Guides*, does not list proper page numbers. He indicates that she agrees with Dr. Tetro that appellant should be evaluated under the scenario of having abnormal electrical studies and would indicate

⁵ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

⁶ *Margaret M. Gilmore*, 47 ECAB 718 (1996).

⁷ A.M.A., *Guides*, 433-521.

⁸ *Id.* at 495.

an impairment of five percent of each upper extremity. However, Dr. Tetro found that appellant had a 15 percent impairment of each upper extremity; it was the Office medical adviser who indicated that appellant was entitled to a five percent impairment of each extremity. Accordingly, Dr. Feinberg failed to properly identify the other medical evidence. Furthermore, Dr. Feinberg does not discuss why appellant “falls into category 2” of the standards for determining impairment for carpal tunnel syndrome. In another attempt to get a usable impairment rating, the Office referred the medical evidence to another Office medical adviser, and asked that he determine appellant’s impairment and describe in detail how he arrived at his conclusion. The Office medical adviser replied by simply stating “5 [percent] each as per (16.5d 495). He provided no explanation as to how he applied this section, which as previously noted, documents three separate ways to determine impairment due to carpal tunnel syndrome.

As the opinion of Dr. Feinberg is in need of clarification and elaboration, this case is remanded to the Office for referral of the case to Dr. Feinberg for a supplemental report. If Dr. Feinberg is unable to clarify or elaborate on his original report or if the supplemental report is vague, speculative or lacking in rationale, the Office should submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on this issue.⁹ After such further development as the Office deems necessary, an appropriate decision should be issued with regard to appellant’s impairment.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers’ Compensation Programs’ October 3, 2005 opinion is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 20, 2006
Washington, DC

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

David S. Gerson, Judge
Employees’ Compensation Appeals Board

⁹ *Harold Travis*, 30 ECAB 1071, 1078 (1979).