

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA GRAHAM and U.S. POSTAL SERVICE,
BEAUMONT REMOTE ENCODING CENTER, Beaumont, TX

*Docket No. 03-841; Submitted on the Record;
Issued October 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained greater than a one percent permanent impairment of the right upper extremity and a seven percent impairment of the left upper extremity, for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's October 30, 2002 request for an oral hearing on the grounds that it was untimely filed.

The Office accepted that on June 2, 1999 appellant, then a 45-year-old data conversion technician, sustained bilateral carpal tunnel syndrome and a right trigger thumb. Appellant underwent right carpal tunnel decompression on August 5, 1999 and left carpal tunnel decompression on September 2, 1999, performed by Dr. Nir Binur, an attending Board-certified plastic surgeon specializing in hand surgery. She returned to work in a limited-duty capacity on October 4, 1999 with restrictions against typing, and on November 11, 1999 filed a claim for a schedule award.

By decision dated January 3, 2000, the Office granted appellant a schedule award for a one percent permanent impairment of the right upper extremity and a seven percent permanent

impairment of the left upper extremity. The period of the award ran from November 10, 1999 to May 3, 2000.¹

On December 20, 2001 Dr. Carl J. Beaudry, an attending Board-certified orthopedic surgeon, performed a repeat left carpal tunnel decompression, as approved by the Office. In a March 11, 2002 report, Dr. Martin A. Haig, a Board-certified orthopedic surgeon and Office referral physician, found a normal range of motion in both hands and wrists and noted appellant's symptoms of slight weakness in the nondominant left hand. Dr. Haig stated that there were no objective findings of ratable impairment according to the A.M.A., *Guides*. Dr. Haig noted that, if the "impairment is not to be judged on A.M.A., *Guidelines*," a successful carpal tunnel release equaled "a five percent impairment to the left wrist."² In a May 17, 2002 evaluation, Dr. Beaudry rated appellant's impairment under the fifth edition of the A.M.A., *Guides* and provided the following findings regarding the left upper extremity: 40 degrees flexion equaling a 3 percent impairment of the upper extremity; 30 degrees extension equaling a 5 percent impairment of the upper extremity; 15 degrees radial deviation equaling a 1 percent impairment of the upper extremity; 45 degrees ulnar deviation, indicating no impairment for this element. Dr. Beaudry totaled these percentages to equal a nine percent impairment of the left upper extremity. He indicated that there were no impairments due to sensory or motor deficits. On May 31, 2002 appellant filed a claim for an additional schedule award. In a September 10, 2002 report, an Office medical adviser noted reviewing Dr. Haig's March 11, 2002 report and concurred that there was no impairment of either upper extremity. The medical adviser did not refer to Dr. Beaudry's May 10, 2002 report.

By decision dated September 23, 2002, the Office found that appellant did not have a ratable impairment of either upper extremity, finding that the weight of the medical evidence rested with the opinion of the Office medical adviser. The Office noted that appellant remained entitled to medical benefits. Appellant disagreed with this decision and in an October 21, 2002 letter, postmarked October 30, 2002, requested an oral hearing before a representative of the Office's Branch of Hearings and Review. She submitted an October 17, 2002 report from Dr. Beaudry who found her condition unchanged.

By decision dated January 17, 2003, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed. The Office found that appellant's request, postmarked October 30, 2002, was not made within 30 days of the September 23, 2002 decision.

¹ In a November 11, 1999 impairment evaluation, Dr. Binur noted radial deviation of 15 degrees in the right wrist, Figures 26 and 29, pages 36 and 38 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*"), equaled a one percent impairment of the right upper extremity. For the left wrist, he noted radial deviation of 15 degrees equaling a 1 percent impairment, ulnar deviation of 20 degrees equaling a 2 percent impairment, flexion of 50 degrees equaling a 2 percent impairment, extension of 50 degrees equaling a 2 percent impairment, totaling a 7 percent impairment of the left upper extremity. Dr. Binur opined that appellant had reached maximum medical improvement. In a December 19, 1999 report, an Office medical adviser concurred with Dr. Binur's November 11, 1999 evaluation, finding that appellant had a seven percent permanent impairment of the left upper extremity and a one percent impairment of the right upper extremity due to loss of motion.

² In an April 7, 2002 letter, appellant asserted that Dr. Haig's schedule award evaluation was inaccurate, as "[p]roper instruments were not used to determine impairment...." Appellant requested that the Office refer her for a second schedule award evaluation.

The Office conducted a limited review of appellant's request and further denied it on the grounds that the issues involved could be advanced equally well through the submission of new, relevant evidence accompanying a valid request for reconsideration. Appellant filed her appeal with the Board on February 11, 2003.³

The Board initially finds that appellant is not entitled to more than a one percent impairment of the right upper extremity, for which she received a schedule award. The Board, however, finds that this case is not in posture for a decision regarding the left upper extremity.

Under section 8107 of the Federal Employees' Compensation Act⁴ and section 10.404 of the implementing federal regulations,⁵ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*⁶ has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁷

Regarding carpal tunnel syndrome, the A.M.A., *Guides* provide that:

“If, after an *optimal recovery time* following surgical decompression, an individual continues to complain of pain, paresthesias, and/or difficulties in performing certain activities, three possible scenarios can be present:

(1) Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual CTSE is rated according to the sensory and/or motor deficits as described earlier.

(2) Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTSS is still present, and an impairment rating not to exceed 5 percent of the upper extremity may be justified.

³ Accompanying her request for appeal, appellant submitted new evidence, which she characterized as a “third opinion” which she obtained at her own expense. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Thus, the Board has not reviewed or considered this report, which may be submitted to the Office accompanying a valid request for reconsideration.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

⁷ See *Joseph Lawrence, Jr.*, *supra* note 6; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

(3) Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength, and nerve conduction studies: there is no objective basis for an impairment rating.”⁸

In this case, the Office determined that, as of November 11, 1999, following bilateral median nerve decompressions, appellant sustained a one percent impairment of the right upper extremity and a seven percent impairment of the left upper extremity. On December 20, 2001 appellant underwent repeat left median nerve decompression, approved by the Office, and on May 31, 2002 filed a claim for an additional schedule award.

Regarding the right upper extremity, neither Dr. Haig nor Dr. Beaudry reported any findings that would entitle appellant to an increased impairment of the right upper extremity. The Board therefore finds that, as there is no medical evidence of record demonstrating that appellant’s impairment on the right has increased, she is not entitled to an additional schedule award for the right.

In a March 11, 2002 report, Dr. Haig, who performed a second-opinion examination for the Office, did not provide specific measurements regarding range of motion on the left, but noted that it was normal. He stated that, according to the A.M.A., *Guides*, there was no permanent impairment of either upper extremity, but that, based on an unspecified rating scale, a successful carpal tunnel release equaled a five percent impairment of the left wrist. Dr. Beaudry provided a May 17, 2002 impairment evaluation based on the fifth edition of the A.M.A., *Guides*. He provided specific measurements of range of motion for the left upper extremity, including flexion, extension, radial and ulnar deviation and totaled these deficits to equal a nine percent impairment due to loss of range of motion. To determine the percentage of impairment, the Office referred Dr. Haig’s report to an Office medical adviser, who opined in a September 10, 2002 report, that the medical evidence did not indicate any permanent impairment of either upper extremity. The Office found in its September 23, 2002 decision, that the Office medical adviser’s report was sufficient to establish that appellant had no ratable impairment of either upper extremity.

Regarding the left upper extremity, however, the A.M.A., *Guides* specifically states that an optimal recovery time should be reached following surgical decompression before an impairment evaluation is to be made.⁹ In this case, appellant underwent repeat left median nerve decompression on December 20, 2001 yet neither Dr. Haig in his March 11, 2002 report nor Dr. Beaudry in his May 17, 2002 report rendered an opinion as to whether appellant had reached maximum medical improvement. The Board therefore finds that the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to determine if maximum medical improvement has been reached and, if so, to determine her impairment utilizing section 16.5d of the fifth edition of the A.M.A., *Guides*.

⁸ A.M.A., *Guides*, *supra* note 6 at 495.

⁹ *Id.*; see *Robert V. Desalvatore*, 54 ECAB ____ (Docket No. 02-2256, issued January 17, 2003); *Silvester DeLuca*, 53 ECAB ____ (Docket No. 01-1904, issued April 12, 2002).

Following this and other such development the Office deems necessary, the Office shall issue an appropriate decision in the case.

As this case must be remanded to the Office, the issue of whether the Office properly denied appellant's October 30, 2002 request for an oral hearing is moot.

The decision of the Office of Workers' Compensation Programs dated September 23, 2002 is hereby affirmed regarding the right upper extremity and is set aside and the case remanded for further development consistent with this decision regarding the left upper extremity.

Dated, Washington, DC
October 8, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member