United States Department of Labor
Employees' Compensation Appeals Board

PAMELA BAKER, Appellant	)	
	)	**Docket No. 04-876**
and	)	**Issued: July 19, 2004**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, Employer	)	

Appearances:
Thomas R. Uliase, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 17, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 14, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than a 10 percent permanent impairment of the right upper extremity and a 9 percent permanent impairment of the left upper extremity for which she has received a schedule award.

FACTUAL HISTORY

On May 4, 1998 appellant, then a 29-year-old data transcriber, filed an occupational disease claim alleging that she developed acute tendinitis in both hands due to excessive keying at work. Appellant became aware of her condition on March 6, 1998 and stopped work at that time. The Office accepted bilateral carpal tunnel syndrome, right wrist tenosynovitis and authorized right carpal tunnel release.

Appellant submitted several reports from Dr. Joseph T. Barmakian, a Board-certified orthopedist, from August 20, 1998 to June 24, 1999, who diagnosed de Quervain's tendinitis in the right wrist and left ring swan-neck deformity. He noted treating appellant's condition conservatively without success and on November 25, 1998 he performed a release of de Quervain's tendinitis of the right wrist. On February 4, 1999 appellant reached maximum medical improvement and Dr. Barmakian returned her to work performing modified duties with no keying and no lifting over 10 pounds.[1]

On September 23, 1999 appellant filed a claim for a schedule award. Appellant submitted a report from Dr. Barmakian dated November 4, 1999 in which he determined that based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[2] (A.M.A., *Guides*) appellant sustained a five percent impairment of the right upper extremity. Dr. Barmakian's report and the case record were referred to the Office medical adviser. In a report dated December 3, 1999, the Office medical adviser indicated that the date of maximum medical improvement was November 4, 1999. He concurred with Dr. Barmakian's determination that appellant sustained a five percent permanent impairment of the right upper extremity.

In a decision dated December 6, 1999, the Office granted appellant a schedule award for a five percent permanent impairment of the right upper extremity. The period of the schedule award was from November 4, 1999 to February 22, 2000.[3]

On September 11, 2002 appellant filed a second claim for a schedule award. Appellant submitted a report from Dr. David Weiss, an osteopath dated May 13, 2002. Dr. Weiss determined in accordance with the A.M.A., *Guides* that appellant sustained a 21 percent permanent impairment of the right upper extremity and a 12 percent permanent impairment of the left upper extremity.

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[1] On July 14, 1999 appellant was offered a position as a part-time flexible mail processor subject to the restrictions set forth by Dr. Barmakian and returned to work on August 4, 1999. On August 10, 1999 appellant stopped work and filed a Form CA-2a, notice of recurrence of disability. Appellant indicated that on August 5, 1999 she experienced pain in her wrists and arms which was causally related to her accepted work-related condition. It does not appear from the record that the Office issued a decision with regard to the recurrence of disability. Thereafter, on August 10, 1999 appellant was offered a position as a modified office clerk and began work on August 16, 1999.

[2] A.M.A., *Guides* (5th ed. 2001).

[3] On April 4, 2000 appellant filed a CA-2a notice of recurrence of disability. Appellant indicated that she experienced pain in her wrist and arms on March 29, 2000. Appellant stopped work on March 30, 2000 and returned on April 4, 2000. In a decision dated July 3, 2000, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence of record did not establish that appellant sustained a change in the nature or extent of her light-duty position. In a letter dated August 22, 2000, appellant requested reconsideration of the Office decision. In a decision dated November 16, 2000, the Office vacated the July 3, 2000 decision on the grounds that appellant was assigned duties from August 16, 1999 to March 29, 2000 which were beyond the medical restrictions established by appellant's treating physician. On May 17, 2001 appellant was offered a position as a modified office clerk subject to the restrictions set forth by Dr. Barmakian. Appellant accepted this position on May 19, 2001 and returned to work.

Dr. Weiss' report and the case record were referred to the Office medical adviser who, in a report dated October 26, 2002, determined that, in accordance with the A.M.A., *Guides,* appellant sustained a 10 percent permanent impairment of the right upper extremity and a 9 percent permanent impairment of the left upper extremity.[4]

In a decision dated November 19, 2003, the Office granted appellant a schedule award for a 19 percent permanent impairment of both upper extremities for the period May 13, 2002 to May 14, 2003. The Office did not indicate the percentage impairment for each extremity. It was noted that appellant was previously awarded a five percent impairment on December 10, 1999 for the period November 4, 1999 to February 22, 2000 and therefore she was only entitled to a 14 percent schedule award.

Appellant requested a hearing before an Office hearing representative. The hearing was held on July 29, 2003. In a decision dated October 14, 2003, the hearing representative affirmed the Office decision of November 19, 2002.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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.[7]

ANALYSIS

In support of her claim for a schedule award appellant submitted a report from Dr. Weiss dated May 13, 2002. The Board has carefully reviewed Dr. Weiss' report and notes that, while the doctor determined that appellant sustained a 21 percent permanent impairment of the right upper extremity and 12 percent permanent impairment of the left upper extremity, it is not clear how he came to this conclusion.

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[4] In a decision dated November 19, 2002, the Office advised appellant that she had been reemployed as a modified office clerk on August 16, 1999 and they determined that this position fairly and reasonably represented her wage-earning capacity. The Office further determined that appellant had no loss of wage-earning capacity.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *See id.*; *Jacqueline S. Harris*, 54 ECAB ___ (Docket No. 02-203, issued October 4, 2002).

Office procedures[8] specifically provide that upper extremity impairment secondary to carpal tunnel syndrome and other entrapment neuropathies should be calculated using section 16.5d and Tables 16-10, 16-11 and 16-15.[9]

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

> "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 CTS [computerized tomography scan] 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 [electromyogram] testing of the thenar muscles: a residual CTS is still present and an impairment rating not to exceed 5 percent of the upper extremity may be justified.
> >
> > (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."[10]

Section 16.5d of the A.M.A., *Guides* further provides that, in rating compression neuropathies, additional impairment values are not given for decreased grip strength.[11] Section 16.8a provides that, since maximum strength is usually not regained for at least a year after an injury or surgical procedure and impairment is evaluated when an individual has reached maximum medical improvement, "strength can only be applied as a measure when a year or more has passed since the time of injury or surgery."[12]

With respect to the right upper extremity, Dr. Weiss determined that appellant had a 4/5 motor strength deficit of the right thumb abduction for a 9 percent impairment;[13] right grip strength performed *via* Jamar hand dynamometer at Level III revealed 24 kilograms (kg) of force strength involving the right hand versus 26 kg of force strength involving the left hand for a 10

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[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808 (August 2002) (March 1995).

[9] A.M.A., *Guides supra* note 2; *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[10] A.M.A., *Guides, supra* note 2 at 495.

[11] *Id.* at 494.

[12] *Id.* at 508.

[13] A.M.A., *Guides* 484, 492, Table 16-11, 16-15.

percent impairment;[14] and a 3 percent impairment for pain,[15] for a total of 21 percent permanent impairment of the right upper extremity. With regard to the left upper extremity, he determined that appellant had a 4/5 motor strength deficit of the left thumb abduction for a 9 percent impairment;[16] and a 3 percent impairment for pain[17] for a total of 12 percent permanent impairment of the left upper extremity. Although the doctor noted that appellant had a 4/5 motor strength deficit of the right and left thumb abduction, and cited to Table 16-11, page 484 of the A.M.A., *Guides,* he failed to identify a percentage of motor deficit between 1 and 25 percent as set forth in the A.M.A., *Guides*[18] and subsequently failed to properly explain how he calculated a 9 percent impairment using Table 16-15, page 492 of the A.M.A., *Guides.*[19] With regard to grip strength deficit, Dr. Weiss calculated a 10 percent deficit, however, as noted above, the A.M.A., *Guides* provides that "in compression neuropathies, additional impairment values are not given for decreased grip strength."[20] Additionally, the Board has found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome be rated on motor and sensory impairments only. Furthermore, Dr. Weiss found a three percent impairment for pain for each of the left and right upper extremities; however, he did not explain how his determination was calculated in accordance with the relevant standards of the A.M.A., *Guides.*[21]

The Board has carefully reviewed the Office medical adviser's report dated October 26, 2002, and likewise finds this report deficient. While the physician found 10 percent impairment for the right upper extremity, he did not adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides.*[22] The Office medical adviser noted that there was no thumb weakness but noted that appellant experienced a 10 percent decrease in grip strength.[23] However, as noted above, the A.M.A., *Guides* provides that, in compression neuropathies, additional impairment values are not given for decreased grip strength.[24] With respect to the left upper extremity, he noted "left thumb 4/5 9 percent" and cited to Tables 16-15 and 16-11, pages 484 and 492 of the A.M.A., *Guides;* however, there is no explanation as to how the physician determined that appellant sustained a 9 percent impairment

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[14] A.M.A., *Guides* 509, Table 16-32, 16-34.

[15] A.M.A., *Guides* 574, Figure 18-1.

[16] A.M.A., *Guides, supra* note 12 at 484, 492.

[17] A.M.A., *Guides, supra* note 14 at 574.

[18] A.M.A., *Guides* 484, Table 16-11.

[19] A.M.A., *Guides* 492, Table 16-15.

[20] *See* page 494, the fifth edition of the A.M.A., *Guides; see also Robert V. Disalvatore*, 54 ECAB ___ (Docket No. 02-2256, issued January 17, 2003) (where the Board found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome be rated on motor and sensory impairments only).

[21] *See Tonya R. Bell,* 43 ECAB 845, 849 (1992).

[22] *Id.*

[23] A.M.A., *Guides, supra* note 13 at 509.

[24] A.M.A., *Guides, supra* note 19 at 494.

of the right upper extremity as he did not reveal his calculations and his narrative does not explain this conclusion.

In view of the disparity in the evaluations of the Office medical adviser and Dr. Weiss and the failure of the Office medical adviser to adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides,* the Office should refer the matter to an Office referral physician to determine the ratable impairment of the right and left upper extremity and to provide a full description of appellant's loss.[25]

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done. Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[26]

The Board, therefore, finds that this case must be remanded for further development. On remand, the Office should refer appellant, the medical evidence of record, and a statement of accepted facts to a Board-certified orthopedic surgeon for examination and opinion as to whether appellant has any permanent impairment of the left and right upper extremity causally related to her employment injury. Following this and any other further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision and must be remanded for further medical development.

[25] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

[26] *John W. Butler,* 39 ECAB 852 (1988).

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 19, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member