

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. HESSER and U.S. POSTAL SERVICE,
BEATRICE POST OFFICE, Beatrice, NE

*Docket No. 03-1359; Submitted on the Record;
Issued December 31, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained more than a two percent permanent impairment of the right upper extremity and a three percent permanent impairment of the left upper extremity, for which he received a schedule award.

The Office of Workers' Compensation Programs accepted that appellant, a 45-year-old distribution and window clerk, sustained bilateral carpal tunnel syndrome requiring bilateral surgical release. Dr. Douglas P. Tewes, an attending Board-certified orthopedic surgeon, performed a right carpal tunnel release on May 15, 1997 and a left carpal tunnel release on May 22, 1997. Dr. Tewes found that appellant reached maximum medical improvement as of August 7, 1997 and released appellant to full duty as of that date. Dr. Tewes noted that appellant was "asymptomatic, in terms of the numbness and tingling."

On September 17, 1998 the Office referred appellant, the medical record and statement of accepted facts to Dr. David Diamant, a Board-certified physiatrist, to obtain an opinion regarding the extent of any permanent impairment. Dr. Diamant submitted an October 8, 1998 report, finding normal grip strength at Jamar position 2 of 132 pounds on the right and 110 pounds on the left, 70 degrees flexion and 50 degrees extension on the right and 50 degrees flexion and 55 degrees extension on the left. Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (hereinafter, the A.M.A., *Guides*), at Figures 26 and 29,¹ Dr. Diamant determined that appellant had a two percent impairment of the right upper extremity due to loss of extension and a four percent impairment of the left upper extremity due to loss of flexion.

¹ Figure 26, page 36 is entitled "Upper Extremity Impairments Due to Lack of Flexion and Extension of Wrist Joint." According to Figure 26, 50 degrees of wrist extension equaled a two percent impairment of the upper extremity and 70 degrees flexion did not constitute an impairment. Figure 29, page 38 is entitled "Upper Extremity Impairments Due to Abnormal Radial and Ulnar Deviations of Wrist."

The Office then referred Dr. Diamant's report to an Office medical adviser for calculation of a schedule award. In an October 26, 1998 report, an Office medical adviser concurred with Dr. Diamant's finding of a two percent impairment of the right upper extremity. The Office medical adviser noted, however, that, according to Figure 26, page 36 of the A.M.A., *Guides*, 50 degrees of wrist flexion equaled a 2 percent impairment and extension of 55 degrees equaled a 1 percent impairment, for a total of a 3 percent impairment of the left upper extremity, as opposed to the 4 percent found by Dr. Diamant.

On December 1, 1998 the Office requested that appellant complete a Form CA-7 claim for compensation and schedule award claim. Appellant did not do so until April 27, 2001. He also submitted an April 3, 2001 physical therapy note reporting grip strength at Jamar position 2 of 70 pounds on the right and 50 pounds on the left. In an April 25, 2001 form report, Dr. Tewes found that these results, coupled with bilateral hand pain and numbness while doing "repetitious work,"² equaled a 10 percent impairment of each upper extremity due to residual carpal tunnel syndrome.

By decision dated May 23, 2001, the Office granted appellant a schedule award for a two percent permanent impairment of the right upper extremity and a three percent permanent impairment of the left upper extremity. The period of the award ran from August 7 to November 24, 1997. The award was based on Dr. Diamant's October 8, 1998 report as reviewed by the Office medical adviser on October 26, 1998. Both physicians used the fourth edition of the A.M.A., *Guides*.

Following issuance of the schedule award, appellant submitted requests for reconsideration on July 10 and October 15, 2001 and November 18, 2002.³ The Office denied reconsideration by merit decisions dated September 7 and November 20, 2001 and January 30, 2003. Each of appellant's requests for reconsideration asserted that the Office erred by not relying on Table 16 of the fourth edition of the A.M.A., *Guides* in formulating the May 23, 2001 schedule award. Appellant's October 15, 2001 and November 18, 2002 requests for reconsideration also alleged that the Office should have used the fourth edition of the A.M.A., *Guides* in adjudicating his requests for reconsideration, as opposed to the fifth edition currently in effect. The Office's decisions denying modification explained that, as appellant submitted new evidence requiring the issuance of a *de novo* decision, the schedule award should be recalculated using the current, fifth edition of the A.M.A., *Guides*. The Office also found that the May 23, 2001 schedule award was correctly calculated and based on appropriate medical evidence.

² Appellant did not claim that work factors on and after his return to full duty on August 7, 1997 caused or contributed to his accepted bilateral carpal tunnel syndrome. Also, Dr. Tewes did not opine specifically that work activities at any time after March 11, 1997 caused or contributed to the accepted bilateral carpal tunnel syndrome.

³ In his November 18, 2002 request for reconsideration, appellant asserted that the Office should rely on the fourth edition of the A.M.A., *Guides* as the schedule award was calculated on October 26, 1998, prior to the Office's adoption of the fifth edition of the A.M.A., *Guides* on February 1, 2001. Appellant cited to *Jack Buscemi* (Docket No. 93-1393, issued August 9, 1994) in support of this assertion. Alternatively, appellant alleged a conflict of opinion between Dr. Tewes and the Office medical adviser.

In support of his requests for reconsideration, appellant submitted additional medical evidence from Dr. Tewes. In April 24 and June 19, 2001 letters, he stated that, according to the fourth edition of the A.M.A., *Guides*, Table 16, page 57, appellant's "mild residual carpal tunnel symptoms" equaled a 10 percent impairment rating of each upper extremity. Dr. Tewes opined that appellant's symptoms were similar to those described "under the paragraph regarding entrapment neuropathy on page 56..."⁴ In an October 9, 2001 report and accompanying letter, Dr. Tewes reiterated that the mild, bilateral, residual carpal tunnel syndrome equaled a 10 percent impairment of each upper extremity according to Table 16 of the fourth edition of the A.M.A., *Guides*.⁵ Dr. Tewes noted that appellant's grip strength, range of motion and two-point discrimination remained normal, but that he had "occasional intermittent numbness and tingling in his fingers" with unspecified activities.

The Office forwarded these new reports to an Office medical adviser, to determine if the medical evidence supported an increased schedule award. In August 27 and November 16, 2001 and December 28, 2002 reports, an Office medical adviser stated that Dr. Tewes incorrectly relied on the fourth edition of the A.M.A., *Guides* and did not provide objective findings regarding grip strength, range of motion and neurologic deficit that would justify the 10 percent impairment rating or explain appellant's subjective symptoms even under Table 16 of the fourth edition of the A.M.A., *Guides*. The Office medical adviser explained that the fifth edition of the A.M.A., *Guides* did not contain an equivalent to Table 16 of the fourth edition, as Table 16 was predicated only on subjective symptoms, thereby engendering inconsistent and unreliable ratings.

The Board finds that appellant has not established that he is entitled to a greater schedule award.

The schedule award provisions of the Federal Employees' Compensation Act⁶ and its implementing regulation⁷ 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 how 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 and guidelines so that there are uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* as the appropriate standard for evaluating scheduled losses. As of February 21, 2001, the Office uses the fifth edition of the A.M.A., *Guides* to calculate new claims for a schedule award, or to

⁴ Table 16 of the fourth edition of the A.M.A., *Guides*, entitled "Upper Extremity Impairment Due to Entrapment Neuropathy," provides that a mild degree of entrapment of the median nerve at the wrist equaled a 10 percent impairment of the upper extremity."

⁵ The cited example describes a 35-year-old forklift mechanic with a 2-year history of median nerve compression followed by surgical decompression, with a 60 percent loss of strength and otherwise normal findings. The fourth edition of the A.M.A., *Guides* states that, according to Table 16, page 57, the "upper extremity impairment due to a mild residual carpal tunnel syndrome is 10 percent."

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (2003).

recalculate prior schedule awards pursuant to an appeal, request for reconsideration or decision of an Office hearing representative.

The standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.⁸ Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.⁹

The medical examination on which the May 23, 2001 schedule award was based occurred on October 8, 1998, when the fourth edition of the A.M.A., *Guides* was in effect. After February 1, 2001, the fifth edition of the A.M.A. *Guides* went into effect, and any new schedule award should have been calculated according to the fifth edition.¹⁰ However, in issuing the May 23, 2001 schedule award, the Office relied on Dr. Diamant's evaluation as reviewed by the Office medical adviser, which was made according to the fourth edition of the A.M.A., *Guides*. Therefore, the Board finds that the Office incorrectly relied on the fourth edition of the A.M.A., *Guides* in issuing the May 23, 2001 schedule award.

The Board further finds that the Office's error in relying on the fourth edition of the A.M.A. *Guides* is nondispositive, as the Office subsequently issued three merit reconsiderations based on the fifth edition of the A.M.A. *Guides*.

Appellant asserts, however, that, as the Office relied on the fourth edition of the A.M.A., *Guides* in performing the schedule award calculation on May 23, 2001, the Office could not then use the fifth edition of the A.M.A., *Guides* in adjudicating his claims for reconsideration, which were all filed after February 1, 2001. Appellant also contends that the Office should have relied on Table 16 of the fourth edition of the A.M.A., *Guides* in adjudicating his claims for reconsideration.¹¹ These arguments, however, are without merit, as the Office

⁸ See *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁹ A.M.A., *Guides*, Chapter 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

¹⁰ As of May 23, 2001, the Office's procedures provided that effective February 1, 2001, all claims examiners and hearing representative should "begin using the fifth edition of the A.M.A., *Guides*." FECA bulletin No. 01-05 (issued January 29, 2001). While these procedures noted that "[a]wards calculated according to any previous edition should be evaluated according to the edition originally used," this did not apply to the calculation of new schedule awards on and after February 1, 2001, as in appellant's case. As of August 30, 2002, the Office revised its procedures to reflect that all schedule awards determined on and after February 1, 2001, the effective date of the fifth edition of the A.M.A., *Guides*, "regardless of the date of the medical examination, should be based on the fifth edition." See FECA Transmittal 02-12 (issued August 30, 2002).

¹¹ Dr. Diamant predicated his October 8, 1998 calculations solely on loss of range of motion under Figure 26 of the fourth edition of the A.M.A., *Guides*, not on appellant's subjective symptoms. Also, as of August 7, 1997, Dr. Tewes had found appellant "asymptomatic in terms of numbness and tingling," the types of symptoms on which a Table 16 rating would be based. The Office medical adviser also relied on loss of range of motion under Figure 26 in calculating the schedule award, not on any subjective symptoms.

erred by relying on the fourth edition in calculating the schedule award, and the Office's procedures state that schedule award recalculations pursuant to requests for reconsideration filed on and after February 1, 2001 should be processed according to the fifth edition of the A.M.A., *Guides*.¹² Therefore, the Board finds that the Office properly relied on the fifth edition of the A.M.A., *Guides* in adjudicating appellant's July 10 and October 15, 2001 and November 18, 2002 requests for reconsideration.

The remaining issue is whether Dr. Tewes' April 24, June 19 and October 9, 2001 reports submitted on reconsideration establish that appellant sustained more than a two percent permanent impairment of the right upper extremity and a three percent permanent impairment of the left upper extremity. In a carpal tunnel schedule award case, there generally will be no ratings based on loss of motion or grip strength.¹³ Under the fifth edition of the A.M.A., *Guides*, schedule awards for carpal tunnel syndrome are predicated on motor and sensory impairments only.¹⁴ Dr. Tewes' April 24 and June 19, 2001 notes and letters, do not mention objective evidence of motor or sensory impairments. Further, Dr. Tewes stated that in his October 9, 2001 report, that appellant had normal grip strength and two-point discrimination, negating the presence of a motor or sensory impairment. Therefore, Dr. Tewes did not find objective impairments, on which to base a schedule award under the rating schemes of the fifth edition of the A.M.A., *Guides*.

Dr. Tewes' reports were reviewed by an Office medical adviser, who opined in August 27 and November 16, 2001 and December 28, 2002 reports, that Dr. Tewes incorrectly relied on the fourth edition of the A.M.A., *Guides* and did not provide objective findings regarding grip strength, range of motion and neurologic deficit that would justify the 10 percent impairment rating or explain appellant's subjective symptoms. As the Office medical adviser provided the only evaluations on reconsideration fully conforming to the A.M.A., *Guides*, such an evaluation constitutes the weight of the medical evidence.¹⁵

Appellant has submitted insufficient evidence to establish entitlement to greater schedule awards.

¹² See FECA Bulletin 01-05, *supra* at note 9.

¹³ See A.M.A., *Guides*, 5th ed., pp. 494-95.

¹⁴ *Robert V. Disalvatore*, 54 ECAB ____ (Docket No. 02-2256, issued January 17, 2003).

¹⁵ *Hildred I. Lloyd*, 42 ECAB 944 (1991); *Bobby L. Jackson*, 40 ECAB 593 (1989). As applied to this case there is no conflict of medical opinion between Dr. Tewes, for appellant and the Office medical adviser, for the government, as Dr. Tewes' reports were predicated on an incorrect interpretation and application of the A.M.A., *Guides*.

The decision of the Office of Workers' Compensation Programs dated January 30, 2003 is hereby affirmed.

Dated, Washington, DC
December 31, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member