United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 07-593**
	)	**Issued: June 1, 2007**
DEPARTMENT OF DEFENSE, DEFENSE CONTRACT MANAGEMENT AGENCY, Philadelphia, PA, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 27, 2006 appellant timely appealed the July 17, 2006 merit decision of the Office of Workers' Compensation Programs, which affirmed a schedule award for permanent impairment of right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has more than nine percent impairment of the right upper extremity.

FACTUAL HISTORY

Appellant, a 53-year-old support services clerk, has an accepted claim for right distal biceps tear, which occurred June 28, 2004. His ruptured biceps tendon was surgically repaired on August 16, 2004. The Office paid appellant appropriate wage-loss compensation and he ultimately resumed his regular duties on or about February 14, 2005.

Appellant filed a claim for a schedule award on October 14, 2005. In a June 3, 2005 report, Dr. David Weiss, a Board-certified orthopedist, found that appellant had 18 percent impairment of the right upper extremity. The overall rating included separate components for pain (3 percent), loss of grip strength (10 percent) and motor strength deficit involving the right biceps (6 percent). Dr. Weiss indicated that appellant reached maximum medical improvement on June 3, 2005.

The district medical adviser (DMA) reviewed the record and on October 6, 2005, he concluded that appellant had nine percent impairment of the right upper extremity. The DMA agreed with Dr. Weiss with respect to appellant's three percent impairment due to pain. However, he disagreed with the 10 percent impairment attributed to loss of grip strength. The DMA stated that it was inappropriate to combine the six percent impairment due to loss of strength in the right elbow with another strength award, such as loss of grip strength. Therefore, the DMA only allowed the six percent impairment for muscle weakness about the right elbow.

On January 12, 2006 the Office granted a schedule award for nine percent impairment for the right upper extremity. The award covered 28.08 weeks from June 3 to December 16, 2005. Appellant subsequently requested a hearing, which was held May 9, 2006. The Office hearing representative issued a July 17, 2006 decision affirming the nine percent impairment awarded January 12, 2006.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act set forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[1] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulation have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[2] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[3]

[1] The Act provides that for a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2000).

[2] 20 C.F.R. § 10.404 (2006).

[3] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

ANALYSIS

The DMA and Dr. Weiss agreed with respect to appellant's right upper extremity impairment attributable to pain (three percent) and loss of strength at the elbow (six percent).[4] The Board finds that the combined nine percent impairment for muscle weakness and pain is appropriate under the A.M.A., *Guides* (5th ed. 2001).[5] However, the case is not in posture for decision regarding appellant's entitlement to an additional award for impairment due to loss of grip strength involving the right hand. The DMA's opinion is not adequately rationalized with respect to his decision to disallow the 10 percent impairment for loss of grip strength. He stated that appellant could be rated based on either muscle strength or grip strength, but not the two combined. However, the DMA did not provide any support for this conclusion. Moreover, the mutually exclusive approach applied by the district medical advisor is ostensibly inconsistent with the A.M.A, *Guides* approach to rating and combining impairments of various regions of the upper extremity, such as the hand, wrist, elbow and shoulder regions.[6] But even assuming *arguendo* there is some validity to the district medical advisor's rating method, he nonetheless failed to explain why he chose to rely on the manual muscle testing rating of 6 percent rather than the higher impairment rating of 10 percent for loss of grip strength. Because of these noted deficiencies, the case is remanded to the Office for further development of the record, followed by a *de novo* decision regarding appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision.

[4] The only variance among the two opinions regarding weakness about the right elbow was that Dr. Weiss mistakenly referenced Table 16-15 (Upper Extremity Sensory and/or Motor Deficits Due to Peripheral Nerve Disorders), A.M.A., *Guides* 492. Dr. Weiss' June 3, 2005 report did not identify an upper extremity peripheral nerve disorder. Therefore, the appropriate table for determining strength deficit due to loss of elbow flexion is Table 16-35 (Manual Muscle Testing), A.M.A., *Guides* 510. As noted, both doctors agreed that appellant had six percent impairment due to biceps weakness.

[5] *See* A.M.A., *Guides* 484, Table 16-11; A.M.A., *Guides* 510, Table 16-35; A.M.A., *Guides* 573, section 18.3d; A.M.A., *Guides* 574, Figure 18-1; A.M.A., *Guides* 604-05, Combined Values Chart.

[6] *See* A.M.A., *Guides* 511-12, section 16.9.

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: June 1, 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