



extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). Dr. Stark did not identify the type of motor strength testing he performed on appellant's right thumb abductors.

### **FACTUAL HISTORY**

On October 28, 2005 appellant, then a 41-year-old rural letter carrier, filed an occupational disease claim alleging that in July 2005 she first became aware of her right elbow tendinitis. On October 13, 2005 she realized that her condition was caused by her employment. By letter dated December 15, 2005, the Office accepted appellant's claim for lateral and medial epicondylitis of the right elbow.

On June 10, 2008 appellant filed a claim for a schedule award. The Office found a conflict in medical opinion. Dr. Irving D. Strouse, an Office referral physician, advised in a September 24, 2007 report that appellant had no residuals or disability causally related to her employment-related conditions. Dr. David Weiss, an attending osteopathy found, in a February 20, 2008 report, that appellant had 14 percent impairment of the right upper extremity.

On November 14, 2008 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Stark.

In a March 4, 2009 report, Dr. Stark reviewed a history of appellant's accepted employment injuries, medical treatment and social and family background. He listed findings on physical and neurological examination of her shoulders, elbows and wrists. Dr. Stark noted less sensitivity over an area from the distal flexor to the base of the fifth finger of the lateral aspect of the right hand. He stated that this finding did not correspond to any nerve innervation or dermatomal distribution. Appellant had good grip strength. She had 5/5 strength in abduction and adduction of the fingers in both hands. Dr. Stark noted that appellant had undergone surgery to treat her employment-related lateral epicondyle and debridement. He advised that the physical examination did not substantiate any finding of right ulnar nerve neuropathy for which she previously underwent surgery. Appellant did not have any motor deficits to her right thumb abductor as noted in Dr. Weiss' February 20, 2008 report.<sup>2</sup> Dr. Stark advised that the use of Table 16-10, Table 16-11 and Table 16-15 at pages 482, 484 and 492, respectively, of the fifth edition of the A.M.A., *Guides* were not appropriate. He found that there were no objective findings related to the accepted employment-related conditions. Dr. Stark noted that appellant had subjective complaints of pain in her right lateral epicondyle and determined that she had three percent impairment of the right upper extremity for pain based on Figure 18-1 at page 574.

In an April 30, 2009 decision, the Office granted appellant a schedule award for three percent impairment of the right upper extremity based on Dr. Stark's March 4, 2009 opinion.<sup>3</sup>

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<sup>2</sup> In his February 20, 2008 report, Dr. Stark advised that grip strength testing performed *via* Jamar Hand Dynamometer at Level III revealed 30 kilograms of force strength in the dominant right hand *versus* 30 kilograms of force strength in the left hand.

<sup>3</sup> In the April 30, 2009 decision, the Office noted that an Office medical adviser reviewed Dr. Stark's March 4, 2009 findings and agreed with his determination that appellant had three percent impairment of the right upper extremity.

By letter dated November 24, 2009, appellant, through her attorney, requested reconsideration. Counsel contended that Dr. Stark's March 4, 2009 report was not entitled to special weight accorded an impartial medical examiner. Dr. Stark noted that appellant had sensitivity over the area of the distal flexor at the base of her fifth finger of the lateral aspect of her right hand which was evidence of an ulnar nerve deficiency, but he did not provide an impairment rating for sensory deficit in accordance with the A.M.A., *Guides*. Counsel contended that he did not provide any evidence of the motor strength testing he performed on the right thumb abductors. He argued that Dr. Weiss' February 20, 2008 report which noted 14 percent impairment of the right upper extremity as a result of grade 2 sensory deficit at the ulnar nerve and motor deficit in the right thumb was entitled to determinative weight.

In a February 24, 2010 decision, the Office denied appellant's request for reconsideration. It found that she failed to raise substantive legal questions or submit new and relevant evidence.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128 of the Act,<sup>4</sup> the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>5</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>6</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

### **ANALYSIS**

Appellant did not submit any relevant and pertinent new evidence. Therefore, the issue is whether she raised relevant legal arguments not previously considered or showed the Office erroneously applied a specific point of law. The Board finds that the Office properly denied appellant's request for reconsideration as the arguments submitted were not substantiated by the facts and circumstances of the case.

On reconsideration, counsel argued that Dr. Stark's opinion that appellant had three percent impairment of the right upper extremity due to pain was not entitled to special weight accorded an impartial medical examiner. He contends that Dr. Stark did not provide an impairment rating for his finding of sensory deficit in accordance with the A.M.A., *Guides*. Dr. Stark advised that appellant had sensory loss over an area from the distal flexor to the base of

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<sup>4</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>6</sup> *Id.* at § 10.607(a).

the fifth finger of the lateral aspect of the right hand, but it did not correspond to any nerve innervation or dermatomal distribution. He noted that there were no objective findings related to the accepted employment injuries. Dr. Stark reported that appellant only had subjective complaints of pain in her right lateral epicondyle. Since he found no objective evidence of permanent impairment, Dr. Stark determined that appellant was entitled to an impairment rating for pain under Figure 18-1 at page 574 of the A.M.A., *Guides*.<sup>7</sup> The Board finds that appellant's contention is insufficient to reopen her claim for further merit review.

Regarding counsel's contention that Dr. Stark did not perform grip strength measurements, the Board notes that he reported that appellant had good grip strength bilaterally in the hands. Dr. Stark noted that Dr. Weiss found that appellant did not have any motor strength deficit. He advised that appellant had undergone surgery to treat her employment-related lateral epicondyle and debridement, but noted that his physical examination did not substantiate any finding of right ulnar neuropathy. He indicated that evaluating impairment due to an ulnar nerve injury was clinically more appropriate than evaluating impairment due to muscle strength, particularly as the A.M.A., *Guides* cautions against the use of strength evaluations.<sup>8</sup>

Appellant's arguments do not require reopening of her claim for further merit review. As appellant did not meet any of the three requirements under 20 C.F.R. § 10.606(b)(2), the Board finds that the Office properly denied her request for reconsideration without a merit review.<sup>9</sup>

### CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>7</sup> A.M.A., *Guides* 571, 18.3(b). An impairment percentage may be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*. Federal Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

<sup>8</sup> A.M.A., *Guides* 507-08. Because strength measurements are functional tests influenced by subjective factors that are difficult to control, and the A.M.A., *Guides* is for the most part based on anatomic impairment, the A.M.A., *Guides* does not assign a large role to such measurements. Only in rare cases should grip strength be used and only when it represents an impairing factor that has not been otherwise considered adequately. *Mary L. Henninger*, 52 ECAB 408 (2001).

<sup>9</sup> *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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