

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES S. GURCIK and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

*Docket No. 01-1202; Submitted on the Record;
Issued August 13, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a seven percent impairment of his right hand for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On June 17, 1998 appellant, then a 58-year-old distribution clerk, filed a claim for carpal tunnel syndrome of the left and right wrist. On July 17, 1998 the Office accepted appellant's claim for aggravation of bilateral carpal tunnel syndrome. Appellant retired from federal service on February 28, 1999.

In a letter dated December 15, 1999, appellant's congressional office inquired about appellant's entitlement to a schedule award.

On December 22, 1999 the Office approved bilateral carpal tunnel syndrome surgery, bilateral electromyography and nerve conduction velocity tests and physical therapy to both wrists post surgery 3 times a week for 90 days.

In a medical report dated January 24, 2000, Dr. Craig H. Rosen, appellant's treating physician and a Board-certified orthopedist, stated that he had examined appellant and determined that he had a seven percent impairment of the right hand and a three percent impairment of the left hand. Dr. Rosen noted that appellant was right-hand dominant, and that JAMAR evaluation showed strength of 80 on the right and 90 on the left, that he had residual discomfort in his hands, although sensory abnormalities had resolved, and that he had weakness in his right hand. He determined that appellant had: "a permanent impairment due to decreased strength of three percent on the right hand. He has four percent [loss] for restriction in motion, which he has a mildly (sic) flexion and extension at the right wrist." Dr. Rosen added that appellant had a 3 percent disability on the right side and 3 percent disability on the left side, and that appellant had a 10 percent impairment in his right hand based on his carpal tunnel syndrome

release. He further noted “a three percent permanent impairment with regards to his left hand, which translates to three percent of the left upper extremity.”

In a report dated April 5, 2000, the Office medical adviser stated that he had reviewed Dr. Rosen’s report and determined that appellant had a seven percent impairment of the right hand and a zero percent impairment of the left hand. The Office medical adviser noted “JAMAR evaluation 80 equals 3 percent.”

In a decision dated April 18, 2000, the Office awarded appellant a seven percent impairment of the right hand.

In a report dated March 23, 2000 and received by the Office on April 24, 2000, Dr. Kenneth C. Peacock, an orthopedist, stated that he had examined appellant that day and determined that he had bilateral carpal tunnel syndrome. By the diagnosis method of determining impairment ratings, Dr. Peacock found that appellant had a 10 percent upper extremity impairment based on thumb sensory loss and loss of strength with grip testing.

On October 23, 2000 appellant, through counsel, requested reconsideration. Appellant submitted an August 31, 2000 report from Dr. David Weiss, an osteopath, who set forth findings from examination pertaining to loss of range of motion and other testing. Dr. Weiss concluded that appellant, under Table 16 at page 57 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* had a 20 percent impairment for entrapment neuropathy of the right upper extremity and 10 percent impairment for entrapment neuropathy of the left upper extremity.

By decision dated December 21, 2000, the Office denied merit review.

The Board finds that the Office improperly denied merit review of appellant’s schedule award claim.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹

The Board notes that Drs. Peacock and Weiss’ reports, submitted after the Office’s April 18, 2000 decision, constitute new and relevant evidence on the issue of the nature and extent of permanent impairment to appellant’s upper extremities and thus are subject to the Office’s merit review.

The Federal (FECA) Procedure Manual addresses the methodology of assessing requests for amended or additional schedule awards.² In the present case, the Office on December 21, 2000 denied merit review of appellant’s schedule award claim, but the Office did not review the

¹ 20 C.F.R. § 10.606(b)(2).

² The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (1995).

new medical evidence as either a request for an amended or additional schedule award. The Office abused its discretion by denying merit review in this case.

The Board further notes that the A.M.A., *Guides* do not encourage the use of grip strength as an impairment rating: “Because strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* for the most part is based on anatomic impairment, the A.M.A., *Guides* does not assign a large role to such measurements.”³ Only in rare cases should grip strength be used, and only when it represents an impairing factor that has not been otherwise considered adequately. The A.M.A., *Guides* states that measurements are repeated three times and the results averaged. Neither Dr. Rosen nor the Office medical adviser fully addressed the issue of whether grip strength was the appropriate measurement of appellant’s bilateral carpal tunnel syndrome nor indicated whether repeated tests were performed.

On remand, the Office shall conduct a merit review. After such further development of the medical evidence as necessary, the Office should issue a *de novo* decision.

The December 21 and April 18, 2000 decisions of the Office of Workers’ Compensation Programs are set aside and the case remanded to the Office for a determination of appellant’s impairment rating based on his bilateral carpal tunnel syndrome consistent with this decision.

Dated, Washington, DC
August 13, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

³ A.M.A., *Guides* at 64 (4th ed. 1993).