United States Department of Labor
Employees' Compensation Appeals Board

KATHRYN A. FREDERICKSDORF, Appellant	)	
and	)	**Docket No. 04-1269**
	)	**Issued: September 22, 2004**
U.S. POSTAL SERVICE, SCHUYLKILL STATION, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., 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
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 13, 2004 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 15, 2003 in which an Office hearing representative affirmed the Office's determination that appellant was not entitled to a schedule award as she did not sustain a permanent impairment of her right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award claim. Appellant's counsel contends that there is an unresolved conflict in the medical opinion evidence regarding whether appellant has any permanent impairment of the right upper extremity which would entitle her to a schedule award.

ISSUE

The issue is whether appellant has met her burden of proof to establish entitlement to a schedule award for permanent impairment to her right upper extremity.

FACTUAL HISTORY

On January 29, 1998 appellant, a 56-year-old window clerk, filed an occupational disease claim alleging that her epicondylitis was due to pushing, pulling and lifting heavy equipment. The Office accepted her claim for right lateral epicondylitis and paid appropriate compensation.

In a report dated November 27, 2001, Dr. David Weiss, an osteopath, diagnosed chronic post-traumatic lateral right elbow epicondylitis. A physical examination revealed:

> "[r]ight elbow reveals tenderness over the lateral epicondyle. Range of motion reveals flexion extension of 0-145/145 degrees, pronation of 80/80 degrees and supination of 80/80 degrees. Valgus and various stress tests produce firm endpoints. The Tinel sign is negative over the cubital tunnel. Testing of the biceps and triceps musculatures is graded at 4/5."

With regards to grip strength, the physician determined that appellant had 10 kilograms of force strength for the right hand which he opined: "markedly abnormal for a 60-year-old, right-hand dominant female." In reaching this determination, Dr. Weiss, utilizing Table 16-11, page 484 and Table 16-15, page 492, concluded appellant had a 6 percent impairment due to right bicep motor deficit and a 10 percent right triceps motor deficit. Utilizing Table 16-34, page 509, the physician determined that appellant had a 20 percent impairment right grip strength deficit. The physician concluded that appellant had a 3 percent impairment due to pain based on using Figure 18-1, page 574. After combining these values, Dr. Weiss concluded that appellant had a 35 percent impairment of her right upper extremity and that the date of maximum medical improvement was October 23, 2001.

In a July 10, 2002 report, the Office medical adviser noted: "grip strength is subjective" and that "epicondylitis, like most overuse syndromes, can resolve with adequate treatment and not be permanent." The Office medical adviser recommended a second opinion to determine if appellant had any permanent impairment due to the accepted right lateral epicondylitis.

In a September 10, 2002 report, Dr. Anthony W. Salem, the second opinion specialist, to whom the Office referred appellant who is a Board-certified orthopedic surgeon, based upon a review of the medical evidence, statement of accepted facts and physical examination concluded that appellant's lateral epicondylitis had not caused any permanent impairment. A physical examination revealed a normal right elbow, full range of motion, no pain upon palpation and no swelling. Dr. Salem reported that appellant had "no restrictions of movement in her arm with flexion, extension, pronation and supination in her right elbow." He opined that appellant had completely recovered from her right lateral epicondylitis and that her current right elbow condition is unrelated to her employment as "she has completely recovered."

By decision dated December 12, 2002, the Office denied appellant's claim on the grounds that she did not sustain any permanent impairment due to the accepted condition of lateral epicondylitis. In reaching this finding, the Office relied upon the opinion of Dr. Salem, the second opinion specialist.

In a December 13, 2002 letter, appellant's counsel requested a hearing before an Office hearing representative. A hearing was held on September 22, 2003 at which appellant was represented by counsel and provided testimony.

In a November 24, 2003 report, a second Office medical adviser determined that there was no conflict of medical opinion evidence. In support of this conclusion he noted:

> "The [American Medical Association, *Guides to the Evaluation of Permanent Impairment*] (A.M.A., *Guide*[*s*]) 5th [e]d. was used to estimate impairment. Report by Dr. Weiss, dated November 27, 2001, indicated certain deficits of the right upper extremity which he used to base his [permanent partial impairment] PPI estimate. However, a more recent report by Dr. Salem, dated September 10, 2002, stated: 'Examination of her right elbow was perfectly normal. There was no swelling and she had full range of motion. There was also no pain when I palpated it.' He further stated that the elbow was completely recovered.
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> "There is no conflict of medical opinions as the more recent evaluation indicated that the problems possibly noted by the earlier evaluator have been resolved. On the basis of available medical evidence, I do not find any PPI of the claimant's right upper extremity."

By decision dated December 15, 2003, the Office hearing representative affirmed the denial of appellant's schedule award on the grounds that she did not have a permanent partial impairment of her right upper extremity due to the accepted condition of right lateral epicondylitis.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] 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.[3]

Before the A.M.A., *Guides* may be utilized, however, the record must contain medical evidence describing a claimant's permanent impairment. The Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award the evaluation must include "a detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member of function, the amount of any

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment." This description must be in sufficient detail so that the claims examiner and other reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[4]

ANALYSIS

In the present case, appellant filed a claim for a schedule award and submitted a November 27, 2001 report, by Dr. Weiss in support of her request. On physical examination, Dr. Weiss reported tenderness over the later epicondyle and reduced grip strength. He concluded appellant reached maximum medical improvement on October 23, 2001. In evaluating appellant's impairment under the fifth edition of the A.M.A., *Guides*, Dr. Weiss found a 3 percent impairment due to pain,[5] a 6 percent impairment due to right bicep motor deficit,[6] a 10 percent right triceps motor deficit[7] and 20 percent impairment right grip strength deficit.[8] He concluded that combining these values, appellant had a 35 percent impairment of her right upper extremity.

In a July 10, 2002 report, the Office medical adviser recommended a second opinion as epicondylitis may not be permanent as it can be resolved and stated grip strength is subjective.

In a September 10, 2002 report, Dr. Salem, an Office referral Board-certified orthopedic surgeon serving as a second opinion specialist, concluded that appellant did not have any permanent impairment due to her accepted right lateral epicondylitis based upon the fifth edition of the A.MA., *Guides*. A physical examination revealed full range of motion, no pain upon palpation, no swelling and "no restrictions of movement in her arm." Based upon these findings, Dr. Salem opined that appellant had completely recovered from her right lateral epicondylitis and her current elbow condition was unrelated to her employment since appellant had recovered completely from the injury.

In a September 24, 2003 report, the Office medical adviser concluded that there was no conflict in the medical opinion evidence as Dr. Salem's report was more recent and "indicated that the problems possibly noted by the earlier evaluator had resolved" and thus appellant did not sustain a permanent impairment due to her accepted right lateral epicondylitis.

Section 8123(a) of the Act provides that, if there is a 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.[9] When there are opposing

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[4] Federal (FECA) Procedure Manual, Part -- 2 Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 1995). *See John H. Smith*, 41 ECAB 444, 448 (1990); *Alvin C. Lewis*, 36 ECAB 595, 596 (1985).

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

[6] A.M.A., *Guides*, Table 16-11, page 484 and Table 16-15, page 492.

[7] *Id.*

[8] A.M.A., *Guides*, Table 16-34, page 509.

[9] *Joseph A. Brown, Jr.*, 55 ECAB ___ (Docket No. 04-376, issued May 11, 2004); *see* 5 U.S.C. § 8123(a).

medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[10] In the instant case, both appellant's physician, Dr. Weiss and the Office referral physician, Dr. Salem, utilized the fifth edition of the A.M.A., *Guides* when providing their permanent impairment rating opinions. Dr. Weiss concluded that appellant had a permanent impairment due to her accepted right lateral epicondylitis which resulted in a 35 percent permanent impairment of her right upper extremity. Dr. Salem, however, opined that appellant did not have a permanent impairment due to her accepted right lateral epicondylitis. As there is a disagreement between appellant's physician, Dr. Weiss and Dr. Salem, the Office referral physician, as to whether appellant has a permanent impairment causally related to her accepted right lateral epicondylitis, a conflict under 5 U.S.C. § 8123(a) is created.

To resolve this conflict in the medical opinion evidence, the Office should prepare a statement of accepted facts and a list of specific questions and refer appellant to an appropriate Board-certified physician to determine whether appellant has a permanent impairment as a result of her accepted employment injury. If the impartial medical examiner concludes that there is a permanent impairment then the physician should determine the extent of appellant's permanent impairment as a result of her accepted employment injury. After this and any such other development as the Office deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that there is a conflict in the medical opinion evidence on the issue of whether appellant sustained a permanent impairment of her right upper extremity due to her accepted employment injury and her entitlement to a schedule award.

[10] *See Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 15, 2003 is set aside and the case remanded for further proceedings consistent with the above decision.

Issued: September 22, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member