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

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| **B.M., Appellant** | ) | |
| **and** | ) | **Docket No. 07-258** |
| | ) | **Issued: May 16, 2007** |
| **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Lancaster, 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:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On November 7, 2006 appellant filed a timely appeal from a May 23, 2006 Office of Workers' Compensation Programs' decision affirming a November 10, 2005 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant has more than a 10 percent impairment of the left upper extremity.

### ***FACTUAL HISTORY***

On February 11, 1996 appellant, then a 40-year-old tractor trailer operator, filed an occupational disease claim alleging that, beginning in November 1994 he developed numbness and pain in his left hand due to vibration from the truck steering wheel, pushing heavy equipment and lifting gates and doors. The Office accepted his claim for carpal tunnel syndrome

of the left hand and authorized surgery. On August 28, 1996 appellant underwent a left carpal tunnel decompression with anterior median epineurotomy. He subsequently filed a claim for a schedule award.

By decision dated July 13, 1999, the Office granted appellant a schedule award for 31.20 weeks compensation for the period February 15 to September 21, 1999, based on a 10 percent impairment of the left extremity.[1] By decisions dated October 16, 2000, October 16, 2001, September 16, 2002 and February 17, 2005, the Office found that appellant had no more than a 10 percent impairment of the left upper extremity. By decisions dated July 3, 2000, February 5, 2001, May 6, 2002, November 9, 2004 and July 11, 2005, Office hearing representatives remanded the case for further development of the medical evidence.[2]

In a December 27, 1999 report, Dr. Nicholas Diamond, a physician specializing in pain management, provided findings on physical examination. He found that appellant had a 31 percent impairment of the left upper extremity.

On March 15, 2001 Dr. Perry A. Eagle, a Board-certified orthopedic surgeon and an Office referral physician, provided findings on physical examination and indicated that appellant had a 6.5 percent impairment of the left upper extremity.

The Office found a conflict in the medical opinion evidence between Dr. Diamond and Dr. Eagle as to the degree of appellant's left upper extremity impairment. The Office referred appellant to Dr. James P. O'Neill, a Board-certified orthopedic surgeon and an impartial medical specialist.

On August 20, 2001 Dr. O'Neill provided a history of appellant's condition and findings on physical examination. He stated:

> "[Appellant] noticed increasing numbness in the left hand in 1983 and eventually underwent surgical intervention in 1996 for [a] left carpal tunnel release after failing conservative measures and injections. His [electromyogram] (EMG) studies show … rather severe carpal tunnel problems.
>
> "Preoperatively, [appellant] stated that his hand was numb. After the surgery he stated that a lot of the pain subsided but he still had some numbness. [Appellant] eventually went back to some light duty followed by working his regular job. [He] has been continuing to do his regular job but still has a funny feeling in his left hand with pressure in and around the left hand … and what [appellant] describes as numbness in all his fingers and thumb. [Appellant] denies any weakness of his hands. He states that he has difficulty with hot and cold discrimination. [Appellant] describes a cramping and clamping sensation in and around his hand. [He] states the numbness is there all the time and not

[1] The Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use, of an arm. 5 U.S.C. § 8107(c)(1). Multiplying 312 weeks by 10 percent equals 31.20 weeks of compensation.

[2] Note to the Board: after R 327 there is duplicate numbering of pages from 322 to 327.

particularly aggravated by anything in particular. There is soreness in the wrist and forearm area."

* * *

"[Appellant] states that his hand does bother him with heavy use but the numbness remains unchanged. He states that it begins in the middle finger and radiates out and involves the entire hand, all fingers and up into the palm. [Appellant] does not feel weak with the use of his hands."

* * *

"Today's physical examination shows some decreased sensation of two point discrimination about seven [millimeters] in all digits and into the palm on both the radial and ulnar side. This involves all fingers and [the] thumb of the hand. There is a positive Tinel's [sign] at the wrist with some shooting pains down into the fingers and up in the proximal arm. There is also a positive Tinel's at the elbow over the ulnar nerve. There is no evidence of atrophy…. [Appellant] does appear to have some weakness of the abductor dignity quinti. He had full range of motion of all [distal interphalangeal] (DIP) joints, [interphalangeal] (IP) joint of the thumb, all [proximal interphalangeal] (PIP) joints and [metacarpophalangeal] (MCP) joints. [Appellant] is able to make a fist without difficulty and bring his fingers close to the distal palmar crease."

* * *

"[Appellant] does definitely have some sensory changes in his hand but his strength is good and there is no evidence of fasciculation.

* * *

"Objective findings did not include decreased strength, atrophy [or] ankylosis. There were some sensory changes and [appellant] could not evaluate cold and heat differentiation in our office. Subjective problems were complaints of pain and tightness in and around the hand and wrist.

"As far as the [impairment] from the sensory changes, these are partial and probably represent 10 percent for the thumb, 5 percent for the index, middle, ring and little finger….

"As far as loss of motion, [appellant] does not demonstrate loss of motion in any of the joints of his hand."

On December 1, 2004 the Office asked Dr. O'Neill to provide a supplemental report regarding appellant's left upper extremity impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[3]

On February 7, 2005 Dr. O'Neill stated that appellant had no more than a five percent upper extremity impairment based on page 495 of the fifth edition of the A.M.A., *Guides.* He indicated that appellant's condition was consistent with the second carpal tunnel syndrome scenario described on page 495 that included normal sensibility and opposition strength with abnormal sensory or motor latencies or abnormal EMG testing of the thenar muscles.

In August 2005, the district medical adviser indicated that Dr. O'Neill's report established that appellant had no greater impairment of the left upper extremity than the 10 percent previously awarded.

By decision dated November 10, 2005, the Office found that appellant had no more than a 10 percent impairment of the left upper extremity.

Appellant requested a hearing that was held on March 21, 2006. Following the hearing, he submitted additional medical evidence. However, this evidence did not address the issue of appellant's impairment of his left upper extremity.

By decision dated May 23, 2006, the Office affirmed the November 10, 2005 decision.

## ***LEGAL PRECEDENT***

The schedule award provision of the Act[4] and its implementing regulation[5] set 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*[6] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

Section 8123(a) 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 [of Labor] shall appoint a third physician who shall make an examination."[8] Where a case is

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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[7] 20 C.F.R. § 10.404.

[8] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[9]

## ***ANALYSIS***

The Office accepted that appellant sustained left carpal tunnel syndrome in the performance of duty. Dr. Diamond found that appellant had a 31 percent impairment of the left upper extremity. Dr. Eagle determined that appellant had a 6.5 percent impairment of the left upper extremity. Due to the conflict between Dr. Diamond and Dr. Eagle, the Office referred appellant to Dr. O'Neill.

The fifth edition of the A.M.A., *Guides*, regarding impairment due to carpal tunnel syndrome, provides:

> "If, after an *optimal recovery time* following surgical decompression, an individual continues to complain of pain, parenthesis 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."[10]

The Board has found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome be rated on motor and sensory deficits only.[11]

The Board finds that the impairment rating of Dr. O'Neill is not entitled to special weight.

Dr. O'Neill indicated that EMG studies showed that appellant had rather severe carpal tunnel problems prior to his surgery. It does not appear that appellant underwent any clinical

[9] *See Roger Dingess,* 47 ECAB 123 (1995); *Glenn C. Chasteen,* 42 ECAB 493 (1991).

[10] A.M.A., *Guides* 495.

[11] *Kimberly M. Held,* 56 ECAB ___ (Docket No. 05-1050, issued August 16, 2005).

tests following surgery such as an EMG or nerve conduction study. The first scenario at page 495 of the A.M.A., *Guides* states that, if there are 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 using the procedures described in Tables 16-10 at page 483 and Table 16-11 at page 484. It does not appear that appellant underwent an EMG or a nerve conduction study as part of the process for his impairment rating. Therefore, the first scenario for impairment due to residual carpal tunnel syndrome cannot be ruled out. After such further development as it deems necessary, the Office should issue an appropriate merit decision

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 23, 2006 and November 10, 2005 are set aside and the case remanded for further action consistent with this decision.

Issued: May 16, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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