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

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| **M.F., Appellant** | ) | |
| **and** | ) | **Docket No. 06-1174** |
| | ) | **Issued: December 7, 2006** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Kansas City, MO, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated June 29 and October 19, 2005 and March 30, 2006, which denied his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

### ***ISSUE***

The issue is whether appellant has met her burden of proof in establishing that she is entitled to a schedule award for the left arm.

### ***FACTUAL HISTORY***

On October 7, 2002 appellant, then a 47-year-old health technician, filed an occupational disease claim alleging that she had poor circulation in her hands and bilateral upper extremity problems due to repetitive movement in the performance of duty. She experienced these problems while working in the telephone room and typing messages. Appellant noted that she

became aware of the condition and its relation to her employment on August 25, 2002. She retired on February 24, 2004.[1] The Office accepted appellant's claim for bilateral carpal tunnel syndrome, bilateral carpal tunnel release and left cubital tunnel syndrome.[2] Appellant received appropriate compensation benefits.

On May 20, 2004 Dr. Richard E. Rattay, a Board-certified orthopedic surgeon, and treating physician, performed a left thumb carpometacarpal joint corticosteroid injection, a right long and ring finger flexor sheath corticosteroid injection, a left ulnar nerve submuscular transposition of the elbow and left carpal tunnel release.

On April 14, 2005 appellant filed a claim for a schedule award.

By letter dated April 20, 2005, the Office requested that Dr. Rattay provide an opinion regarding appellant's work-related condition. The Office advised the physician to utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) and provide an opinion regarding whether appellant had any permanent impairment, and if so, the percentage of impairment with an explanation of how the calculation was derived.

In an April 21, 2005 treatment note, Dr. Rattay opined that appellant had reached maximum medical improvement. In a memorandum of a telephone call dated April 24, 2004, the Office noted that appellant had inquired as to the status of her schedule award claim.

In reports dated May 28 and June 1, 2005, the Office medical adviser noted that appellant was eligible for an impairment rating due to her left cubital tunnel syndrome and her carpal tunnel syndrome.

By letter dated June 2, 2005, the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. John A. Gragnani, a Board-certified orthopedic surgeon.

In a June 20, 2005 report, Dr. Gragnani noted appellant's history of injury and treatment and utilized the fifth edition of the A.M.A., *Guides.* He noted that appellant's chief complaints included tingling in the left arm going down to the hand when pressing or pulling along the left forearm and numbness, as well as complaints about her right hand and wrist. Dr. Gragnani also noted that appellant occasionally used a splint when driving her car for long distances, but otherwise, she did not use any other assistive devices, nor did she take any medications. Dr. Gragnani conducted a physical examination and noted that it revealed no evidence of

[1] The Board notes that appellant has a separate claim for an orthopedic condition in her hip, leg, back, feet or right knee. That claim was previously before the Board and denied in decisions dated January 26, 2004 and December 5, 2005. Docket Nos. 05-1702 and 03-2299. The record reflects that appellant filed several claims for a back problem which were denied by the Office for a date of injury of October 31, 1999 under file number 112004466; November 5, 2000 under file number 112004578 and September 10, 2003 under file number 112019871. The Office also denied appellant's claim for an emotional condition on October 1, 2003 under file number 112021806. Appellant also has several preexisting conditions including migraine headaches, failed back syndrome, fibromyalgia, tenosynovitis, back surgery, depression, anxiety, gastric reflux disorder and obesity.

[2] On April 1, 2004 the Office issued a schedule award for 10 percent impairment to the right upper extremity.

atrophy, sympathetic activity, or vasomotor or sudomotor dysfunction in the upper extremities. He determined that range of motion for the left wrist correlated to flexion of 60 degrees, extension of 72 degrees, ulnar deviation of 46 degrees and radial deviation of 28 degrees. Dr. Gragnani conducted range of motion measurements for the left elbow with a goniometer and determined that appellant had flexion of 144 degrees, extension of 0 degrees, supination of 80 degrees and pronation of 80 degrees. He opined that appellant reached maximum medical improvement in September 2004. Dr. Gragnani referred to Figure 16-28 and Figure 16-31 for the wrist[3] and Figure 16-34 and 16-37 for the elbow.[4] He noted that on sensory examination, there was no significant loss of two point discrimination and vibration was intact. Dr. Gragnani explained that no further rating would be derived from Tables 16-10 and 16-11 for motor or sensory loss, as pain was included in the range of motion measurements.[5] He opined that there was no value which could be awarded to appellant for loss of range of motion, pain, or sensory or motor changes at either the elbow or wrist.

In a report dated June 24, 2005, the Office medical adviser reviewed Dr. Gragnani's June 20, 2005 report. He determined that Dr. Gragnani's ratings were acceptable and in accordance with the A.M.A., *Guides.* He opined that appellant had no impairment of the left upper extremity.

By decision dated June 29, 2005, the Office denied appellant's claim for a schedule award to the left upper extremity. Appellant was advised that medical treatment for her bilateral carpal tunnel syndrome and left cubital tunnel syndrome continued.

By letter dated September 23, 2005, appellant requested reconsideration. She submitted a September 7, 2005 report from Dr. Rattay. He indicated that he utilized the fifth edition of the A.M.A., *Guides* and provided physical examination findings in a clinic note dated "September 97, 2005."[6] He subsequently opined that appellant had a 38 percent impairment of the left upper extremity or 23 percent of the whole person.

In an October 17, 2005 report, the Office medical adviser determined that Dr. Rattay's report did not include any examination findings such as range of motion measurements, sensory assessments or strength assessments or girth measurements. He opined that without providing a thorough physical examination, his report allowed no basis upon which to provide an impairment rating or to reconsider the schedule award issue.

By decision dated October 19, 2005, the Office denied modification of the June 29, 2005 decision, which denied appellant's claim for a schedule award.

By letter dated December 11, 2005, appellant requested reconsideration. In support of her request, she enclosed a November 23, 2005 report from Dr. Rattay.

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[3] A.M.A., *Guides* 467, 469.

[4] *Id.* at 472, 474.

[5] *Id.* at 482, 484.

[6] No such note accompanied his report.

Dr. Rattay noted that his report was similar to his September 7, 2005 opinion. He conducted a physical examination and stated that "on closer examination today, on physical examination, she has a definite altered sensation, that Dr. Gragnani did not pick up on his examination and I did not report in my last note." Dr. Rattay indicated that the range of motion for the left wrist correlated to dorsiflexion of 65 degrees (extension), flexion of 55 degrees, ulnar deviation of 25 degrees, and radial deviation of 15 degrees. For the left elbow range of motion measurements, the physician noted that flexion was equal to 145 degrees, elbow extension was equal to 0 degrees, supination and pronation were both equal to 80 degrees. Dr. Rattay found that vibratory sensation in the upper extremities was normal in the wrists and fingers, and the Tinel's sign were negative through the left upper extremity over the median and ulnar nerves. Regarding the shoulder, he noted that appellant had active range of motion of extension to 100 degrees and abduction to 100 degrees, with internal rotation to the L3 level and external rotation moderately limited to 40 degrees. Dr. Rattay advised that passive range of motion was equal to flexion of 160 degrees and abduction of 160 degrees. He noted that internal rotation was 40 degrees. Dr. Rattay also provided grip strength findings utilizing a Jamar dynamometer and noted that for the left hand position one was two kilograms, position two was four kilograms, position three was six kilograms, position four was eight kilograms and position five was six kilograms. He also noted that the grip strength measurements did not show an atypical pattern. Dr. Rattay opined that appellant had a 14 percent upper extremity disability for the left hand, a 5 percent disability for the elbow and 23 percent of the left shoulder. He indicated that this resulted in a 42 percent left upper extremity disability or a 25 percent whole person disability.

In a report dated January 15, 2006, the Office medical adviser opined that the grip strength findings provided by Dr. Rattay were noncompliant as the reported findings did not show a bell shaped curve pursuant to page 508 of the A.M.A., *Guides.* The Office medical adviser also noted that while Dr. Rattay opined that appellant had definite altered sensation he did not explain how he arrived at such a rating. He determined that he could not utilize Dr. Rattay's report as his findings were nonphysiologic and did not form a basis for an impairment rating. He opined that Dr. Rattay's report was not sufficient to establish impairment of appellant's left upper extremity.

By decision dated March 30, 2006, the Office denied modification of the June 29, 2005 decision which denied appellant's claim for a schedule award.

## ***LEGAL PRECEDENT***

Section 8107 of the Federal Employees' Compensation Act[7] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[8] The Act, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8107.

use of uniform standards applicable to all claimants.[9] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[10]

Section 8123(a) of the Act provides in pertinent part: If there is 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.[11] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[12]

## ***ANALYSIS***

The Board finds that the case is not in posture for decision due to a conflict in medical opinion between Dr. Rattay, appellant's treating physician, and Dr. Gragnani, the second opinion physician.

By letter dated April 20, 2005, the Office requested that appellant's physician, Dr. Rattay submit a report in which he described appellant's condition and determined whether she was entitled to an impairment rating. In response, Dr. Rattay provided a report dated September 7, 2005 in which he indicated that he had utilized the fifth edition of the A.M.A., *Guides* and provided physical examination findings. However, no such physical examination findings accompanied his report. While he opined that appellant was entitled to an impairment of 38 percent of the left upper extremity, he did not explain how his calculations were derived or provide a report that conformed with the protocols of the A.M.A., *Guides*. Board precedent is well settled, however, when an attending physician's report gives an estimate of impairment, but does not indicate that the estimate is based upon the application of the A.M.A., *Guides* or improperly applies the A.M.A., *Guides*, the Office is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides.*[13]

However, in his November 23, 2005 report, Dr. Rattay noted that his report was similar to his September 7, 2005 opinion. But, this time, he conducted a physical examination and provided range of motion measurements. The range of motion measurements included findings for the left wrist which correlated to dorsiflexion of 65 degrees (extension), flexion of 55 degrees, ulnar deviation of 25 degrees and radial deviation of 15 degrees. The Board notes that these findings would correlate to 0 percent for 65 degrees of dorsiflexion, 1 percent for 55 degrees of flexion, 1 percent for 25 degrees of ulnar deviation and 1 percent for 15 degrees of

[9] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[10] 20 C.F.R. § 10.404.

[11] 5 U.S.C. § 8123(a).

[12] *William C. Bush*, 40 ECAB 1064 (1989).

[13] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

radial deviation according to Figures 16-28 and 16-31.[14] These measurements would be added for the wrist and would amount to an impairment of three percent. The Board notes that the Office medical adviser did not provide any opinion explaining why appellant would not be entitled to an impairment rating based on these findings. Furthermore, these findings are in conflict with those of Dr. Gragnani.

In a June 20, 2005 report, Dr. Gragnani, the second opinion physician, noted appellant's history of injury and treatment and utilized the fifth edition of the A.M.A., *Guides.* He conducted a physical examination and noted that it revealed no evidence of atrophy, sympathetic activity, or vasomotor or sudomotor dysfunction in the upper extremities. Dr. Gragnani referred to Figure 16-28 and Figure 16-31 for the wrist[15] and determined that range of motion for the left wrist correlated to flexion of 60 degrees, or a 0 percent impairment, extension of 72 degrees, or a 0 percent impairment, ulnar deviation of 46 degrees or a 0 percent impairment, and radial deviation of 28 degrees or a 0 percent impairment. Regarding the range of motion measurements for the left elbow, he referred to Figure 16-34 and 16-37.[16] Dr. Gragnani determined that appellant had flexion of 144 degrees or 0 percent impairment, extension of 0 degrees or 0 percent impairment, and supination and pronation of 80 degrees, which both equaled a 0 percent impairment. He opined that appellant reached maximum medical improvement in September 2004 and noted no further rating would be derived from Tables 16-10 and 16-11 for motor or sensory loss, as pain was included in the range of motion measurements.[17] However, appellant did not receive a range of motion impairment. He opined that there was no value which could be awarded to appellant for loss of range of motion, pain, or sensory or motor changes at either the elbow or wrist. However, as noted above, Dr. Rattay provided measurements for range of motion of the wrist which indicate that appellant had a three percent impairment. The Board finds that there is a conflict between Dr. Gragnani and Dr. Rattay[18] regarding the findings for the wrist.

The Board finds that the Office should have referred appellant to an impartial medical specialist to resolve the medical conflict regarding the extent of impairment arising from appellant's accepted employment injury.

Therefore, in order to resolve the conflict in the medical evidence, the case will be remanded to the Office for referral of the case record, including a statement of accepted facts and, if necessary, appellant, to an impartial medical specialist for a determination regarding the

[14] *Supra* note 3.

[15] *Id*.

[16] *Supra* note 4.

[17] *Supra* note 5.

[18] While Dr. Rattay reported grip strength findings, the A.M.A., *Guides* provides that loss of strength may be rated separately if such a deficit has not been considered adequately by other rating methods. The A.M.A., *Guides* further provides that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts that prevent effective application of maximum force. *See* A.M.A., *Guides* 508, section 16.8a. Dr. Rattay did not provide any explanation to show that grip strength findings were an appropriate basis of impairment in light of the restrictions set forth in the A.M.A., *Guides.*

extent of her left arm in accordance with the relevant standards of the A.M.A., *Guides*.[19] After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's entitlement to a schedule award to the left arm.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision due to a conflict in the medical evidence.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 30, 2006 and October 19, 2005 are set aside and the case is remanded for further action consistent with this decision.

Issued: December 7, 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

[19] *See Harold Travis*, 30 ECAB 1071, 1078-79 (1979).