

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

C.M., Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
JOHN F. KENNEDY INTERNATIONAL)
AIRPORT, Jamaica, NY, Employer)

Docket No. 07-1655
Issued: December 17, 2007

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2007 appellant, through counsel, filed a timely appeal of the January 8, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative, which affirmed the Office's May 24, 2006 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than a 13 percent impairment of the left fourth finger, for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. In a January 18, 2006 order, the Board set aside an Office hearing representative's September 21, 2004 decision, which affirmed the Office's July 17, 2003 schedule award for a 13 percent permanent impairment of appellant's left

fourth finger.¹ The Board remanded the case to the Office for proper assemblage of the case record as it did not contain an Office medical adviser's July 11, 2003 memorandum which found that appellant sustained a 13 percent impairment of the left fourth finger. The Board further remanded the case for the Office to obtain clarification from Dr. Marcia Halpern, a Board-certified orthopedic surgeon and impartial medical examiner, who, in a March 3, 2003 medical report, referred to appellant's left fifth finger while the Office granted him a schedule award for permanent impairment of the left fourth finger. The facts and the history relevant to the present issue are hereafter set forth.

On July 4, 1987 appellant, then a 55-year-old maintenance mechanic, filed a traumatic injury claim. On July 1, 1987 he hurt his left elbow when his hand became caught between two metal ladders as a bucket fell from the ladder. By letter dated August 10, 1987, the Office accepted the claim for soft tissue injury and nerve damage to the left elbow and authorized left ulnar nerve transposition which was performed on October 14, 1987.² On June 20, 2001 appellant filed a claim for a schedule award. The Board found a conflict in the medical opinion evidence between Dr. David Weiss, an attending Board-certified orthopedic surgeon, who opined in a March 17, 2000 medical report that appellant sustained a 50 percent impairment of the left upper extremity and a 32 percent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) and Dr. Richard H. Bennett, an Office referral physician, who opined in a February 25, 2002 report that appellant sustained a five percent impairment of the left arm based on the A.M.A., *Guides*. Dr. Halpern's March 3, 2003 impartial medical report reviewed the history of appellant's July 1, 1987 employment-related injuries and medical background. On physical examination, she found that appellant had some residual numbness in his left fifth finger, but otherwise he had an excellent recovery with no motor impairment. Dr. Halpern reported 50 percent reduction in pinprick in the left fifth finger only. Appellant had full range of motion of the left elbow for pronation, supination, flexion and extension and no motor impairment. Dr. Halpern opined that appellant had reached maximum medical improvement and that he had no impairment of the left elbow. On July 11, 2003 the Office medical adviser determined that Dr. Halpern's March 3, 2003 finding that appellant had 50 percent numbness in the left little finger as a residual of his accepted employment-related injury constituted a 13 percent impairment of that finger for loss of sensation based on the A.M.A., *Guides* 448, Table 16-6.

Following the issuance of the Board's January 18, 2006 order, the Office, by decision dated May 24, 2006, found that appellant did not have more than a 13 percent impairment of the left fourth finger based on the Office medical adviser's July 11, 2003 opinion.

By letter dated May 30, 2006, appellant, through counsel, requested an oral hearing before an Office hearing representative.

In a decision dated January 8, 2007, a hearing representative affirmed the May 24, 2006 decision. She found that appellant had no more than a 13 percent impairment of the left fourth finger based on the Office medical adviser's July 11, 2003 opinion.

¹ Docket No. 05-552 (issued January 18, 2006).

² Appellant retired from the employing establishment on December 31, 1999.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulations⁴ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁵ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁶

In situations where there are 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 specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁷

ANALYSIS

The Board finds that the Office properly determined that a conflict in the medical opinion evidence arose between Dr. Weiss, an attending physician, and Dr. Bennett, an Office referral physician, as to the extent of permanent impairment of appellant's left upper extremity due to his employment-related soft tissue injury and nerve damage to the left elbow. Dr. Weiss opined that appellant sustained a 50 percent impairment of the left upper extremity and a 32 percent impairment of the right upper extremity based on the A.M.A., *Guides*. Dr. Bennett opined that appellant sustained a five percent impairment of the left arm based on the A.M.A., *Guides*.

The Office referred appellant to Dr. Halpern, selected as the impartial medical specialist. In a March 3, 2003 report, Dr. Halpern found that appellant had some residual numbness in the left fifth finger but had otherwise excellent recovery with no motor impairment on examination. She reported 50 percent reduction in pinprick in the left fifth finger only. Appellant had full range of motion of the left elbow for pronation, supination, flexion and extension and no motor impairment. Dr. Halpern opined that he had reached maximum medical improvement and he had no impairment of the left elbow.

On July 11, 2003 an Office medical adviser reviewed Dr. Halpern's March 3, 2003 findings and determined that 50 percent numbness in appellant's left little finger as a residual of his accepted July 1, 1987 employment-related injury constituted a 13 percent impairment of that finger for loss of sensation based on the A.M.A., *Guides* 448, Table 16-6. The Board finds that

³ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁴ 20 C.F.R. § 10.404.

⁵ 5 U.S.C. § 8107(c)(19).

⁶ 20 C.F.R. § 10.404.

⁷ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

the Office medical adviser correctly referred to appellant's left little finger as the fourth finger although Dr. Halpern referred to this digit as the fifth finger. Section 8107(c) of the Act⁸ lists the thumb and each of the fingers separately as a compensable member of the body. Thus, appellant's left little finger represents the fourth finger for schedule award purposes.⁹ The Office medical adviser's determination of appellant's impairment was based on Dr. Halpern's findings and complies with the A.M.A., *Guides*. The Board finds that the medical adviser properly concluded that appellant sustained a 13 percent impairment of the left fourth finger.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than a 13 percent impairment of the left fourth finger, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 17, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁸ 5 U.S.C. § 8107(c)(6)-(7),(9)-(10), (12).

⁹ *Id.*