

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

M.S., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
INDUSTRIAL SUPPLY CENTER,)
Philadelphia, PA, Employer)

Docket No. 06-1171
Issued: December 8, 2006

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 24, 2006 appellant filed a timely appeal from a December 13, 2005 decision of the Office of Workers' Compensation Programs, granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 12 percent impairment of the right upper extremity causally related to her accepted right carpal tunnel syndrome.

FACTUAL HISTORY

On July 15, 1998 appellant, then a 41-year-old secretary, filed an occupational disease claim for a right hand injury. The Office accepted her claim for right carpal tunnel syndrome.¹ On March 3, 2003 appellant filed a claim for a schedule award.

¹ Appellant has a separate claim accepted for left carpal tunnel syndrome.

In a December 6, 2002 report, Dr. David Weiss, a Board-certified family practitioner, diagnosed right carpal tunnel syndrome and stated:

“[Appellant has] pins and needles sensation in her right hand. She awakens at night with her right hand asleep. [Appellant] notes right wrist pain and stiffness. [She] notes increased pain with weather changes.

“[Appellant] notes modification and restriction when performing household duties. She notes difficulties performing nonspecialized hand activities of grasping, pulling, pushing, fine dexterity and lifting using her right hand.”

* * *

“[Appellant] states the pain level[,] on a scale of 0 to 10[,] is 6/10 in her right hand....

“Examination of the right hand and wrist reveals no thenar or hypothenar atrophy. Fist presentation is normal to the distal palmar crease. Wrist range of motion reveals dorsiflexion of 0-75/75 degrees, palmar flexion of 0-75/75 degrees, radial deviation of 0-20/20 degrees and ulnar deviation of 0-35/35 degrees. There is focal tenderness noted over the flexor retinaculum. Resisted thumb abduction is graded at 4+/5. The Tinel’s sign is positive. The one-minute Phalen’s sign is positive. Carpal compression is positive.”

* * *

“Neurological examination: Sensory examination reveals a perceived sensory deficit over the median nerve distribution of the right hand.

“Grip strength testing performed via Jamar Hand Dynamometer at Level III reveals 14 [kilograms] of force strength involving the right hand versus 16 [kilograms] of force strength involving the left hand.”

Dr. Weiss found that appellant had a 53 percent impairment of the right upper extremity, including 31 percent for sensory deficit of the right median nerve, based on Tables 16-10 and 16-15 at pages 482 and 492 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*; 20 percent for right grip strength deficit, based on Tables 16-32 and 16-34 at page 509; 9 percent for 4/5/ motor strength deficit of the right thumb abduction, based on Tables 16-15 and 16-11 at pages 492 and 484; and 3 percent for pain, based on Figure 18-1 at page 574.

In a July 24, 2003 report, Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon and an Office referral physician, stated that appellant had numbness and tingling in the right hand. His findings on physical examination were as follows:

“Tinel’s sign is negative over the median and ulnar nerve of the right elbow. Tinel’s sign is slightly positive over the median nerve of the right wrist.... [Appellant] has grip strength which is +5/5 for the right hand.

“Examination of the right elbow reveals the following range of motion ... [e]lbow extension [of] 0 degrees, [e]lbow flexion [of] 150 degrees. Examination of the right forearm reveals ... [f]orearm supination [of] 85 degrees, [f]orearm pronation [of] 80 degrees. Examination of the right wrist reveals ... extension [of] 50 degrees, flexion [of] 80 degrees, ulnar deviation [of] 40 degrees and radial deviation [of] 30 degrees.”

* * *

“[Appellant] had no loss of sensibility, abnormal sensation but did have some pain. I awarded a three percent associated with pain and paresthesias. This is for page 492. There was no actual sensory or motor deficit; therefore, the impairment associated with Table 16-15 on page 492 is zero percent.”

Dr. Draper found that appellant had a five percent impairment of the right upper extremity, including two percent for 50 degrees of extension, based on Figure 16-18 at page 467 of the fifth edition of the A.M.A., *Guides* and three percent for pain,² based on Tables 16-10 and 16-15 at pages 482 and 492.

By decision dated August 14, 2003, the Office granted appellant a schedule award for 15.60 weeks for the period July 24 to November 10, 2003 based on a five percent impairment of the right upper extremity.³

Appellant requested an oral hearing. By decision dated January 16, 2004, an Office hearing representative found a conflict in the medical evidence and remanded the case for further development.

The Office referred appellant, together with copies of medical reports and a statement of accepted facts, to Dr. Linda S. Sykes, a Board-certified neurologist, for an independent medical examination.

² It is unclear how Dr. Draper calculated a three percent impairment due to pain as he did not indicate the grade he selected from Table 16-10.

³ The Federal Employees’ Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of an upper extremity. 5 U.S.C. § 8107(c)(1). Multiplying 312 weeks by five percent equals 15.60 weeks of compensation.

In a May 9, 2004 report, Dr. Sykes provided a history of appellant's condition and findings on physical examination. She stated:

"[Appellant] states that she is left handed. CURRENT SYMPTOMS include numbness and some tingling involving the thumb, index and part of the middle finger primarily on the palmar surface of the right hand. She reports that this is worse when she awakens from sleep and that gym workouts temporarily increase her hand symptoms. [Appellant] describes some problems with hand gripping of the right hand and occasionally dropping things from the right hand."

* * *

"On NEUROLOGIC EXAMINATION.... On motor examination, [appellant] demonstrates strength of 5/5 in all of the finger extensors of the right hand.... She appears to demonstrate 5/5 thumb adduction and abduction and opponens in the right hand. Rapid alternating movements are intact and symmetrical on the right and left. There is a positive Tinel's [sign] to percussion over the median nerve at the wrists bilaterally. Using a standard hand grip device in measurements of kilograms of force, this was repeated on several occasions during the examination and was not altogether consistent. However, a right hand grip of 8 [kilograms] of force versus the left hand grip of 7 [kilograms] of force was noted. Previous evaluations ... showed considerably greater force in both hands. There is a described decreased sensation to pin[prick] over the palmar surface of the thumb, index and middle fingers of both the right and the left hand extending in the lateral hand to one inch proximal to the flexor retinaculum. Range of motion of the right wrist shows full extension, full flexion, full medial and lateral rotation. Strength in the arms, except as noted above, is intact.

"ASSESSMENT: Utilizing the [A.M.A., *Guides*, fifth edition], Chapter 16.5, Impairment of the Upper Extremities Due to Peripheral Nerve Disorders, pages 480 through 497, the following determination is made:

1. Determination of Upper Extremity Sensory Deficit or Pain (Table 16-10). [Appellant's] sensory disturbance is [G]rade 4 with a percentage sensory deficit of 25 percent.
2. Determining Impairment of the Upper Extremity Due to Motor and Loss of Power Deficit (Table 16-11). [Appellant's] motor deficit is compatible with [G]rade 4 with 25 percent motor deficit.
3. Determination of Maximal Upper Extremity Impairment Due to Unilateral Combined Deficits of the Major Peripheral Nerves (Table 16-15) indicates combined motor and sensory deficits maximum of 45 percent. The actual

combined motor and sensory deficits are noted in [appellant] to be 12 percent (45 x 25 percent).⁴

“Following review of medical records, interview and neurologic examination of [appellant] and utilizing the A.M.A., *Guides*, it is determined that [appellant] has, due to compression median neuropathy, 12 percent right upper extremity impairment. Considering duration of symptoms, [appellant] has reached, in the absence of surgery ... maximal medical improvement.”

In a June 21, 2004 memorandum, the district medical director stated:

“[A]lthough Dr. Sykes’ opinions are not totally consistent [with] prior evaluations, the proposed [schedule award] is consistent with the findings of our second opinion physician. Therefore, I am in agreement with the [schedule award] based upon the A.M.A., *Guides*, fifth edition:

[Page] 482, [T]able 16-10, [G]rade 4 [equals] 25 percent;

[Page 484, [T]able 16-11, [G]rade 4 [equals] 25 percent;

[Page 492, [T]able 16-15, 45 percent [times] 25 percent [equals] 12 percent.”

By decision dated June 14, 2004, the Office granted appellant an additional schedule award for the right upper extremity of 21.84 weeks for the period November 11, 2003 to April 11, 2004, based on an additional impairment of seven percent.⁵

Appellant requested an oral hearing that was held on March 30, 2005.

By decision dated June 3, 2005, the Office affirmed the June 14, 2004 decision.

Appellant requested reconsideration and submitted additional evidence. In a May 4, 2005 report, Dr. Weiss stated his disagreement with the right upper extremity impairment rating of Dr. Sykes. He stated that when he examined appellant on December 6, 2002 she had a pins and needles sensation, stiffness and pain. Dr. Weiss noted that her pain was rated at a level 6 out of 10 which was a “distressing pain level” which equaled a Grade 2 sensory deficit, rather than the Grade 4 found by Dr. Sykes. He indicated that Dr. Sykes utilized the incorrect grip strength

⁴ The Board notes that 45 percent multiplied by 25 percent actually equals 11.25 percent which Dr. Sykes apparently rounded to 12 percent.

⁵ Multiplying 312 weeks by seven percent equals 21.84 weeks of compensation.

chart and also did not provide any impairment for motor strength deficit for right thumb abduction. Dr. Weiss stated:

“In terms of the activities of daily living, [appellant] noted modification and restrictions when performing nonspecialized hand activities of grasping, pulling, pushing, fine dexterity and lifting with her right hand.

“A neurological examination [and] sensory examination, revealed a perceived sensory deficit over the median nerve distribution to the right hand.

“When considering these findings and applying them to [T]able 16-10 on page 482, it is my opinion that this equates to a [G]rade 2 classification of sensory deficit rather than a [G]rade 4 as attributed by Dr. Sykes in [her] May 9, 2004 report....”

In a November 1, 2005 memorandum, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an Office medical adviser, stated, regarding Dr. Weiss’ report:

“The question that has arisen is Dr. Weiss’ indication that Dr. Sykes used the wrong chart in regards to grip strength. However, it is not appropriate or permitted to use [grip] strength evaluation combined with peripheral nerve compression calculation because the peripheral nerve calculation is the more objective of the two, the peripheral nerve calculation should take precedence. In addition under these circumstances according to page 508, 16.8a principles, Dr. Weiss would not be permitted to use strength calculations.... Therefore, it was not appropriate for Dr. Weiss to utilize strength calculations in the presence of peripheral nerve calculation.”

* * *

“Dr. Weiss additionally utilizes [G]rade 2 rather than [G]rade 4 from [T]able 16-10. Grade 4 describes the symptoms and deficit as to ‘distorted superficial tactile sensibility (diminished light touch) with [or] without minimal abnormal sensations or pain that is forgotten during activity.’ Grade 2 is described as ‘decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility) with abnormal sensations or moderate pain that may prevent some activities.’ Clearly the records indicate that this best fits to [G]rade 4, resulting in 25 percent sensory deficit rather than [G]rade 2 that would represent an 80 percent sensory deficit.”

By decision dated December 13, 2005, the Office denied modification of the June 3, 2005 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulation⁷ 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*⁸ has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁹

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."¹⁰ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹¹

ANALYSIS

The Office accepted that appellant sustained right carpal tunnel syndrome knee strain in the performance of duty.

Dr. Weiss found that appellant had a 53 percent impairment of the right upper extremity, including 31 percent for sensory deficit of the right median nerve, 20 percent for right grip strength deficit, 9 percent for motor strength deficit of the right thumb abduction and 3 percent for pain. Dr. Draper found that she had a five percent impairment of the right upper extremity, including two percent for 50 degrees of extension and three percent for pain. Due to the conflict in medical opinion between Dr. Weiss and Dr. Draper, the Office referred appellant to Dr. Sykes for an impartial medical evaluation.

Dr. Sykes stated that appellant had numbness and some tingling involving the thumb, index and part of the middle finger, primarily on the palmar surface of the right hand. The symptoms were worse when she awakened from sleep or engaged in physical exercise. Appellant had problems with hand gripping with her right hand and occasionally dropped items that she was holding. There was a positive Tinel's sign to percussion over the median nerve.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁹ 20 C.F.R. § 10.404.

¹⁰ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

¹¹ *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

There was a decreased sensation to pinprick over the palmar surface of the thumb, index and middle fingers of the right hand. Regarding Table 16-10 at page 482, sensory deficit, Dr. Sykes found that appellant had a Grade 4 sensory deficit.

The Board finds that the report of Dr. Sykes is not entitled to special weight and is not sufficient to resolve the conflict in the medical opinion evidence as to appellant's right upper extremity impairment. Dr. Sykes' determination that appellant had a Grade 4 sensory deficit as described in Table 16-10 is not consistent with her symptoms. Appellant had abnormal sensations of numbness and tingling sensation. These symptoms are not consistent with the Grade 4 description that indicates that any abnormal sensations are "forgotten during activity." The description in Grade 3, that the abnormal sensations may "interfere with some activities," seems to be more consistent with appellant's symptoms of hand gripping problems and dropping things. Due to this deficiency, Dr. Sykes' opinion regarding appellant's right upper extremity impairment is not entitled to special weight.

CONCLUSION

The Board finds that the report of Dr. Sykes is not entitled to special weight. Therefore, the conflict in the medical evidence has not been resolved. Upon remand of the case, the Office should refer appellant to another Board-certified specialist for an evaluation of her impairment due to her accepted right carpal tunnel syndrome. After such further development as the Office deems necessary, it should issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 13 and June 3, 2005 are set aside and the case is remanded for further action consistent with this decision.

Issued: December 8, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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