

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

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M.S., Appellant )

and )

**DEPARTMENT OF TRANSPORTATION,** )  
**FEDERAL AVIATION ADMINISTRATION,** )  
**Atlantic City, NJ, Employer** )

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**Docket No. 09-237**  
**Issued: September 1, 2009**

*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 3, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 31, 2008 merit decision concerning her entitlement to schedule award compensation. 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 met her burden of proof to establish that she has more than a 27 percent permanent impairment of her left arm, a 14 percent permanent impairment of her right arm and a 6 percent permanent impairment of her right leg.

**FACTUAL HISTORY**

On September 16, 1998 appellant, then a 63-year-old computer specialist and systems engineer, filed a traumatic injury claim alleging that she sustained injury on September 15, 1998 when she fell on a cement floor and cut her hand on a coffee cup. She stopped work on

September 15, 1998 and returned to work on September 28, 1998. The Office accepted that appellant sustained right arm and right buttock contusions, laceration of the right index finger, C5 radiculopathy and C4-5 and C5-6 disc bulges. It paid appropriate compensation for periods of disability.

In a report dated February 12, 2002, Dr. David Weiss, an attending osteopath and Board-certified orthopedic surgeon, provided findings on examination of appellant, who complained of numbness and tingling in both hands, greater on the right, pain and burning sensation in her right elbow, pain in both anterior thighs and pain and swelling in her right knee, which made it difficult for her to complete her activities of daily living. Dr. Weiss noted that range of motion and strength testing of all extremities showed normal results, but that she had abnormal grip strength testing of 20 kilograms of force strength in the right hand and 15 kilograms of force strength in the left hand. He indicated that sensory examination revealed a perceived sensory deficit over the C6 nerve distribution on the right and a perceived sensory deficit over the C5-6 nerve distribution on the left. Dr. Weiss noted that appellant exhibited tenderness over the medial midline of the right knee and that her right leg displayed one-centimeter atrophy. He diagnosed chronic post-traumatic cervical and lumbosacral sprains and strains, C4-5 and C5-6 bulging discs, cervical radiculopathy, radial tunnel syndrome and post-traumatic patellofemoral arthralgia of the right knee.

Dr. Weiss provided impairment ratings for the right arm, left arm and right leg. For the right arm, he found that appellant had a 10 percent impairment under Tables 16-31 and 16-34 on page 509 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) for grip strength deficit; a 6 percent impairment under Tables 15-15 and 15-17 on page 424 for sensory loss associated with the C6 nerve distribution; and a 3 percent impairment under Figure 18-1 on page 574 for pain. He concluded that appellant had an 18 percent impairment of her right arm by using the Combined Values Chart on pages 604 to 606 to combine the 10 and 6 percent values to equal 15 percent and then adding the 3 percent value under Chapter 18. For the left arm, Dr. Weiss found that appellant had a 20 percent impairment under Tables 16-31 and 16-34 for grip strength deficit, a 4 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C5 nerve distribution, a 6 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C6 nerve distribution and a 3 percent impairment under Figure 18-1 for pain. He concluded that appellant had a 31 percent impairment of her left arm by using the Combined Values Chart to combine the 20, 4 and 6 percent values to equal 28 percent and then adding the 3 percent for pain under Chapter 18. For the right leg, Dr. Weiss found that appellant had eight percent impairment under Table 17-6 on page 530 for her one centimeter leg atrophy and three percent impairment under Figure 18-1 for pain. He indicated that appellant reached maximum medical improvement on February 12, 2002.

By decision dated June 18, 2002, the Office granted appellant a schedule award for a six percent impairment of her right leg. The award was calculated using the 66 2/3 percentage of pay rate. By decision dated July 28, 2003, the Office set aside its June 18, 2002 decision on the grounds that it had not adequately identified the basis for the granting of the award.

In a report dated November 25, 2003, an Office medical adviser advised that Dr. Weiss' calculations for sensory loss associated with the C5-6 nerve distributions were too generous. He

indicated that appellant's one-centimeter atrophy of the right leg entitled her to a three percent impairment rating rather than an eight percent impairment rating. The Office medical adviser indicated that adding the three percent rating for atrophy to the three percent rating for pain calculated under Figure 18-1 meant that appellant had a six percent impairment of her right leg.

In a December 3, 2003 decision, the Office granted appellant a schedule award for a six percent impairment of her right leg. The award was calculated using the  $66 \frac{2}{3}$  percentage of pay rate. In a June 22, 2004 decision, the Office hearing representative remanded the case to the Office for evaluation of the impairment of appellant's right and left arms to be followed by an appropriate decision.

In a report dated December 6, 2004, the Office medical adviser calculated impairment ratings for appellant's right and left arms. For the right arm, he found that appellant had 10 percent impairment under Tables 16-31 and 16-34 for grip strength deficit and 4 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C6 nerve distribution.<sup>1</sup> The Office medical adviser concluded that appellant had a 14 percent impairment of her right arm by adding the 10 and 4 percent values. For the left arm, he found that appellant had 20 percent impairment under Tables 16-31 and 16-34 for grip strength deficit, a 3 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C5 nerve distribution<sup>2</sup> and 4 percent impairment under Tables 15-15 and 15-17 for sensory loss associated with the C6 nerve distribution. The Office medical adviser concluded that appellant had a 27 percent impairment of her left arm by adding the 20, 3 and 4 percent values.

In a February 10, 2005 decision, the Office granted appellant a schedule award for a 27 percent impairment of her left arm and a 14 percent impairment of her right arm. The award was calculated using the  $66 \frac{2}{3}$  percentage of pay rate.

In a February 14, 2006 decision, the Office hearing representative affirmed the Office's February 10, 2005 decision with respect to appellant's schedule award entitlement. The Office hearing representative further found that appellant had not shown that she had a dependent within the meaning of section 8110 of the Federal Employees' Compensation Act and, therefore, was only entitled to the  $66 \frac{2}{3}$  percentage of pay rate.

In a February 6, 2007 decision,<sup>3</sup> the Board set aside the Office's February 14, 2006 decision and remanded the case to it. The Board found fault with the assessments of Dr. Weiss and the Office medical adviser and directed the Office to further develop the medical evidence.

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<sup>1</sup> For the right C6 nerve distribution, the Office medical adviser used a 50 percent grade under Table 15-5 rather than the 75 percent grade used by Dr. Weiss. He indicated that appellant was not entitled to the three percent impairment rating for pain as it included in the rating for sensory loss under Chapter 15.

<sup>2</sup> For the left C5 nerve distribution, the Office medical adviser used a 60 percent grade under Table 15-5 rather than the 80 percent grade used by Dr. Weiss. For the left C5 nerve distribution, he used a 50 percent grade under Table 15-5 rather than the 80 percent grade used by Dr. Weiss. The Office medical adviser noted that appellant was not entitled to the three percent impairment for pain under Chapter 18 because that deficit was included in the rating for sensory loss.

<sup>3</sup> Docket No. 06-1592 (issued February 6, 2007).

The Board found that Dr. Weiss did not provide proper evaluations of grip strength and or explain the basis for including pain under Chapter 18 of the A.M.A., *Guides*.

On remand, the Office referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for an examination and opinion on permanent impairment. On May 8, 2007 Dr. Stark opined that his examination revealed no impairment of appellant's arms or right leg. He indicated that there was no sensory or motor deficit to the lower extremities. There was full range of motion of both wrists and all the fingers and no weakness of the hands or wrists. Dr. Stark stated that range of motion of the elbows, shoulders, hips, knees and ankles was "preserved." He discussed the medical evidence of record and stated:

"[I]t appears at this time that the accepted conditions have resolved. [Appellant] at this time, in my opinion has reached maximum medical improvement to treat those conditions. I find no restriction of motion in her upper extremities or right lower extremity, and there are no neurological findings. It is my opinion that [appellant] sustained zero percent impairment relating to her left upper extremity, zero percent impairment relating to [her] right upper extremity, and zero percent impairment relating to her right lower extremity."

On June 26, 2007 Dr. Morley Slutsky, a Board-certified orthopedic surgeon and Office medical adviser, agreed with Dr. Stark's opinion that appellant did not have any permanent impairment of her arms and right leg. In a December 21, 2007 decision, the Office denied appellant's claim for any additional impairment of her arms and right leg. It indicated that it based its determination on the opinion of Dr. Stark.

Appellant requested a hearing before an Office hearing representative. At the May 13, 2008 hearing, appellant's attorney contended that the Office procedures prevented it from relying on the opinion of the Office medical adviser, Dr. Slutsky, to determine appellant's impairment. She also argued that Dr. Stark's opinion was of limited probative value because he did not record precise findings on examination or, in the alternative, that there was an unresolved conflict in the medical evidence between Dr. Stark and Dr. Slutsky regarding appellant's impairment.

In a July 31, 2008 decision, the Office hearing representative determined that appellant did not meet her burden of proof to establish that she has more than a 27 percent permanent impairment of her left arm, a 14 percent permanent impairment of her right arm and a 6 percent permanent impairment of her right leg.<sup>4</sup>

### **LEGAL PRECEDENT**

The schedule award provision of the Act<sup>5</sup> and its implementing regulations<sup>6</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

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<sup>4</sup> The Office hearing representative did not discuss the pay rate of appellant's schedule award compensation and this matter is not the subject of the present appeal.

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

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.<sup>7</sup> It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>8</sup>

### ANALYSIS

The Office granted appellant schedule award compensation for a 27 percent permanent impairment of her left arm, a 14 percent permanent impairment of her right arm and a 6 percent permanent impairment of her right leg. On remand, the case was referred to Dr. Stark, a Board-certified orthopedic surgeon, but the Office found that his opinion showed no additional entitlement to schedule award compensation. Appellant contends that the opinion of Dr. Stark is of limited probative value because he did not record precise findings on examination. She also contended that a conflict existed between Dr. Slutsky, a Board-certified orthopedic surgeon serving as an Office medical adviser, and Dr. Weiss, an attending osteopath and Board-certified orthopedic surgeon, regarding appellant's impairment.

The Board finds that there are deficiencies in Dr. Stark's evaluation of appellant's impairment. Dr. Stark noted normal results for range of motion, strength and sensory condition of the arms and right leg. However, the A.M.A., *Guides* provides specific tests and standards for evaluating such potential deficits, but there is no clear indication that he performed these test or applied these standards.<sup>9</sup> For example, Dr. Stark stated that range of motion of the wrists, fingers, elbows, shoulders, hips, knees and ankles was normal, but he did not provide any record that actual findings were obtained for the various range of motion tests described in the A.M.A., *Guides* for these body parts, nor did he indicate that he performed manual muscle testing or evaluation of sensory loss associated with specific nerves (primarily C5 and C6 in the present case) in accordance with the standards of the A.M.A., *Guides*.

As noted above, proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Therefore, the case should be remanded to the Office for further development of the medical evidence regarding appellant's impairment. After such

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<sup>7</sup> *Id.*

<sup>8</sup> *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>9</sup> A.M.A., *Guides* 433-563. The Board notes that there is no conflict in the medical evidence regarding appellant's impairment. Section 8123(a) of the Act provides in pertinent part: "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." There is no conflict due to the deficiencies noted in both the 2002 opinion of Dr. Weiss (as explained in the Board's February 6, 2007 decision) and the 2007 opinion of Dr. Stark.

development as it deems necessary, the Office should issue an appropriate decision on this matter.

**CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she has more than a 27 percent permanent impairment of her left arm, a 14 percent permanent impairment of her right arm and a 6 percent permanent impairment of her right leg. The case is remanded to the Office for further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' July 31, 2008 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 1, 2009  
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