

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE O. CLARKE and U.S. SENATE,
Washington, DC

*Docket No. 01-542; Submitted on the Record;
Issued October 23, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has greater than 10 percent impairment to her right and left upper extremities.

On April 12, 1995 appellant, then a 52-year-old computer quorum specialist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she developed bilateral epicondylitis of both elbows and bilateral carpal tunnel syndrome as a result of her federal employment. On June 17, 1995 the Office of Workers' Compensation Programs accepted appellant's claim for bilateral epicondylitis and bilateral carpal tunnel syndrome. The Office authorized surgery, which was performed by Dr. Rida N. Azer, a Board-certified orthopedic surgeon, on April 11, 1996.

In a medical report dated March 19, 1997, Dr. Azer noted that appellant was progressing well. He stated that based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*.) appellant had a "permanent impairment of 30 percent of her right upper limb and 30 percent of her left upper limbs." Dr. Azer noted that appellant could perform her duties as a computer specialist, but that she would be slower and could not type for long periods of time. In a medical report dated August 13, 1997, he reiterated that appellant had a 30 percent impairment of both upper extremities. Dr. Azer noted:

"In response to the various specific questions, the patient has hand pain when she uses the hands repetitively. The pain is in the right and left wrist and interferes with movements of the wrist. There is only minimal sensory loss. There is no involvement of the thumb, index, long or ring fingers or small finger. This is not applicable. The date of maximum improvement is [March 19, 1997]. We had previously completed the form for "Quorum Computer Specialist." The range of motion today of the right wrist is 0 to 50 degrees in dorsiflexion and in palmar flexion 0 to 55 degrees, in radial deviation only 15 degrees on the right wrist and the left wrist is also the same. The patient's grip strength on the right is 25 pounds, on the left is 40 pounds. She is dominantly right handed. There is no

ankylosis. There is no wrist instability or causalgia and there is a small area of a hypertrophic scar on the right wrist of about ¼ of one inch of the volar aspect.”

The Office forwarded Dr. Azer’s report to the Office medical adviser and asked for a determination for schedule award purposes. By letter dated December 4, 1997, the Office advised appellant that when the Office medical adviser applied Dr. Azer’s findings to the A.M.A., *Guides*, he determined that appellant sustained a 10 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity. The Office asked appellant to have Dr. Azer or another physician recalculate the rating and submit a report.

In a medical report dated January 2, 1998, Dr. Azer reiterated that appellant had a 30 percent impairment of each upper extremity as indicated in his August 13, 1997 report. Based on this opinion, the Office found a conflict was created as to the nature and extent of appellant’s upper extremity impairments.

By letter dated February 24, 1998, the Office referred appellant to Dr. Vincent Guy Desiderio, a Board-certified orthopedic surgeon, for an impartial medical examination. In a medical opinion dated March 16, 1998, Dr. Desiderio concluded:

“[W]ith regard to a disability rating, based upon the A.M.A., *Guides* 4th edition, Table 16, [page 57] upper extremity impairment due to entrapment neuropathy, [appellant] has now what is now a mild entrapment of the median nerve at the wrist. She had had EMGs [electromyogram] prior to the surgery, which did show a positive carpal tunnel syndrome, however, EMG/Nerve Conduction Study performed in December 1997 was essentially normal. Based upon her residual symptoms, it is my opinion that she has a mild entrapment and, therefore, has a 10 percent permanent impairment of function of both the left and right upper extremity. She has no permanent disability with regard to her elbows.”

In a decision dated June 11, 1998, appellant was granted schedule awards for a 10 percent impairment of both the right and left upper extremities.

By letter dated February 18, 1999, appellant requested reconsideration of the June 11, 1998 decision. In support of this request, appellant submitted two new medical reports by Dr. Azer. In a medical report dated June 24, 1998, he stated:

“On a permanent basis, this patient should avoid any activities that involve repetitive movements of the hands, strenuous use of the hands and having her hands close to machinery. These limitations are permanent. Based upon the A.M.A., *Guides*, this patient has a partial permanent impairment of 35 percent of the right upper limb and 35 percent of the left upper limb.”

Dr. Azer reiterated these impairment ratings in a medical report dated January 13, 1999.

In a decision dated June 3, 1999, the Office reviewed appellant’s claim on the merits and determined that the evidence submitted in support of her reconsideration request was not sufficient to warrant modification of the February 2, 1998 decision. The Office specifically noted that Dr. Azer’s new reports did not indicate which edition of the A.M.A., *Guides* he used,

nor cite the specific tables or protocol. Accordingly, the weight of the medical evidence rested with the opinion of Dr. Desiderio.

By letter dated August 20, 1999, appellant filed an appeal with Board. However, appellant withdrew her appeal in order to request reconsideration on May 23, 2000. By decision dated July 28, 2000, the Board dismissed appellant's appeal.¹

In support of her request for reconsideration, appellant submitted additional medical reports from Dr. Azer. In medical reports dated June 3, September 9 and December 29, 1999, February 23 and August 2, 2000, Dr. Azer made comments on appellant's continued progress. In his April 5, 2000 report, Dr. Azer stated:

“As previously mentioned, the patient has a partial permanent impairment of 25 percent [sic] of the right upper limb and 35 percent of the left upper limb, as indicated in my report of January 13, 1999. The reason why that evaluation increases compared to that of [January 2, 1998] where I gave the patient 30 percent of the right upper limb and 30 percent of the left upper limb is that on the evaluation date, on [January 13, 1999], her condition had progressed.

“Today, the patient has a partial permanent impairment of 35 percent of the right upper limb and 35 percent of the left upper limb. It has not changed since [January 13, 1999]. This is based on the A.M.A., *Guides*.”

In a letter dated May 25, 2000, Dr. Azer noted that he used the 4th edition of the A.M.A., *Guides* in formulating his opinion.

By decision dated November 2, 2000, the Office reviewed appellant's case on the merits and denied modification, of its prior decisions.

The Board finds that appellant has not established greater than a 10 percent impairment to her left upper extremity and a 10 percent impairment to her right upper extremity for which she received schedule awards.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing 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. 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, 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 regulation, as the appropriate standard for evaluating schedule losses.

¹ Docket No. 00-77 (issued July 28, 2000).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

In the present case, Dr. Azer, appellant's treating orthopedic surgeon, initially rated appellant as sustaining a 30 percent impairment to her right upper limb and a 30 percent impairment of the left upper limb. Pursuant to Dr. Azer's most recent calculations, appellant sustained a 35 percent impairment to each upper limb. Although Dr. Azer indicated that in making his determinations, he applied the 4th edition of the A.M.A., *Guides*, his opinion of permanent impairment is of diminished probative value in that he failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the A.M.A., *Guides*.⁴ Dr. Azer's impairment estimate was in disagreement with Dr. Desiderio's estimate of 10 percent impairment as found by the Office medical adviser. Based on this conflict, the case was referred to Dr. Desiderio determined on examination that appellant had a 10 percent impairment to both her upper extremities due to a mild median nerve entrapment. He properly utilized the A.M.A., *Guides* (4th edition), Table 16, which is found on page 57 of the A.M.A., *Guides* to rate the impairment at 10 percent of each upper extremity. He did not provide any rating for appellant's carpal tunnel condition, as he noted recent diagnostic testing was essentially normal. As Dr. Desiderio was appointed as the impartial medical examiner, his report constitutes special weight. When a case is referred to an impartial medical examiner for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵ Accordingly, the Board finds that the report of Dr. Desiderio is entitled to special weight.

The November 2, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 23, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

⁵ *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).