

2006 she underwent a left carpal tunnel release and exploration of the right palm. On April 30, 2007 appellant filed a claim for a schedule award.

In a February 27, 2007 report, Dr. David Weiss, an osteopath, diagnosed cumulative and repetitive trauma disorder, bilateral carpal tunnel syndrome and status post right and left carpal tunnel release surgery. He rated impairment to appellant's upper extremities as 37 percent of the left arm and 10 percent of the right arm. Dr. Weiss noted that he applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

The left arm impairment rating incorporated a Grade 4/5 motor strength deficit for left thumb abduction of nine percent. Dr. Weiss rated sensory loss to both arms by identifying the median nerve with reference to Tables 16-10 and 16-15.¹ He stated that appellant had a Grade 2 sensory deficit (80 percent). Dr. Weiss' report indicates that he used Table 16-15 to rate the median nerve below the forearm for which 39 percent maximum impairment is provided. He multiplied 39 percent times 80 percent to total 31 percent sensory loss. Dr. Weiss indicated that the sensory loss combined with the motor loss totaled 37 percent. For the right arm, he rated sensory loss only of the right median nerve. Dr. Weiss stated that appellant had a Grade 4 sensory deficit (25 percent). He multiplied the 39 percent maximum value by 25 percent to total 9.75 percent, rounded to 10 percent.

On September 21, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, reviewed the medical evidence. He agreed with the 10 percent rating of impairment by Dr. Weiss as it pertained to appellant's right arm. Dr. Berman disagreed with the left arm impairment rating noting that physical examination found no atrophy on either side and in the absence of atrophy and in the presence of a painful condition, decreased strength could not be rated. He recommended against accepting the nine percent motor weakness rating. As to the extent of sensory loss, Dr. Berman advised that he would classify the extent of sensory deficit as Grade 3 (60 percent). This classification was for distorted superficial tactile sensation, diminished light touch and two-point discrimination, as documented by Dr. Weiss. Dr. Berman stated that physical examination did not reveal decreased protective sensitivity, as the basis for classifying sensory deficit as Grade 2. He multiplied the 39 percent maximum by 60 percent to total 23.4 percent impairment, rounded to 23 percent sensory loss of the left arm.

On May 28, 2008 the Office granted schedule awards for 10 percent impairment of the right upper extremity and 23 percent impairment of the left upper extremity. It found that the weight of opinion rested with Dr. Berman. The period of the award for the right arm ran 31.2 weeks and 71.76 weeks for the left.

By letter dated January 12, 2009, appellant requested reconsideration. She indicated that she was enclosing new medical reports dated October 18 and December 30, 2008. However, no evidence was received.²

¹ A.M.A., *Guides*, Table 16-10 at 482 and Table 16-15 at 492.

² The record on appeal includes evidence received after the Office issued its April 6, 2009 decision. The Board cannot consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

In an April 6, 2009 decision, the Office denied appellant's request for reconsideration without conducting further merit review.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulations⁴ 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

With regard to rating loss of strength, section 16.8 of the A.M.A., *Guides* note that such measurements are functional tests influenced by subjective factors that are difficult to control. Therefore, the A.M.A., *Guides* do not assign a large role to such measurements. Section 16.8a states:

“In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the [A.M.A.,] *Guides*, the loss of strength may be rated separately.... If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise the impairment ratings based on objective anatomic findings take precedence. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts that prevent effective application of maximal force in the region to be evaluated.”⁷

ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome for which she underwent surgery. Appellant subsequently claimed a schedule award.

Dr. Weiss rated the extent of permanent impairment to her right arm as 10 percent based on sensory loss (pain) involving the median nerve below the forearm. Table 16-15 provides that the maximum impairment of an arm for such sensory loss is 39 percent. Dr. Weiss classified the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ *Id.*

⁷ A.M.A., *Guides* 508.

extent of sensory deficit from Table 16-10 as Grade 4 or 25 percent. Multiplying these values, results in 9.75 percent, rounded to 10 percent of the affected member. Dr. Berman, the Office medical adviser, agreed with this rating. Appellant has not submitted evidence which would establish that she had greater impairment to her right arm.

As to appellant's left arm, Dr. Weiss rated nine percent impairment for motor strength deficit involving left thumb abduction. His basis for this impairment rating is not clear as he merely provided general citation to Table 16-15 and 16-11. Dr. Weiss did not identify any specific nerve as enervating the thumb or address how he classified the extent of motor weakness. For this reason, this impairment rating is not adequately supported with medical rationale. Dr. Berman noted that to the extent that Dr. Weiss was rating loss of strength in the presence of a painful condition, section 16.8a of the A.M.A., *Guides* provide that decreased strength cannot be rated in the presence of decreased motion or painful conditions that prevent the application of maximal force in the region being evaluated. Dr. Weiss provided measurements on grip strength testing but did not address how this was utilized in his impairment rating. For these reasons, the Board finds that this rating is of diminished probative value.

As noted, Table 16-15 provides a maximum of 39 percent impairment for sensory deficit of the median nerve below the forearm. The Office medical adviser disagreed with how Dr. Weiss classified the extent of sensory deficit to the left arm under Table 16-10. Dr. Weiss advised that appellant had Grade 2 sensory deficit (80 percent) while the Office medical adviser classified the extent of deficit as Grade 3 (60 percent). Dr. Weiss rated 31 percent impairment (80 percent of 39 percent) for sensory loss while the Office medical adviser found 23 percent impairment (60 percent of 39 percent) for pain involving the left arm. The Board finds that the opinion of Dr. Weiss is in conflict with that of Dr. Berman.

When there are opposing reports of virtually equal weight and rationale, the case is to be referred to an impartial medical specialist.⁸ The Board will remand the case for the Office to refer appellant to an impartial medical specialist to resolve whether appellant has greater than 23 percent impairment of her left arm. After such further development as deemed necessary, the Office shall issue an appropriate decision on her left arm impairment.⁹ The decision of the Office will be affirmed as to the 10 percent rating to her right arm.

CONCLUSION

The Board finds appellant has 10 percent impairment to her right arm, for which she received a schedule award. As to the extent of loss to her left arm, the case is not in posture for decision based on a conflict in medical opinion.

⁸ *William C. Bush*, 40 ECAB 1064 (1989).

⁹ In light of this disposition on the merits, the reconsideration issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2009 and May 28, 2008 decisions of the Office of Workers' Compensation Programs be affirmed as to appellant's right arm impairment. The decisions are set aside as to her left arm impairment and remanded for further action conforming to this decision of the Board.

Issued: August 18, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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