

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

C.R., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Lyons, NJ, Employer**)

**Docket No. 07-220
Issued: April 20, 2007**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2006 appellant timely appealed the April 26, 2006 merit decision of the Office of Workers' Compensation Programs, which affirmed a schedule award for permanent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.¹

ISSUE

The issue is whether appellant has greater than 30 percent impairment of the right upper extremity.

¹ The record includes additional medical evidence received after the Office issued the April 26, 2006 decision. The Board is limited to reviewing the record as it existed at the time of the Office's final decision. Therefore, new evidence cannot be considered on appeal. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

Appellant, a 62-year-old former nursing assistant, has an accepted claim for aggravation of right wrist and right elbow neuropathy, which arose on September 19, 1997.² Appellant had arthroscopic surgery on his right wrist on December 2, 1997. He returned to work on November 2, 1998, as a full-time, modified nursing assistant. However, appellant resigned within a matter of days and accepted private-sector employment as a substance abuse counselor beginning November 16, 1998, with no loss of wage-earning capacity.

On April 19, 2000 the Office granted appellant a schedule award for 14 percent impairment of the right upper extremity.³ In a May 2, 2002 decision, the Board found that there was an unresolved conflict of medical opinion regarding the extent of appellant's right upper extremity impairment.⁴ The Board, therefore, set aside the schedule award and remanded the case to the Office with instructions to refer appellant to an impartial medical examiner.⁵

In a report dated August 29, 2002, Dr. Gregory J. Mineo, a Board-certified orthopedic surgeon and impartial medical examiner, found 30 percent impairment of the right upper extremity. The overall rating was a combination of impairments due to sensory deficit at the elbow and loss of range of motion in the shoulder, elbow and wrist. With only slight modification, the district medical adviser concurred with Dr. Mineo's overall rating of 30 percent impairment of the right upper extremity.

On October 8, 2002 the Office awarded appellant an additional 16 percent impairment for the right upper extremity. The award covered 49.92 weeks from June 14, 2002 to May 29, 2003. Appellant subsequently requested a hearing, which was held on July 27, 2004. The Office hearing representative issued an October 25, 2004 decision affirming the additional 16 percent impairment awarded October 8, 2002.

On February 3, 2005 appellant requested reconsideration. In support of his request, he submitted an October 5, 2004 report from Dr. David Weiss, a Board-certified orthopedist, who found 59 percent impairment of the right upper extremity under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).⁶ By decision dated April 26, 2006, the Office denied modification.

² Appellant previously sustained an employment-related right wrist sprain on April 16, 1996.

³ The Branch of Hearings & Review affirmed the schedule award on January 4, 2001.

⁴ The Board found a conflict between the April 14, 1999 report of Dr. Ronald J. Potash, who found 71 percent impairment, and the February 1, 2000 report of Dr. Daniel E. Muser, an Office referral physician, who found only 14 percent impairment of the right upper extremity.

⁵ Docket No. 01-1350. The Board's May 2, 2002 decision is incorporated herein by reference.

⁶ Dr. Weiss claimed to have examined appellant on April 14, 1999. However, the only examination findings from that specific date were provided by Dr. Potash. While Dr. Weiss' name appeared on the letterhead along with Dr. Potash's name, the April 14, 1999 report of examination and impairment rating was signed only by Dr. Potash.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act 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.⁷ 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁸ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁹

ANALYSIS

The Board previously found a conflict of medical opinion between appellant's physician, Dr. Potash and Dr. Muser, the Office referral physician.¹⁰ On remand, the Office referred appellant to Dr. Mineo for an impartial medical evaluation. In his August 29, 2002 report, Dr. Mineo found 30 percent impairment of the right upper extremity. He assigned 14 percent impairment for loss of range of motion in the wrist, 2 percent impairment for loss of range of motion in the elbow and 7 percent impairment for loss of range of motion in the shoulder. The district medical adviser noted that Dr. Mineo made a slight error in calculating appellant's impairment for loss of range of motion in the shoulder. Instead of 7 percent impairment as noted by Dr. Mineo, appellant had 14 percent based on 125 degrees flexion (4 percent), 35 degrees extension (1 percent), 90 degrees abduction (4 percent), and 0 degrees internal rotation (5 percent).¹¹ The district medical adviser agreed with Dr. Mineo's range of motion assessment of 14 percent impairment for the wrist and 2 percent for the elbow.¹² When properly combined, the range of motion deficits for the shoulder (14 percent), wrist (14 percent), and elbow (2 percent) total 27 percent impairment of the right upper extremity.¹³

Dr. Mineo also assigned 7 percent impairment for what he described as a "mild" sensory deficit involving the ulnar nerve at the right elbow. The district medical adviser correctly noted that, under Table 16-15, A.M.A., *Guides* 492, a 7 percent sensory deficit was the maximum upper extremity impairment attributable to the ulnar nerve (above midforearm). This level of

⁷ The Act provides that, for a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks of compensation. 5 U.S.C. § 8107(c)(1) (2000).

⁸ 20 C.F.R. § 10.404 (2006).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

¹⁰ The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹¹ See A.M.A., *Guides* 476, Figure 16-40; A.M.A., *Guides* 477, Figure 16-43; A.M.A., *Guides* 479, Figure 16-46.

¹² See *id.* at 467, Figure 16-28; *Id.* at 469, Figure 16-31; *Id.* at 472, Figure 16-34; *Id.* at 474, Figure 16-37.

¹³ See *id.* at 434-35, section 16.1b; Combined Values Chart, *Id.* at 604-05.

impairment would correspond to a Grade 0 classification (100 percent) under Table 16-10, A.M.A., *Guides* 482. Dr. Mineo, however, did not specifically classify appellant's sensory deficit as Grade 0. The district medical adviser found that a Grade 3 classification (60 percent) best fit Dr. Mineo's characterization of appellant's symptoms.¹⁴ The impairment for sensory deficit is obtained by multiplying the Grade 3 sensory deficit (60 percent) by the maximum upper extremity sensory impairment attributable to the ulnar nerve (7 percent), which equals 4.2 percent. The upper extremity impairment due to sensory deficit (4 percent) is then combined with the upper extremity impairment for loss of range of motion (27 percent), for a total upper extremity impairment of 30 percent.¹⁵

The Board finds that the Office properly relied on the impartial medical examiner's August 29, 2002 findings. Dr. Mineo's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed his medical records. Dr. Mineo also reported accurate medical and employment histories. Therefore, the Office properly accorded determinative weight to the impartial medical examiner's findings.¹⁶ The 30 percent impairment rating provided by the district medical adviser on October 4, 2002 is consistent with Dr. Mineo's findings and conforms to the A.M.A., *Guides* (5th ed. 2001). As such, the reports of Dr. Mineo and the district medical adviser constitute the weight of the medical evidence.¹⁷

Appellant has not submitted any credible medical evidence indicating he has greater than 30 percent impairment of the right upper extremity. In his October 5, 2004 report, Dr. Weiss found 59 percent impairment of the right upper extremity under the A.M.A., *Guides* (5th ed. 2001). He stated that he had previously evaluated appellant on April 14, 1999, however, Dr. Weiss did not identify any specific physical findings in support of his 59 percent impairment rating. Thus, the Board cannot ascertain whether Dr. Weiss' October 5, 2004 rating is appropriate.¹⁸

¹⁴ A Grade 3 classification is characterized by "[d]istorted superficial tactile sensibility (diminished light touch and two-point discrimination), with some abnormal sensations or slight pain, that interferes with some activities." This classification represents a 26 to 60 percent deficit. A.M.A., *Guides* 482, Table 16-10.

¹⁵ See A.M.A., *Guides* 480, section 16.5a; Combined Values Chart, A.M.A., *Guides* 604-05.

¹⁶ Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹⁷ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

¹⁸ Alternatively, if Dr. Weiss is claiming authorship of the April 14, 1999 report signed by his colleague, Dr. Potash, then the October 5, 2004 report is still insufficient to overcome the weight properly accorded Dr. Mineo's August 29, 2002 findings. A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion. *Richael O'Brien*, 53 ECAB 234, 242 n.6 (2001).

CONCLUSION

Appellant has not demonstrated that he has greater than 30 percent impairment of the right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board