

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEATRICE O. GORSE and U.S. POSTAL SERVICE,
INTERNATIONAL & BULK MAIL CENTER, Jersey City, N.J.

*Docket No. 97-17; Submitted on the Record;
Issued October 28, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a review of her case on the merits.

The Office accepted that on April 22, 1990 appellant, then a 44-year-old mail process mechanic, sustained an amputation of the distal interphalangeal joint of her left middle (third) and ring (fourth) fingers when her left hand was pulled into a sprocket while appellant was cleaning a conveyor belt chain.

Appellant underwent reconstruction of the left third and fourth fingers on April 24 and May 11, 1990, performed by Dr. Loka Reddy, an attending Board-certified plastic and reconstructive surgeon. Appellant returned to light-duty work on May 23, 1990 with no use of the left hand. Dr. Reddy prescribed physical therapy three times per week to improve range of motion and strength of the left hand and fingers.

In a May 31, 1990 report, Dr. Edmond A. Saad, an attending Board-certified orthopedic surgeon, held appellant off work through June 11, 1990. The record indicates that appellant was off work through June 18, 1990, then returned to limited duty.

In an October 29, 1990 report, Dr. Saad opined that appellant required additional treatment, and restricted appellant from climbing ladders and using her left hand near machinery. In a January 7, 1991 report, Dr. Saad held appellant off work through March 7, 1991 and recommended continued physical therapy. In a February 4, 1991 report, Dr. Saad noted "persistent flexion deformity of the PIP [proximal interphalangeal] joints of 10 degrees," with "good functional range of motion and strength in that hand." Dr. Saad opined that appellant could use her hand normally except for some temporary sensitivity to the cold.

In a February 15, 1993 report, Dr. Ronald Goldberg, a Board-certified general practitioner, to whom appellant was referred by her attorney, provided a history of injury and

treatment, and calculated the degree of permanent impairment according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, third edition, revised (hereinafter, the A.M.A., *Guides*). On examination, Dr. Goldberg noted that the third and fourth fingers of appellant's left hand were "deformed and shortened. He noted a 12 percent impairment of the left hand due to limitation of flexion to 80 degrees of the proximal interphalangeal joint of the third finger, and a second 12 percent impairment of the left hand due to limitation of flexion to 80 degrees of the proximal interphalangeal joint of the fourth finger. Dr. Goldberg found some loss of pinprick discrimination on the third and fourth fingers of the left hand, which he characterized as less than a six percent impairment of the left hand and therefore within normal range according to the A.M.A., *Guides*. Based on figure 17, page 25, Dr. Goldberg found a 45 percent impairment of the left hand due to amputation of the third finger at the distal interphalangeal joint, and a second 45 percent impairment of the left hand due to amputation of the fourth finger at the distal interphalangeal joint. He noted a 45 degree deficit equaling a 12 percent impairment due to loss of range of motion of the proximal interphalangeal joint, equaling a 67 percent impairment of the third finger of the left hand. For the fourth finger, Dr. Goldberg also found a 67 percent impairment due to deficits identical to those affecting the third finger. Using the combined values chart, Dr. Goldberg calculated an 89 percent impairment of the left hand. He noted that according to Table 1, page 15, an 89 percent impairment "of the left hand based upon impairment of the index and middle finger is an 18 percent impairment of the left hand. Based upon table 2, an 18 percent impairment of the left hand is a 16 percent impairment of the upper extremity." Dr. Goldberg therefore concluded that appellant had a 16 percent permanent impairment of the left upper extremity.

On May 28, 1993 appellant claimed a schedule award.

In an October 20, 1993 file memorandum, the Office requested that an Office medical adviser review the medical record, in particular Dr. Goldberg's February 15, 1993 report, and perform a schedule award calculation.

In an October 20, 1993 response, an Office medical adviser noted that appellant had reached maximum medical improvement as of February 15, 1993, the date of Dr. Goldberg's report. He stated that Dr. Goldberg "should not have combined the finger impairments until he converted them first to *hand impairments*. His figure is too *low*." (Emphasis in the original). The Office medical adviser agreed with Dr. Goldberg's assessment of a 67 percent impairment of the third and fourth digits due to amputation at the distal interphalangeal joint, according to Table 1, page 15 of the A.M.A., *Guides*. Again referring to Table 1, the adviser noted that a 67 percent impairment of the third digit equaled a 13 percent impairment of the hand, and a 67 percent impairment of the fourth digit equaled a 7 percent impairment of the hand, totaling a 20 percent permanent impairment of the left hand. The adviser then consulted Table 2, page 16, entitled "Relationship of Impairment of the Hand to Impairment of the Upper Extremity," and noted that a 20 percent impairment of the hand equaled an 18 percent impairment of the upper extremity. The Office medical adviser concluded that appellant had an 18 percent permanent impairment of the left upper extremity due to the April 22, 1990 injury.

By decision dated May 30, 1995,¹ the Office awarded appellant a schedule award for an 18 percent permanent impairment of the left upper extremity.²

In a May 14, 1996 letter, appellant, through her attorney, requested reconsideration. Appellant asserted that there was a conflict of medical opinion between Dr. Goldberg, who opined that appellant had an 89 percent impairment of the left hand, and the Office medical adviser, who found a 20 percent impairment of the left hand. Appellant requested that a Board-certified specialist be appointed to resolve the alleged conflict, and requested to participate in the selection of the impartial specialist.³

By decision dated July 2, 1996, the Office denied reconsideration on the grounds that the evidence submitted was “inaccurate and based on faulty premises,” and was therefore insufficient to warrant a merit review of the May 30, 1995 schedule award. The Office found that there was no conflict of medical opinion, as Dr. Goldberg’s mention of an 89 percent impairment of the left hand was due to a mathematical error.⁴ The Office concluded that the weight of the medical evidence rested with the Office medical adviser.

The Board finds that the Office did not abuse its discretion by denying appellant’s request for a merit review.

The only decision before the Board on this appeal is the July 2, 1996 Office decision finding that appellant, in her request for reconsideration, had not submitted sufficient evidence to warrant review of the Office’s May 30, 1995 decision. Since more than one year has elapsed between the issuance of the May 30, 1995 merit decision and September 17, 1996, the date

¹ Dr. Saad submitted a November 30, 1995 report, stating that based on the A.M.A., *Guides*, appellant had a 16 percent permanent impairment of the left upper extremity. Dr. Saad did not refer to specific tables or figures in the A.M.A., *Guides* in this report. This report was not relied upon by the Office in calculating appellant’s schedule award. However, to evaluate whether Dr. Saad’s November 30, 1995 report indicated an increased degree of permanent impairment, in a May 21, 1996 letter, the Office requested that an Office medical adviser review the November 30, 1995 report, and advise if the determination of an 16 percent permanent impairment of the left upper extremity was accurate according to the A.M.A., *Guides*. In a May 22, 1996 reply, a second Office medical adviser performed a schedule award calculation based on Dr. Saad’s November 30, 1995 report, concluding that it indicated an 11 percent permanent impairment of the left upper extremity.

² The award ran from February 15, 1993 to March 15, 1994, a period of 56.16 weeks of 393.12 days, and was paid in a lump sum of \$24,497.49.

³ In a May 21, 1996 letter, the Office requested that Dr. Saad provide the schedule award calculations supporting his November 30, 1995 calculation of a 16 percent impairment of the upper extremity. The record indicates that Dr. Saad did not respond to this request prior to issuance of the July 2, 1996 decision.

⁴ The Office also found that Dr. Goldberg’s report was of diminished probative value as he confused the third and fourth fingers with the index and third fingers. The Board notes that the Office misinterpreted Dr. Goldberg’s reference to Table 1, page 15 of the A.M.A., *Guides*. This table, entitled “Relationship of Impairment of the Digits to Impairment of the Hand,” is divided into three columns: percentage impairment of the thumb; “Impairment of Index *or* Middle Finger”; “Impairment of Ring *or* Little Finger” (Emphasis added). The Office assumed that Dr. Goldberg had become confused, as he referred to “the index and middle finger” of appellant’s left hand, instead of the third and fourth fingers. As the A.M.A., *Guides* demonstrate, Dr. Goldberg was referring to the table’s column headings. Thus, the Office’s criticism of Dr. Goldberg’s report is in large part unfounded.

appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 30, 1995 decision.⁵

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁶

Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁷

In support of her request for reconsideration, appellant asserted that there was a conflict of medical opinion between Dr. Goldberg, who found an 89 percent permanent impairment of the left hand, and the Office medical adviser, who found a 20 percent permanent impairment of the left hand. The Board finds, however, that both Dr. Goldberg and the Office medical adviser found identical objective impairments, but that Dr. Goldberg made an error in applying the appropriate grading scheme, resulting in a higher stated percentage of impairment.

The A.M.A., *Guides*, at page 54, provides a “Summary of Steps in Evaluating Impairments of the Upper Extremity.” The evaluator must first determine digit impairment due to amputation, then sensory impairment, then motion impairment for each finger joint. Then, in step five, the evaluator should “[c]ombine, using the Combined Values Chart, the impairment of each digit due to *amputation, sensory loss, loss of motion ... to obtain individual digit impairments.*” Then, in step six, the evaluator should “[c]onvert each *individual digit impairment to hand impairment* (Table 1, p. 15).”

In his February 15, 1993 report, Dr. Goldberg found a 67 percent permanent impairment of the third and fourth fingers. According to the steps set forth in the A.M.A., *Guides*, what Dr. Goldberg should have done next was to convert each individual digit impairment to hand impairment using Table 1, page 15, entitled “Relationship of Impairment of the Digits to Impairment of the Hand.” Table 1 indicates that a 67 percent impairment of the third and fourth fingers is equivalent to a 20 percent impairment of the hand. Instead, Dr. Goldberg used the

⁵ See 20 C.F.R. § 501.3(d)(2).

⁶ 20 C.F.R. § 10.138(b)(1).

⁷ 20 C.F.R. § 10.138(b)(2).

combined values chart to combine the impairments of two digits, not a group of affected joints in one digit as the A.M.A., *Guides* directs. This led to Dr. Goldberg's erroneous finding that two 67 percent impairments equaled an 89 percent impairment of the left hand. The Board finds that Dr. Goldberg was in error by using the combined values chart.

In an October 23, 1990 report, the Office medical adviser used Dr. Goldberg's assessment of a 67 percent impairment of the third and fourth fingers, then used Table 1, page 15 to convert these percentages to a 13 percent impairment of the left hand due to amputation of the third finger, and a 7 percent impairment of the left hand due to amputation of the fourth finger, equaling a 20 percent impairment of the left hand. He then used Table 2, page 16 to determine that a 20 percent impairment of the hand equaled an 18 percent impairment of the upper extremity, for which appellant received a schedule award. The Board finds that the Office medical adviser properly used the A.M.A., *Guides* in calculating the schedule award.

Thus, Dr. Goldberg and the Office medical adviser agree on the objective clinical findings, and that appellant sustained a 67 percent impairment of the third and fourth fingers of her left hand. The apparent conflict occurred when Dr. Goldberg erroneously used the combined values chart instead of Table 1, page 15 to find the percentage of impairment of the hand. The Board finds that there is no conflict of medical opinion between Dr. Goldberg and the Office medical adviser, only a difference in mathematics produced by Dr. Goldberg's error in applying the grading scheme.

As appellant did not provide relevant and pertinent evidence not previously considered by the Office, the Office did not abuse its discretion by denying a merit review of the case.

The decision of the Office of Workers' Compensation Programs dated July 2, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 28, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member