

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

HERBERT P. KURZ, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 05-1731
Issued: March 14, 2006**

Appearances:
Jeffrey P. Zeelander, 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 August 17, 2005 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs' dated August 12, 2005 which granted a schedule award for 23 percent impairment of both his left and right upper extremities. 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 23 percent permanent impairment of his left and right upper extremities for which he received schedule awards.

FACTUAL HISTORY

On January 12, 2001 appellant, then a 53-year-old clerk, filed an occupational disease claim for bilateral carpal tunnel syndrome with bilateral tenosynovitis which he alleged were caused or aggravated by his employment duties. The Office accepted the claim for bilateral carpal tunnel syndrome and bilateral tenosynovitis and authorized surgery on May 23 and September 26, 2001 for a release of stenosing tenosynovitis left long and ring finger, left carpal

tunnel release and right carpal tunnel release. Appellant returned to limited duty after both surgical procedure.

The record reflects that the Office, in case number A03-0135438, accepted the conditions of bilateral carpal tunnel syndrome for which appellant underwent a right carpal tunnel release on June 30, 1988 and a left carpal tunnel release on August 11, 1988. A schedule award was issued on December 18, 1990 for 18 percent permanent impairment of the right upper extremity.

On August 16, 2004 appellant filed a Form CA-7 claiming a schedule award. By decision dated November 29, 2004, the Office denied appellant's claim.

On May 13, 2005 appellant filed a Form CA-7 claiming a schedule award. He submitted an April 6, 2005 medical report from Dr. George L. Rodriguez,¹ who reviewed appellant's history and set forth the results of range of motion findings at the wrist and all fingers at all joints for both hands. Dr. Rodriguez opined that appellant reached maximum medical improvement on or about March 31, 2002 and continued to experience significant bilateral wrist pain attributable to the work-related injuries of 1988 and 2000. Utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he opined that appellant had a 24 percent left upper extremity impairment and a 39 percent right upper extremity impairment for a sensory nerve impairment and grip strength impairment. For the left upper extremity impairment, Dr. Rodriguez found a 24 percent sensory nerve impairment of the median nerve. Utilizing Table 16-10, page 482 and Table 16-15, page 492, he opined that appellant had Grade 3 impairment to the median nerve or a 60 percent deficit which, when multiplied by the 39 percent maximum impairment, resulted in a 24 percent impairment. Under Table 16-34, page 509, appellant had eight percent strength loss index which equated to a zero percent right upper extremity impairment. Under the Combined Values Chart, he found that appellant's left upper extremity impairment equaled 24 percent. For the right upper extremity impairment, Dr. Rodriguez also found a 24 percent sensory nerve impairment based on the median nerve. Utilizing Table 16-10, page 482 and Table 16-15, page 492, he opined that appellant had a Grade 3 impairment to the median nerve or 60 percent deficit which, when multiplied by the 39 percent maximum impairment, resulted in a 24 percent impairment. Under Table 16-34, page 509, appellant had a 33 percent strength loss index which equated to a 20 percent right upper extremity impairment. Under the Combined Values Chart, he found that appellant's right upper extremity impairment equaled 39 percent.

In a June 1, 2005 report, an Office medical adviser noted that appellant's date of maximum medical improvement was April 6, 2005. The Office medical adviser applied the A.M.A., *Guides* to the physical findings of Dr. Rodriguez and determined that appellant had 23 percent left upper extremity impairment and 23 percent right upper extremity impairment. The Office medical adviser utilized the same Tables and Figures as Dr. Rodriguez to determine appellant's sensory impairment, but opined that the calculation resulted in a 23.4 percent impairment rating as opposed to Dr. Rodriguez's 24 percent impairment rating. The Office medical adviser further stated that Dr. Rodriguez's grip strength calculations were disallowed by the section 16.8a principles on page 508 of the A.M.A., *Guides*.

¹ Dr. Rodriguez's credentials are not of record.

In a decision dated August 12, 2005, the Office granted a schedule award for 23 percent impairment of each upper extremity, less the 18 percent award he previously received for the right arm.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.³

The schedule award provision of the Act⁴ provides for compensation to employees sustaining permanent loss or loss of use, of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.⁵

ANALYSIS

The Office based appellant's schedule awards for 23 percent permanent impairment to both the left and right upper extremities on the June 1, 2005 report of its Office medical adviser. The Office's procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.⁶ The Office medical adviser applied the A.M.A., *Guides* to the physical findings of Dr. Rodriquez, a treating physician, to determine that appellant had 23 percent permanent impairment to both upper extremities. Under Table 16-15, page 492, maximum impairment based on loss of the median nerve is 39 percent for sensory deficit or pain. Multiplying the Grade 3 or 60 percent maximum sensory deficit from Table 16-10 by 39 percent equaled 23.4 percent sensory impairment, which rounds down to a 23 percent impairment for both extremities.⁷ An impairment based on grip strength is allowable only under circumstances where the examiner believes the employee's loss of strength represents an impairing factor that has not been considered adequately by other

² 5 U.S.C. §§ 8101-8193.

³ *Gary J. Watling*, 52 ECAB 278 (2001).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *See* 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

⁷ *See Marco A. Padilla*, 51 ECAB 202, 206 n.6 (1999) (the Office's policy is to round the calculated impairment percentage to the nearest whole number).

methods in the A.M.A., *Guides*.⁸ This case does not present such a circumstance as Dr. Rodriguez did not address any such additional impairing factors due to loss of strength in his April 6, 2005 report. The Office medical adviser properly disallowed Dr. Rodriguez's inclusion of grip strength pursuant to section 16.8a of the A.M.A., *Guides*.

Since the Office medical adviser's determination of appellant's impairment is based on the examining physician's findings and complies with the A.M.A., *Guides*, the Office properly based its schedule award decision on his evaluation. There is no medical evidence of record, based on the A.M.A., *Guides*, which establishes that appellant has greater than a 23 percent permanent impairment to both the left and right upper extremities.⁹

As appellant previously received an award for a 18 percent permanent impairment of the right upper extremity, the Office properly awarded an additional 5 percent impairment for the right upper extremity.¹⁰

CONCLUSION

The Board finds that appellant has no more than 23 percent impairment to both the left and right upper extremities.

⁸ See A.M.A., *Guides* 508.

⁹ The Board notes that appellant retains the right to request an increased schedule award based on medical evidence indicating a progression in his employment-related condition. *Linda T. Brown*, 51 ECAB 115 (1999).

¹⁰ See *Mike E. Reid*, 51 ECAB 543, 547-48 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 14, 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