

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FELICE FERRETTI, JR. and U.S. POSTAL SERVICE,
BULK MAIL FACILITY, Jersey City, NJ

*Docket No. 03-873; Submitted on the Record;
Issued September 23, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 5 percent permanent impairment of the left upper extremity; and (2) whether the February 27, 2002 decision of the Office of Workers' Compensation Programs was properly issued.

On June 1, 2000 appellant, then a 57-year-old mailhandler, filed an occupational disease claim alleging that beginning on January 1, 1990 he developed bilateral carpal tunnel syndrome and epicondylitis, low back syndrome, bilateral shoulder conditions that included a right rotator cuff tear, and bilateral foot conditions caused by his job. The Office accepted appellant's claim for bilateral carpal tunnel syndrome, right foot neuroma, a left ruptured Achilles tendon and lumbago. He underwent a right carpal tunnel release in 1991 and a left carpal tunnel release in 1999.

In a report dated February 5, 2001, Dr. David Weiss, appellant's attending orthopedist, provided findings on examination and stated that, according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides*),¹ appellant had a 44 percent permanent impairment of the right upper extremity, a 13 percent impairment of the left lower extremity, and a 3 percent impairment of the right lower extremity.

On April 30, 2001, the Office's district medical adviser reviewed Dr. Weiss's report and indicated that appellant had a 20 percent permanent impairment of the right upper extremity due to loss of strength according to Table 16-34 at page 509 of the fifth edition of the A.M.A., *Guides*, a 3 percent permanent impairment of the left lower extremity based on atrophy of the left calf, and no permanent impairment of the right foot.

¹ Dr. Weiss indicated in his report that he based his evaluation on the fourth edition of the A.M.A., *Guides*. However, it is clear from his citations to the A.M.A., *Guides* that he used the fifth edition.

By decision dated June 18, 2001, the Office of Workers' Compensation Programs granted appellant a schedule award of 71.04 weeks for the period January 10, 2001 to May 22, 2002 based on a 20 percent permanent impairment of the right upper extremity and a 3 percent permanent impairment of the left lower extremity.

By letter dated June 26, 2001, appellant, through his representative, requested an oral hearing.

By decision dated October 23, 2001, an Office hearing representative vacated the Office's June 18, 2001 decision and remanded the case for further development and referral to a new second opinion physician because the reports of Dr. Weiss and the Office medical adviser were not based on correct application of the A.M.A., *Guides*.

In a report dated January 3, 2002, Dr. R. Barry Lurate, a specialist in orthopedic and sports medicine and an Office referral physician, provided findings on examination and stated:

“[Appellant] is completely non-tender over the Morton's neuroma of the right foot, completely non-tender over the area of Achilles tendonosis...Neither foot or ankle demonstrate motion deficits and...his motor strength testing was highly inconsistent and thus, no valid conclusions could be drawn...[Appellant] has full range of motion of both wrists and all digits of the hand. By Dr. Weiss's report he had scored poorly on his hand strength measurements. However, there was no consistency of effort validation documented. Likewise, I am unable to test [appellant] appropriately for consistency of effort and manual strength testing demonstrates marked inconsistencies. Furthermore, he has absolutely no evidence of any thenar or hyperthenar atrophy on today's exam[ination]... [Appellant] has subjective tenderness to palpation of the wrist, which would seem highly inappropriate this long after his surgery....On the other hand, he does seem to have a positive Phalen's test on the left and some residual abnormalities on his follow-up nerve conduction studies.”

* * *

“His carpal tunnel symptoms have...been accepted as a claim and there does appear to be valid, objective studies to support residual complaints.

“CONCLUSION: [O]ne could rate [appellant's] residual carpal tunnel symptoms of the left hand at a 5 [percent] impairment rating based on page 495 of the A.M.A., *Guides*...[fifth edition]. This rating could perhaps be adjusted upwards if in fact he could have more in depth strength testing done with consistency of effort validation through a more thorough functional capacity evaluation.”

In a memorandum dated January 31, 2002, the Office's district medical adviser stated that appellant had a five percent impairment of the left arm based on a positive Phalen's test and changes shown in appellant's EMG (electromyogram) and NCS (nerve conduction study) according to Dr. Lurate's report.

By decision dated February 27, 2002, the Office granted appellant a schedule award for 15.6 weeks for the period May 23 to September 9, 2002 based on a five percent permanent impairment of the left upper extremity.²

As noted above, by decision dated June 18, 2001, the Office granted appellant a schedule award based on a 20 percent permanent impairment of the right upper extremity and a 3 percent permanent impairment of the left lower extremity. However, an October 23, 2001 decision by an Office hearing representative vacated the June 18, 2001 decision. By decision dated February 27, 2002, the Office granted appellant a schedule award based on a five percent permanent impairment of the left upper extremity. As there is no final Office decision regarding a schedule award for the right upper and left lower extremities, the Board has no jurisdiction to consider these issues.³

The Board finds that appellant has no more than a 5 percent permanent impairment of the left upper extremity.

The schedule award provision of the Act⁴ and its implementing regulation⁵ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In this case, Dr. Lurate, a specialist in orthopedic and sports medicine and an Office referral physician, provided findings on examination in a report dated January 3, 2002 and correctly determined that appellant had a five percent permanent impairment of the left hand due to residuals of his employment-related carpal tunnel syndrome based on page 495 of the fifth edition of the A.M.A., *Guides*. This section provides that after an optimal recovery time following surgery for carpal tunnel release, an impairment rating not to exceed five percent of the upper extremity may be justified where the individual has normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles.

On appeal appellant asserts that there was an unresolved conflict in the medical opinion evidence between Dr. Weiss and the Office district medical adviser or between Dr. Weiss and

² The record contains additional evidence which was not before the Office at the time it issued its February 27, 2002 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

³ 20 C.F.R. § 501.2.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

Dr. Lurate, necessitating resolution of the conflict by referral to an impartial medical specialist.⁶ However, as correctly determined by the Office hearing representative in his October 23, 2001 decision, Dr. Weiss did not base his evaluation of appellant's permanent impairment on correct application of the A.M.A., *Guides*. Therefore, neither report was sufficient to evaluate the degree and extent of appellant's permanent impairment for purposes of a schedule award determination. As Dr. Weiss's report was not sufficient to determine appellant's schedule award, it is not of equal weight to Dr. Lurate's report. For these reasons, there is no conflict between Dr. Weiss and the Office medical adviser or between Dr. Weiss and Dr. Lurate. The Board has held that a conflict exists in the medical evidence between a claimant's physician and the government's physician only when there are opposing medical reports of virtually equal weight and rationale.⁷

Appellant also asserts on appeal that the Office's February 27, 2002 decision was not properly issued and he was prevented from obtaining assistance in filing a hearing request because the Office did not provide his attorney with a copy of the February 27, 2002 decision. However, the record indicates that a copy of the February 27, 2002 decision was mailed to the correct address of record for appellant's attorney. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁸ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁹ The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, raises the presumption that the original was received by the addressee.¹⁰ In this case, the Office's February 27, 2002 decision reflects that a copy of that decision was mailed to the correct address of appellant's attorney of record. The record reflects that other documents pertaining to appellant's case, including the Office's October 23, 2001 decision, were received by appellant's attorney at the address shown on the Office's February 27, 2002 decision. Appellant submitted no evidence to overcome the presumption that a copy of the Office's February 27, 2002 decision, sent to the address of record provided by appellant's attorney, was received by the attorney.

⁶ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. 8123(a).

⁷ See *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁸ *George F. Gidicsin*, 36 ECAB 175, 178 (1984).

⁹ *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

¹⁰ *Larry L. Hill*, 42 ECAB 596, 600 (1991).

The decision of the Office of Workers' Compensation Programs dated February 27, 2002 is affirmed.

Dated, Washington, DC
September 23, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member