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M.H., Appellant)	
)	
and)	Docket No. 10-1035
)	Issued: January 12, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
Topeka, KS, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On March 2, 2010 appellant filed an appeal of the Office of Workers' Compensation Programs' September 9, 2009 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.

On appeal, appellant's representative argues that the Office failed to properly consider all medical evidence of record, which established greater than two percent impairment.

On July 25, 2003 appellant sustained injury to her right wrist when she reached inside a box at work. The Office accepted the claim for ganglion cyst of the right wrist. Appellant

underwent approved surgery for removal of the ganglion cyst on July 2, 2004 and returned to work on July 26, 2004.¹ On March 14, 2007 she filed a claim for a schedule award.

In a November 1, 2004 report, Dr. Peter V. Bieri, a treating physician, opined that she had nine percent permanent impairment of the right upper extremity. He stated that the physical examination was conducted in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, and that all valid range of motion measurements were obtained in the manner directed. Dr. Bieri provided a history of injury and treatment reflecting that appellant sustained a work-related right wrist injury on July 25, 2003, with subsequent development of a ganglion cyst, which was treated by surgical intervention. Appellant was left with residual symptomatology. Examination of the right upper extremity revealed a scar along the volar and radial surface that was slightly hypertrophic and exquisitely tender to palpation. Slight tissue atrophy was noted at the base of the right thumb. The right thumb interphalangeal (IP) joint was essentially ankylosed at zero degrees. Grip strength was measured with the Jamar dynamometer, with a maximum of 16.5 kilograms (kg) on the dominant right side, as opposed to 27.0 kg on the left. Two-point discrimination of the distal right upper extremity was judged to be six millimeters (mm). Ability to perform repetitive fine and gross motor movements was slightly impaired secondary to pain and weakness.

Referencing the fifth edition of the A.M.A., *Guides*, Dr. Bieri opined that appellant had nine percent permanent impairment of the right upper extremity. Pursuant to Figure 16-12 at page 456, he found nine percent impairment due to ankylosis of the right thumb IP joint. Dr. Bieri noted that the nine percent rating for the thumb translated to four percent hand impairment, according to page 438, which in turn corresponded to four percent upper extremity impairment, pursuant to page 439 of the A.M.A., *Guides*. In addition, he concluded that appellant had five percent right upper extremity impairment for pain and weakness, with reference to page 492. Applying the Combined Values Chart at page 604, Dr. Bieri determined that she had a total right upper extremity impairment of nine percent. He opined that appellant had reached maximum medical improvement.

Dr. Bieri continued to treat appellant for her right wrist condition. On February 15, 2006 he stated that appellant's condition remained essentially the same. Examination confirmed loss of active range of motion of the IP joint of the right thumb, along with increased sensitivity at the site of the previous ganglion cyst excision.

In a December 22, 2006 report, Dr. Bieri stated that appellant continued to experience pain and weakness involving the right hand and wrist, along with persistent numbness and tingling extending into the median nerve distribution on the right. Examination revealed ankylosis of the IP joint. Grip strength was measured with the Jamar dynamometer, with a maximum of 12.5 kg on the dominant right side, as opposed to 29.0 kg on the left. Measurements were considered valid, forming a bell-shaped curve. Two-point discrimination

¹ This case has previously been before the Board. In a decision dated November 24, 2006, the Board affirmed the Office's March 21, 2006 decision denying appellant's claim for a recurrence of disability. Docket No. 06-1437 (issued November 24, 2006).

was judged at 6 to 10 mm involving the median nerve distribution distal to the right wrist. Phalen's testing was positive at 10 seconds. Referencing his reports dated November 1, 2004 and February 15, 2006, Dr. Bieri concluded that appellant continued to demonstrate nine percent permanent impairment of her right upper extremity. On February 23, 2007 he reiterated his opinion that appellant had nine percent right upper extremity impairment.

The Office forwarded the record to an Office medical adviser for review and opinion on whether appellant had permanent impairment of her right upper extremity. In a report dated April 14, 2007, Dr. Daniel Zimmerman, a Board-certified internist, stated that Dr. Bieri had failed to specify the tables or figures that were utilized to make his impairment rating. Indicating that Dr. Bieri's impairment rating was based in part on range of motion restrictions and "possibly grip strength weakness," Dr. Zimmerman noted that page 508 of the fifth edition of the A.M.A., *Guides* precluded an impairment rating due to grip strength deficit in a painful condition. He opined that Dr. Bieri's reports did not satisfy the requirements in Chapter 16 for an impairment rating for an upper extremity condition.

The Office referred appellant to Dr. Joseph G. Sankoorikal, a Board-certified physiatrist, for an examination and an opinion as to any permanent impairment of her right arm due to her accepted injury. In a report dated August, 21, 2007, Dr. Sankoorikal opined that appellant had two percent permanent impairment of the right upper extremity. He listed a history of her injury and treatment, noting that she experienced difficulty bending the thumb and complained of some weakness and some electrical shock-like feelings and popping of the right thumb.

Examination of the right wrist revealed a well-healed scar, with no wasting of the thenar or hypothenar muscles. There were no allodynia or color changes. Range of motion of the wrists was 85 degrees of flexion and extension bilaterally; 35 degrees of radial deviation and ulnar deviation on the right side; and 30 degrees of radial and ulnar deviation on the left side. Shoulder and elbow range of motion was normal in all planes.

The first right metacarpophalangeal (MCP) flexion was 55 degrees and extension was neutral. On the left side flexion was 90 degrees and extension was neutral. First distal interphalangeal (DIP) flexion was 75 degrees with neutral extension on the right side; on the left side flexion was 90 degrees with neutral extension. On the second, third, fourth and fifth digits the MCP flexion was 90 degrees with an extension, which was neutral. Other joints were essentially normal. Dr. Sankoorikal diagnosed a history of ganglion cyst on the right wrist status post removal with residual pain and decreased range of motion at the first MCP interphalangeal joint. He opined that appellant was "eligible for a partial permanent impairment of two percent for the thumb," due to a decreased range of motion at MCP and DIP joints of the thumb on the right side. He stated that appellant had reached maximum improvement. Dr. Sankoorikal noted that his impairment rating was based on the A.M.A., *Guides*.

In an October 5, 2007 report, the medical adviser stated that the two percent impairment rating of appellant's right thumb was acceptable based on the A.M.A., *Guides*. Dr. Sankoorikal had referred to the fifth edition of the A.M.A., *Guides* and considered range of motion and chronic pain, as well as sensory changes and weakness at the right wrist level.

In a decision dated October 22, 2007, the Office granted appellant a schedule award for two percent impairment of the right thumb. The period of the award was from August 21 to 31, 2007.

On November 15, 2007 appellant, through her representative, requested an oral hearing held on March 13, 2008. Appellant testified that she was entitled to augmented compensation because she had a dependent son.

In an April 8, 2008 report, Dr. Bieri stated that appellant reached maximum improvement on November 1, 2004. He clarified that his prior impairment rating was based on the fifth edition of the A.M.A., *Guides*. Dr. Bieri's nine percent rating for the thumb was based on the IP joint being ankylosed at zero degrees (page 456, Table 16-12). Appellant also had related tissue atrophy. The nine percent thumb impairment equated to four percent hand impairment, (page 438) and four percent upper extremity impairment (page 439). Dr. Bieri noted that his examination documented pain and weakness with use of fine maneuvers of the hand, resulting in pain at the level of the arm. He concluded that appellant had an additional five percent impairment to the upper extremity at the level of the arm per Table 16-15 at page 492. Dr. Bieri concluded that appellant's combined right upper extremity impairment was nine percent.

By decision dated June 2, 2008, an Office hearing representative set aside the October 22, 2007 decision, finding that appellant had submitted sufficient evidence to warrant further development of the case file.

On remand, the Office returned the case record to Dr. Zimmerman for an opinion as to whether appellant had more than two percent impairment to the right thumb. Dr. Zimmerman was asked to correlate his findings with the A.M.A., *Guides*.

On June 15, 2008 Dr. Zimmerman opined that Dr. Bieri's April 8, 2008 report could not be used as a basis to modify the prior schedule award. Dr. Bieri had not measured range of motion in all planes and there was no indication that he used a goniometer as required by the A.M.A., *Guides*. He also noted that on August, 21, 2007 Dr. Sankoorikal found that the right IP joint was no longer ankylosed, a finding which led to the medical conclusion that appellant had not reached maximum improvement on November 1, 2004 when he was examined by Dr. Bieri.

By decision dated June 19, 2008, the Office denied appellant's request for an increased schedule award.

On June 15, 2009 appellant, through counsel, requested reconsideration.

In a June 10, 2009 report, Dr. Bieri reiterated his opinion that appellant had nine percent impairment of the right upper extremity pursuant to the fifth edition of the A.M.A., *Guides*, and that she was at maximum improvement as of his November 2004 examination. He again stated that he used a goniometer when performing range of motion testing, as required by the A.M.A., *Guides*. Dr. Bieri also performed tests on all of the joints and planes of the thumb, including both the MP joint and IP joint. The only joint he found issue with was the IP joint. Dr. Bieri's

nine percent rating for the thumb was based upon IP joint being “zeroed out essentially ankylosed at zero degrees,” pursuant to Table 16-12 at page 456 of the A.M.A., *Guides*. He noted that the nine percent thumb impairment corresponds to four percent hand impairment according to page 438 of the A.M.A., *Guides*, and four percent upper extremity impairment pursuant to page 439. Appellant is also entitled to another five percent impairment rating to the upper extremity at the level of the arm for pain and weakness with use of fine maneuvers according to Table 16-15 at page 492. The combination of the four percent to the arm on page 439 and the five percent on page 492 equals the nine percent found in his initial report.

The Office forwarded Dr. Bieri’s June 10, 2009 report to Dr. Zimmerman. In a report dated September 2, 2009, Dr. Zimmerman opined that Dr. Bieri’s report provided no basis to revise the prior impairment rating. The report contained no findings on examination, but merely explained issues relating to his critique of June 15, 2008. Moreover, any revision in the schedule award rating would have to be made under the sixth edition of the A.M.A., *Guides*.

By decision dated September 9, 2009, the Office denied modification of the prior schedule award, based upon the report of the medical adviser.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act² and its implementing federal regulations³ 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. The Act, however, 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴

Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.⁵ Effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.⁶ FECA Bulletin No. 09-03, issued March 15, 2008, clarifies that any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*.⁷

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.* at § 10.404(a).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁶ *See* FECA Bulletin No. 09-03 (issued March 15, 2008).

⁷ *Id.*

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.⁸ While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁹ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁰

ANALYSIS

The Board finds that this case is not in posture for a decision. The Office's September 9, 2009 decision will be set aside and the case remanded for further development of the medical evidence.

In a June 2, 2008 decision, an Office hearing representative set aside an October 22, 2007 schedule award decision, finding that appellant had submitted sufficient medical evidence to warrant further development of the case file. She noted that Dr. Bieri found that appellant had nine percent impairment to the right upper extremity and had correlated his findings with the A.M.A., *Guides*. The hearing representative remanded the case to the Office for further development.

On remand, the Office did forward the case file to Dr. Zimmerman who was instructed to correlate his findings with the A.M.A., *Guides* and provide medical rationale to support his opinion on the degree of permanent impairment to appellant's right upper extremity. His June 15, 2008 report, however, did not discuss the examination findings in relation to the A.M.A., *Guides* or provide medical rationale supporting his opinion that appellant had no more than two percent impairment of her right thumb. His report was limited to a critique of Dr. Bieri's April 8, 2008 report, which he asserted could not be used as a basis to modify the prior schedule award.

In its June 19, 2008 decision, the Office denied appellant's request for an increased schedule award, relying on the unrationalized report of the medical adviser. The Board notes that, with the exception of forwarding the case file to the medical adviser, the Office undertook no further development of the medical evidence as instructed by the Office hearing representative.

Pursuant to her June 15, 2009 reconsideration request, appellant submitted a June 10, 2009 report from Dr. Bieri, who reiterated his opinion that appellant had nine percent impairment of the right upper extremity pursuant to the fifth edition of the A.M.A., *Guides*, and that she was at maximum improvement at the time of his November 2004 examination. Dr. Bieri stated that he used a goniometer when performing range of motion testing, and that he performed tests on all of the joints and planes of the thumb, including both the MP joint and IP joint. His nine percent rating for the thumb was based upon IP joint being "zeroed out essentially ankylosed at zero degrees," pursuant to Table 16-12 at page 456 of the A.M.A., *Guides*. Dr. Bieri noted that

⁸ *Vanessa Young*, 55 ECAB 575 (2004).

⁹ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁰ *Melvin James*, 55 ECAB 406 (2004).

the nine percent thumb impairment corresponded to four percent hand impairment according to page 438 of the A.M.A., *Guides*, and four percent upper extremity impairment pursuant to page 439. He concluded that appellant was also entitled to another five percent impairment rating at the level of the arm for pain and weakness with use of fine maneuvers according to Table 16-15 at page 492. The combination of the four percent to the arm on page 439 and the five percent on page 492 equaled the nine percent found in his November 1, 2004 report.

After reviewing the June 10, 2009 report, the medical adviser stated that it provided no basis to revise the prior impairment rating, as it contained no examination findings. He did not, however, correlate the examination findings with the A.M.A., *Guides* or provide medical rationale to support his opinion on the degree of permanent impairment to appellant's right upper extremity. The medical adviser merely criticized Dr. Bieri's report for addressing issues raised in his June 15, 2008 report. The Board notes that Dr. Bieri attempted to clarify issues raised by the medical adviser. The April 8, 2008 report provided medical evidence that was found sufficient to warrant further development of the claim. Dr. Zimmerman should have addressed findings provided in the June 10, 2009 report. The Office improperly relied on the medical adviser's unrationalized September 2, 2009 report.

Dr. Zimmerman noted that any revision in the schedule award rating would have to be made under the sixth edition of the A.M.A., *Guides*. Effective May 1, 2009, the Office was required to begin applying the sixth edition of the A.M.A., *Guides*¹¹ in calculating schedule awards.¹² A claimant who has received a schedule award calculated under a previous edition and who claims an increased award will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.¹³ The required application of a new edition of the A.M.A., *Guides* should not be considered a deterrent to the proper development of medical evidence for purposes of making a schedule award determination.

It is well established that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.¹⁴ While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.¹⁵ The Office undertook development of the medical evidence by referring appellant to Dr. Sankoorikal for a second opinion examination. It has an obligation to secure a report adequately addressing the relevant issue of the extent of appellant's upper extremity impairment.¹⁶ The case will be remanded for appropriate development of the medical evidence.

¹¹ A.M.A., *Guides* (6th ed. 2008).

¹² See FECA Bulletin No. 09-03 (issued March 15, 2008).

¹³ *Id.*

¹⁴ *Vanessa Young, supra* note 8.

¹⁵ *Richard E. Simpson, supra* note 9.

¹⁶ See *Peter C. Belkind*, 56 ECAB 580 (2005) (where the opinion of the Office's second opinion physician was unclear on whether the claimant had any permanent impairment due to his accepted employment injury, the Board found that the Office should secure a report adequately addressing the relevant issue). See also *Melvin James, supra* note 10.

CONCLUSION

The Board finds that the case is not in posture for decision. The case shall be remanded for further development of the medical evidence, to be followed by an appropriate merit decision.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 12, 2011
Washington, DC

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

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

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