United States Department of Labor
Employees' Compensation Appeals Board

BARBARA J. KERSHNER, Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer**	**Docket No. 05-792** **Issued: November 15, 2005**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 17, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 25, 2004 which found no more than 30 percent impairment of the left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has more than 30 percent impairment to her left upper extremity for which she received a schedule award. On appeal she argues that a conflict in medical opinion evidence exists and the Office medical adviser's opinion cannot carry the weight of the medical evidence.

FACTUAL HISTORY

On July 25, 1990 appellant, then a 50-year-old mail processor, filed a claim alleging that she injured her left knee, elbow, shoulder and thumb when she tripped while in the performance of her federal duties. The Office accepted the claim for a contusion to the left elbow and knees,

rotator cuff strain, left shoulder impingement syndrome, an aggravation of arthrosis of the medial carpal joint to the left thumb and fibromyalgia and paid all appropriate compensation. Appellant underwent surgery for resection arthroplasty to the left thumb in March 1992 and a left shoulder surgery consisting of acromioplasty in July 1994. The record reflects that she returned to limited-duty work following each surgical procedure.

On July 27, 2002 appellant filed a claim for a schedule award. In support of her claim, she submitted an April 16, 2002 report from Dr. David Weiss, an osteopath, who opined that appellant had post-traumatic acromioclavicular (AC) arthropathy with impingement to the left shoulder; status post arthroscopic surgery with acromioplasty of the left shoulder; chronic supraspinatus tendinitis to the left shoulder; post-traumatic carpometacarpal joint arthritis to the left thumb and status post suspensionoplasty of the metacarpal (MC) joint of the left thumb. He provided subjective and objective findings and opined that appellant reached maximum medical improvement on April 16, 2002. Under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] Dr. Weiss found that the left shoulder resection acromioplasty constituted a 10 percent impairment,[2] the left thumb metacarpophalangeal (MP) arthroplasty constituted a 3 percent impairment,[3] 170 degrees of flexion for the left shoulder constituted a 1 percent impairment,[4] the left grip strength constituted a 30 percent impairment[5] and the 3/5 motor strength deficit of the left thumb abduction constituted a 17 percent impairment.[6] Dr. Weiss found that the combined left upper extremity impairment constituted a 51 percent impairment. He also found that appellant had a 3 percent pain-related impairment based on the subjective factors listed in his report.[7] Dr. Weiss then added the combined left upper extremity impairment of 51 percent to the pain related impairment of 3 percent and concluded that appellant had a 54 percent total left upper extremity impairment.

On September 16, 2002 an Office medical adviser reviewed Dr. Weiss's findings. He stated that he concurred with Dr. Weiss's findings and calculations with the exception of including grip strength in the impairment rating. Citing to page 508 of the A.M.A., *Guides*, the Office medical adviser noted that "decreased grip strength [could not] be rated in the presence of decreased motion, painful conditions,"… "that prevent effective application of manual force." Also "impairment ratings based on objective anatomic findings take precedence." The Office medical adviser found that appellant's left shoulder impairment totaled an 11 percent impairment which comprised of a 10 percent acromioplasty and a 1 percent range of motion deficit. The Office medical adviser found that the impairment values for her left thumb comprised of a 17 percent motor strength loss, a 3 percent MP arthroplasty and 3 percent pain. Utilizing the

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

[2] *Id*. at 506, Table 16-27.

[3] *Id.*

[4] *Id*. at 476, Figure 16-40.

[5] *Id*. at 509, Table 16-34.

[6] *Id.* at 492, Table 16-15 and 484, Table 16-11.

[7] *Id.* at 574, Figure 18-1.

Combined Values Chart on page 604, the Office medical adviser combined the 17 percent motor strength loss and 3 percent MP arthroplasty to find 19 percent impairment. He then combined 19 percent impairment with 3 percent for pain to find total thumb impairment of 21 percent. The 11 percent total impairment for the left shoulder was then combined with the 21 percent total impairment for the left thumb to comprise 30 percent impairment of the left arm. The Office medical adviser additionally opined that maximum medical improvement was reached on April 16, 2002 based on Dr. Weiss's examination.

By decision dated December 11, 2002, the Office granted appellant a schedule award for a 30 percent loss of use, of the left arm. The period of the award ran for 93.60 weeks from April 16, 2002 to January 31, 2004.

On December 13, 2002 appellant, through his attorney, requested a hearing, which was held on July 27, 2004. He argued that a conflict in medical opinion should be declared, noting that the Office medical adviser did not include grip strength deficit in the rating. No new medical evidence with regard to appellant's impairment rating was received.[8]

By decision dated October 25, 2004, an Office hearing representative affirmed the December 11, 2002 decision, finding that appellant had no more than 30 percent impairment to her left upper extremity for which she received a schedule award.[9]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[10] and its implementing regulation[11] sets 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 regulations as the appropriate standard for evaluating schedule losses.[12]

[8] In reports dated December 23, 2003, May 18 and July 7, 2004, Dr. Ronald E. Krauser, a Board-certified internist specializing in rheumatology, reported on the status of appellant's medical conditions.

[9] The Board notes that, following the October 25, 2004 hearing representative decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a).

[10] 5 U.S.C. § 8107(a-c).

[11] 20 C.F.R. § 10.404.

[12] *See Mark A. Holloway*, 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

Regarding loss of strength, the A.M.A., *Guides* states in relevant part:

> "[I]mpairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (*e.g.*, thumb amputation) that prevent effective application of maximal force in the region being evaluated."[13] (Emphasis in the original.)

FECA Bulletin No. 01-05, issued January 29, 2001 and section 18.3(b) provides that Chapter 18 should not be used to rate pain-related impairment when conditions are adequately rated in the other chapters of the A.M.A., *Guides*.[14] The bulletin provides that Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain, identifying those as Chapters 13, 16 and 17.

ANALYSIS

In a report dated April 16, 2002, Dr. Weiss found that the left shoulder resection acromioplasty constituted a 10 percent impairment,[15] the left thumb MP arthroplasty constituted a 3 percent impairment,[16] 170 degrees of flexion for the left shoulder constituted a 1 percent impairment,[17] the left grip strength constituted a 30 percent impairment[18] and the 3/5 motor strength deficit of the left thumb abduction constituted a 17 percent impairment.[19] The Office medical adviser reviewed with Dr. Weiss's report and concurred with his findings for the impairment values of each individual calculation. The Board notes that these impairment values were properly rated under the A.M.A., *Guides*. However, the Board finds that neither Dr. Weiss nor the Office medical adviser properly applied the methodologies as outlined in FECA Bulletin No. 01-05 and the A.M.A., *Guides* in determining appellant's impairment to the left upper extremity.

Dr. Weiss improperly included the grip strength calculation in determining appellant's impairment. The Office medical adviser properly found that decreased strength could not be rated according to page 508 of the A.M.A., *Guides*. As discussed above, the A.M.A., *Guides* provides: "[d]ecreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities or absences of parts (*e.g.*, thumb amputation) that prevent effective

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[13] A.M.A., *Guides* 508, section 16.8a; see also FECA Bulletin No. 01-05, issued January 29, 2001.

[14] A.M.A., *Guides* 571, section 18.3b; *see also* FECA Bulletin No. 01-05, issued January 29, 2001.

[15] *Id*. at Table 16-27, page 506.

[16] *Id.*

[17] *Id*. at Figure 16-40, page 476.

[18] *Id*. at Table 16-34, page 509.

[19] *Id.* at Table 16-15, page 492 and Table 16-11, page 484.

application of maximal force in the region being evaluated."[20] In this case, Dr. Weiss found that appellant had decreased motion of the left shoulder and the thumb and pain. It was, therefore, inappropriate for Dr. Weiss to utilize the values for loss of strength in evaluating appellant's impairment in view of his findings that she had a loss of range of motion in both her shoulder and thumb and pain.

Additionally, both Dr. Weiss and the Office medical adviser improperly calculated appellant's impairment based on a finding of pain in the thumb. As noted above, FECA Bulletin No. 01-05 and section 18.3(b) provide that Chapter 18 should not be used to rate pain-related impairment when conditions are adequately rated in the other chapters of the A.M.A., *Guides*.[21] In assessing the impairment due to pain or sensory loss to appellant's extremity, neither Dr. Weiss nor the Office medical adviser provided sufficient explanation as to why the protocols of Chapter 16 would not adequately rate her upper extremity sensory loss.

As neither Dr. Weiss's impairment rating or the Office medical adviser's impairment rating conforms to the methodologies as outlined in FECA Bulletin No. 01-05 and the A.M.A., *Guides*, the case is not in posture for decision. The Office's October 25, 2004 decision will be set aside and the case remanded for further appropriate medical development to determine the extent of appellant's impairment pursuant to the A.M.A., *Guides* and Office procedures.

CONCLUSION

The Board finds that the case is not in posture for decision and that the schedule award issued in this case must be set aside. The case will be remanded to the Office for further development of the medical evidence, as is appropriate and for an opinion on the extent of impairment which conforms with the A.M.A., *Guides* and Office procedures.[22]

[20] *Id*. at 508.

[21] *Id*. at 571, section 18.3b.

[22] In light of the Board's decision, appellant's arguments are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 25, 2004 is set aside. The case is remanded to the Office for further action in conformance with this decision.

Issued: November 15, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board