

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MANUELA R. CORTES and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

*Docket No. 00-859; Submitted on the Record;
Issued October 23, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has more than a 20 percent permanent impairment of the left upper extremity.

On December 30, 1992 appellant, then a 36-year-old clerk, filed a claim alleging that her carpal tunnel syndrome was causally related to her federal employment. The Office of Workers' Compensation Programs accepted the claim for bilateral carpal tunnel syndrome, right and left ulnar nerve entrapment and authorized ulnar transposition surgery on the right side. Appellant returned to work on limited duty.

On June 7, 1995 appellant filed a claim for a schedule award.

The Office referred appellant to Dr. Kenneth C. Peacock, a Board-certified orthopedic surgeon, for an evaluation of the extent of any permanent impairment arising from her accepted employment injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).¹ Dr. Peacock determined appellant sustained a three percent impairment of the right upper extremity and zero percent impairment of the left upper extremity.

Appellant submitted a May 4, 1995 report from Dr. David Weiss, an osteopath, who indicated that appellant had residuals of her accepted injuries, including pain and stiffness in the elbows bilaterally; numbness in both hands bilaterally, with the left being greater than the right; and pins and needles in the hands, bilaterally, with the right being greater than the left. Dr. Weiss found a 30 percent loss of grip strength for the right and left upper extremities in accordance with the A.M.A., *Guides*, 4th edition.² He determined that appellant sustained a

¹ A.M.A., *Guides*, (4th ed. 1993).

² See Table 32, page 65.

maximum loss of function due to sensory deficits³ of five percent and impairment due to sensory deficit of the left upper extremity of three percent⁴ for a total impairment of the left upper extremity of 32 percent.⁵

Appellant's treating physician, Dr. Eric D. Strauss, a Board-certified orthopedic surgeon, submitted a report dated October 11, 1995. He noted the date of maximum medical improvement as December 29, 1993, Jamar Dynamometer readings of a mean of 27 for the left and 18 for the right, loss of grip strength in the right upper extremity and diminished sensation in the medial antebrachial cutaneous nerve distribution. He determined that appellant had a 30 percent impairment of the right upper extremity, based on the A.M.A., *Guides*, 4th edition.

Dr. Strauss' report and the case record were referred to the Office's medical adviser who determined that Dr. Strauss did not refer to specific page numbers, tables or figures in rating impairment in accordance with the A.M.A., *Guides* and suggested that appellant return to Dr. Strauss for evaluation of permanent impairment of both upper extremities. The Office medical adviser found that Dr. Weiss' 30 percent impairment for the right upper extremity and 32 percent impairment for the left upper extremity, were inconsistent with the facts in the record which indicated that the right upper extremity was more affected than the left. The Office medical adviser determined that Dr. Weiss' results were unreliable.

In a supplemental report dated June 19, 1996, Dr. Strauss noted how his calculations came from the A.M.A., *Guides*, 4th edition. In a June 26, 1996 report, an Office medical adviser determined that appellant sustained a 29 percent impairment of the right upper extremity.

In a decision dated June 23, 1996, the Office granted appellant a schedule award for a 29 percent impairment for the right upper extremity.

Appellant, requested a hearing. In an April 10, 1997 decision, the hearing representative affirmed the schedule award for permanent impairment to the right upper extremity, but remanded the case to determine the extent of any permanent impairment of the left upper extremity. The hearing representative indicated that appellant should be referred for evaluation to her treating physician, Dr. Strauss.

In a report dated April 28, 1997, Dr. Strauss noted that appellant's shoulder range of motion revealed 120 degrees of abduction and forward flexion, external rotation was 45 degrees and internal rotation was to T-6. The wrist revealed 60 degrees of palmar flexion, 60 degrees of dorsiflexion, 20 degrees of radial deviation and 40 degrees of ulnar deviation. The elbow revealed positive Tinel's sign over the ulnar nerve with positive elbow flexion test and discomfort over the cubital tunnel consistent with ulnar neuropathy. Dr. Strauss rated appellant

³ See Table 15, page 54.

⁴ See Table 11a, page 48.

⁵ See page 322.

with a 20 percent impairment of the left upper extremity based on the A.M.A., *Guides*, 4th edition,⁶ a figure between mild and moderate upper extremity impairment.⁷

Dr. Strauss' report and the case record were referred to the Office's medical adviser who determined that the appellant sustained a 20 percent impairment of the left upper extremity.⁸

In a decision dated June 10, 1997, the Office granted appellant a schedule award for a 20 percent impairment for the left upper extremity.

Appellant, again requested a hearing. In a July 19, 1998 decision, the hearing representative set aside the decision of the Office dated June 10, 1997 and remanded the case for referral to a second opinion physician because of the disparity between the reports of Drs. Weiss and Strauss.

The Office referred appellant to Dr. Narni R. Niri, a Board-certified neurologist, to determine the extent of permanent impairment of the left upper extremity.

In a report dated October 14, 1998, Dr. Niri noted that motor tone and power were normal throughout except for mild weakness of the left abductor pollicis and opponens pollicis, that deep tendon reflexes were 2-plus and symmetrical, that plantar responses were flexor and that appellant had sensory deficit in the left ulnar distribution. Dr. Niri found a 20 percent permanent impairment of the left upper extremity.

By a decision dated November 25, 1998, the Office found that appellant had no more than a 20 percent permanent impairment of the left upper extremity.

By letter dated December 4, 1998, appellant requested a hearing, which was on held June 29, 1999. Appellant argued that Dr. Niri did not address loss of grip strength or refer to the A.M.A., *Guides*, in his report. He further noted that Dr. Niri indicated a repeat electromyogram was scheduled and the results of the study could affect the impairment rating.

By decision dated September 16, 1999, the hearing representative affirmed the Office's prior decision.

The Board finds that this case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act⁹ and its implementing regulation¹⁰ 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

⁶ See Table 16, page 57 of the A.M.A., *Guides*.

⁷ *Id.*

⁸ *Supra* note 6.

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404 (1999).

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, 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 regulations as the appropriate standard for evaluating schedule losses.

On appeal appellant alleges that she is entitled to a schedule award greater than the 20 percent impairment rating granted by the Office and that there is a conflict in the medical opinion evidence between Drs. Weiss and Niri.

The Office referred appellant for a second opinion to Dr. Niri who issued a report dated October 14, 1998. He indicated that he reviewed the records provided to him and performed a physical examination of appellant. Dr. Niri diagnosed appellant with ulnar neuropathy on the left side. He indicated that appellant's condition was related to her repetitive hand use at work. Dr. Niri determined that appellant had permanent impairment of the left upper extremity of 20 percent. Although he noted some findings upon physical examination, Dr. Niri neither provided range of motion findings nor did he explain how his findings were compatible with the A.M.A., *Guides*.

Additionally, the Board notes that appellant's treating physician, Dr. Strauss, in a report dated April 28, 1997, determined appellant had a 20 percent impairment of the left upper extremity based on the A.M.A., *Guides*, 4th edition.¹¹ He noted appellant had discomfort over the cubital tunnel consistent with ulnar neuropathy which he characterized as between mild and moderate severity. The A.M.A., *Guides*, provide a 10 percent impairment rating for mild severity and 30 percent impairment rating for moderate severity at both the wrist and elbow sites. The Board finds that the rating granted by Dr. Strauss for ulnar neuropathy is consistent with his characterization of appellant's impairment pursuant to the A.M.A., *Guides*.¹² However, the Board notes that the Office did not take into consideration Dr. Strauss' findings with regard to range of motion. Dr. Strauss specifically noted that range of motion revealed 120 degrees of abduction. In accordance with Figure 41, page 44 of the A.M.A., *Guides*, this corresponds to a three percent impairment rating. With regard to appellant's forward flexion, he noted this figure as 120 degrees. According to Figure 38, page 43 of the A.M.A., *Guides*, this would represent a four percent impairment rating. Dr. Strauss measured appellant's external rotation at 45 degrees. In accordance with Figure 44 at page 45 of the A.M.A., *Guides*, this corresponds to a 1 percent impairment. The A.M.A., *Guides*, provide that range of motion findings are to be combined with percentages for peripheral nerve system impairments.¹³ Thus, the Office erred in its determination regarding the extent of appellant's impairment due to loss of range of motion. The Board notes that these findings would appear to entitle appellant to an additional schedule award.

¹¹ See Table 16, page 57 of the *Guides*.

¹² *Id.*

¹³ See *id* at 46.

On appeal, appellant relies on the report of Dr. Weiss dated May 4, 1995. He determined that appellant sustained loss of grip strength in the left upper extremity¹⁴ of 30 percent; with maximum loss of function due to sensory deficits¹⁵ of 5 percent and impairment due to sensory deficit of the left upper extremity of 3 percent (5% X 60%)¹⁶ for a total impairment of the left upper extremity of 32 percent. Although appellant's physician, Dr. Weiss used the A.M.A., *Guides* to arrive at the 32 percent left upper extremity impairment rating he calculated this impairment by combining¹⁷ values from two tables, which are not combinable according to the Offices' procedure manual.¹⁸ The Offices' procedure manual addresses impairments calculated using tables with overlapping applications, leading to impairment percentages which are considered to overstate the actual degree of impairment. It lists impairment tables which are incompatible and makes clear that impairment ratings from Table 15, page 54, maximum percentage of upper extremity impairment from unilateral sensory or motor deficits, cannot be combined with ratings for grip and pinch strength, Table 32, page 64 to 65.¹⁹ This was also pointed out in the FECA Bulletin 95-17, issued March 23, 1995, which discusses alternatives in calculation of an impairment for schedule award purposes. However, Dr. Weiss did exactly that, he combined impairment values for maximum percentage of upper extremity impairment with impairment values for grip and pinch strength to reach the 32 percent impairment, which is a calculation not in accordance with the Offices' procedure manual. Consequently, this calculation is considered to overstate appellant's impairment and is, therefore, of diminished probative value.

In view of these findings the Office should refer this case to an Office medical adviser, along with the reports of Drs. Niri and Strauss, to determine if appellant is entitled to an additional schedule award. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision.

¹⁴ See Table 32, page 65.

¹⁵ See Table 15, page 54.

¹⁶ See Table 11a, page 48.

¹⁷ See page 322.

¹⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700, Exhibit 4: Use of the 4th ed. of the A.M.A., *Guides* (October 1995).

¹⁹ *Id.*

The September 16, 1999 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
October 23, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member