

**United States Department of Labor
Employees' Compensation Appeals Board**

VERNETTE F. HOLLOWAY, Appellant

and

**U.S. POSTAL SERVICE, WAVERLY POST
OFFICE, Baltimore, MD, Employer**

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**Docket No. 05-131
Issued: May 2, 2005**

Appearances:
Vernette F. Holloway, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 13, 2004 appellant filed a timely appeal from the April 16, 2004 merit decision of the Office of Workers' Compensation Programs granting her a schedule award for 16 percent impairment of her right upper extremity. The record also contains an Office decision dated July 22, 2004 denying appellant's request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Pursuant to 5 U.S.C. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit schedule award decision and the nonmerit decision in this case.

ISSUES

The issues are: (1) whether appellant has more than 16 percent impairment of her right upper extremity for which she received a schedule award; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 1, 2000 appellant, then a 49-year-old window distribution clerk, filed a series of claims of occupational disease alleging that she developed bilateral peroneal neuropathy, minimal disc bulge right carpal tunnel syndrome and right shoulder myofascial pain syndrome due to factors of her federal employment. The Office accepted appellant's claims on July 14, 2000 for bilateral peroneal neuropathy, lumbar strain, right carpal tunnel syndrome, epicondylitis and right carpal tunnel release. Appellant filed a claim for a schedule award on July 24, 2000.

The Office also accepted that appellant sustained a left shoulder strain by decision dated September 25, 2000, right elbow sprain by decision dated January 19, 1999, right radial tendinitis by decision dated November 30, 1998, left carpal tunnel syndrome by decision dated February 1, 2000, and lumbar strain by decision dated September 17, 1998.

In a letter dated October 5, 2002, appellant stated that she had not experienced surgical treatment of her carpal tunnel syndrome.

Appellant filed notices of recurrence of disability on October 23, 2001 alleging that she sustained a recurrence of disability on March 12 and 14, 2001 due to her accepted conditions. The Office denied these claims by decision dated March 27, 2002. Appellant requested reconsideration on April 15, 2002. By decision dated July 16, 2002, the Office vacated its March 27, 2002 decision and accepted appellant's claims for disability beginning March 12 and 14, 2001. The Office accepted her claim for right carpal tunnel syndrome, right lateral epicondylitis, right ulnar nerve entrapment, right shoulder strain, right radial tendinitis, bilateral peroneal neuropathy, bilateral arm strain, low back strain and aggravation of lumbar disc disease.

In a letter dated August 12, 2002, the Office requested that appellant's attending physician, Dr. Margit Bleecker, a Board-certified neurosurgeon, provide appellant's permanent impairment for schedule award purposes. In a report dated August 29, 2002, Dr. Bleecker diagnosed right carpal tunnel syndrome and stated that appellant had reached maximum medical improvement. She found that appellant had a Class 2 motor impairment of the median nerve or three percent impairment, and a Class 4 impairment of the median nerve due to decreased sensation or 22 percent impairment of the upper extremity. Dr. Bleecker combined this figures to reach 22 percent impairment of the right upper extremity due to carpal tunnel syndrome.

On September 5, 2002 Dr. Bleecker provided an impairment rating for appellant's right shoulder. Range of motion in the right shoulder was extension 40 degrees or 1 percent impairment; flexion 145 degrees or 3 percent impairment; abduction of 100 degrees or 4 percent impairment; adduction 30 degrees or 1 percent impairment; external rotation 75 degrees, not a ratable impairment; and internal rotation of 42 degrees a 3 percent impairment. Dr. Bleecker concluded that appellant had 12 percent impairment of her right shoulder due to loss of range of motion.

Appellant stopped work on September 28, 2002 and received disability retirement benefits.

The Office referred appellant for second opinion evaluations with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, and Dr. Michael S. Miller, a Board-certified neurologist. In a report dated December 12, 2002, Dr. Miller found that appellant's electrodiagnostic studies demonstrated right carpal tunnel syndrome. On January 2, 2003 Dr. Smith found that appellant's Tinel's and Phalen's signs were negative, with tenderness diffusely in the right upper extremity. Testing of two-point discrimination was grossly abnormal with greater than 20 millimeters suggesting symptom embellishment. He found no loss of range of motion in the right wrist. Dr. Smith concluded that appellant had reached maximum medical improvement. He found that as she had no loss of range of motion and as appellant's sensory testing was not accurate, her impairment rating was based on pain alone. Dr. Smith found that appellant had a 10 percent impairment of the ulnar nerve due to pain or 4 percent impairment of the right upper extremity.

The Office medical consultant, Dr. Willie E. Thompson, a Board-certified orthopedic surgeon, reviewed the medical evidence on September 24, 2003 and concluded that appellant had five percent impairment of the right upper extremity due to carpal tunnel syndrome. Dr. Thompson relied on page 495 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ which provides for three possible rating scenarios "after an *optimal recovery time* following surgical decompression."² He combined appellant's 12 percent impairment due to loss of range of motion of the right shoulder with the 5 percent impairment rating due to carpal tunnel syndrome to reach 16 percent impairment of the right upper extremity.

By decision dated December 8, 2003, the Office granted appellant a schedule award for 16 percent impairment of her right upper extremity.

Appellant requested reconsideration on January 12, 2004 and submitted a new and relevant report from Dr. Bleecker dated January 2, 2004. Dr. Bleecker disagreed with Dr. Thompson's rating regarding appellant's carpal tunnel syndrome noting that the three scenarios on page 495 of the A.M.A., *Guides* were to be applied only after surgical intervention. She stated that appellant had not undergone a right carpal tunnel release and that therefore her method of calculating permanent impairment due to carpal tunnel syndrome was correct and appellant was entitled to 22 percent rather than 5 percent impairment.

On April 6, 2004 the Office referred Dr. Bleecker's report to Dr. Thompson and noted that appellant had not undergone a right carpal tunnel release. He responded on April 7, 2004 and asserted that he was aware that appellant had not undergone surgery, but that page 495 of the A.M.A., *Guides* was the applicable provision and she was entitled to no more than five percent impairment due to her accepted right carpal tunnel syndrome.

By decision dated April 16, 2004, the Office reviewed appellant's claim on the merits and denied modification of its December 8, 2003 decision relying on Dr. Thompson's report.

¹ A.M.A., *Guides* (5th ed. 2001).

² *Id.* at 495, carpal tunnel syndrome.

Appellant again requested reconsideration on May 5, 2004 and resubmitted the medical evidence of record. By decision dated July 22, 2004, the Office refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) on the grounds that she failed to submit any relevant new evidence.³

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶

Impairments due to peripheral nerve disorders such as carpal tunnel syndrome are rated according to the sensory and/or motor deficits. The impairment due to carpal tunnel syndrome is evaluated by multiplying the grade of severity of the sensory or motor deficit by the respective maximum upper extremity impairment value resulting from sensory or motor deficits of each nerve structure involved. When both sensory and motor functions are involved the impairment values derived for each are combined.⁷ In addition the A.M.A., *Guides* also provide specific methods for evaluating carpal tunnel syndrome following surgical decompression.⁸

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 The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the

³ Following the Office's July 22, 2004 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ A.M.A., *Guides*, 481.

⁸ *Id.* at 495.

⁹ 5 U.S.C. § 8123.

Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.¹⁰

ANALYSIS -- ISSUE 1

In this case, appellant's attending physician, Dr. Bleecker, a Board-certified neurologist, determined appellant's impairment rating for carpal tunnel syndrome by calculating the sensory and motor deficits to reach an impairment rating of 22 percent. The Office medical consultant, Dr. Thompson, a Board-certified orthopedic surgeon, determined appellant's impairment rating for carpal tunnel syndrome by applying the provision of the A.M.A., *Guides* specifically referring to calculation of a permanent impairment following recovery from surgery. As the record establishes that appellant has not had any surgery, the Board finds that the appropriate method for calculating her impairment rating was that applied by Dr. Bleecker, determining appellant's sensory and motor deficits.

The Board further finds that there is an existing conflict in the medical evidence between appellant's attending physician, Dr. Bleecker, and the Office referral physician, Dr. Smith, a Board-certified orthopedic surgeon, regarding the extent of appellant's sensory and motor deficits due to carpal tunnel syndrome.¹¹ Dr. Bleecker found that appellant had a Class 4 motor deficit of 25¹² and a Class 3 sensory deficit of 50 percent.¹³ Dr. Smith, on the other hand, found no motor deficit, and only 5 percent sensory deficit or Class 4 impairment.¹⁴ Due to these discrepancies in the physical findings, the Board finds that the case must be remanded for an impartial medical specialist, to resolve the conflict of medical findings and apply the correct provisions of the A.M.A., *Guides*.¹⁵

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict of the medical opinion evidence. The Board further finds that the general provisions of the A.M.A., *Guides* regarding peripheral nerve disorders are appropriate as appellant has not undergone a surgical carpal tunnel release.

¹⁰ 20 C.F.R. § 10.321.

¹¹ The Board notes that range of motion impairments are not included in calculating peripheral nerve disorders. A.M.A., *Guides*, 480.

¹² A.M.A., *Guides*, 484, Table 16-11. Dr. Bleecker inappropriately listed this as a Class 2 impairment which ranges from 51 to 75 percent impairment of the nerve

¹³ A.M.A., *Guides*, 482, Table 16-10. Dr. Bleecker inappropriately listed this as a Class 4 impairment which ranges from 1 to 25 percent impairment.

¹⁴ *Id.*

¹⁵ Due to the disposition of this issue, the second issue is rendered moot and the Board will not address whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2004 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: May 2, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member