United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
	)	**Docket No. 07-884**
and	)	**Issued: August 20, 2007**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Sharpsburg, GA, 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 February 12, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated April 19 and December 18, 2006 denying her claim for a schedule award for the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established entitlement to a schedule award.

FACTUAL HISTORY

On February 17, 1998 appellant, then a 51-year-old rural carrier, sustained injury while pushing a hamper full of packages and mail on ramp and felt her elbow "pop." She did not stop work but returned to regular duty and, on April 27, 1998, accepted a light-duty position. The Office accepted appellant's claim for right lateral epicondylitis and lesion of the right radial nerve. The Office authorized a right lateral epicondylectomy which was performed in 1999 and a right radial tunnel release which was performed on May 18, 2005.

Appellant came under the treatment of Dr. Michael P. Gruber, a Board-certified orthopedic surgeon, who noted a history of injury and diagnosed severe lateral epicondylitis. In reports dated August 3 to November 23, 1998, he noted appellant's persistent symptoms of pain in the lateral epicondyle area and recommended a right lateral epicondyletomy which was performed in July 1999. From December 22, 1999 to November 14, 2002, he noted that appellant continued to experience persistent discomfort in the radial nerve distribution. Dr. Gruber referred appellant to Dr. Gary M. Lourie, a Board-certified orthopedist, who was experienced in radial tunnel syndrome. An electomyogram (EMG) was performed on February 1, 2000 which revealed mild right median neuropathy at the wrist consistent with carpal tunnel syndrome. In a report dated April 12, 2001, Dr. Lourie reviewed a history of appellant's injury and diagnosed lateral epicondylitis with symptoms consistent with radial tunnel. He advised that conservative treatment failed and recommended a radial tunnel release.

In a report dated January 11, 2005, Dr. Lourie indicated that appellant had not been treated in four years and returned with symptoms consistent with lateral epicondylitis and radial tunnel syndrome. A magnetic resonance imaging (MRI) scan of the right elbow dated March 9, 2005 revealed post-surgical changes around the lateral epicondyle and a partial tear of the common extensor tendon. Dr. Lourie recommended a right radial tunnel release which was performed on May 18, 2005.

On June 15, 2005 appellant filed a claim for a schedule award.

In a letter dated August 8, 2005, the Office requested that appellant's treating physician provide an impairment rating of the upper extremities in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[1] (A.M.A., *Guides*).

In reports dated June 2 to August 2, 2005, Dr. Lourie noted that appellant experienced increased tenderness and negative provocative radial tunnel. On August 23, 2005 he advised that appellant had reached maximum medical improvement and opined that, in accordance with the A.M.A., *Guides,* she sustained a 29 percent impairment of the upper extremities or a 17 percent impairment of the whole person.

In a report dated September 15, 2005, an Office medical adviser determined that appellant was not entitled to a schedule award for the upper extremities based on Dr. Lourie's reports. He indicated that appellant had a surgical release of the right radial tunnel with release of the posterior interosseous nerve on May 18, 2005 and had excellent recovery with no loss of motion in the elbow. The medical adviser advised that appellant experienced some tenderness but negative provocative radial tunnel test and had a normal EMG of the right upper extremity. He noted that Dr. Lourie granted a 29 percent schedule award with no basis or objective evidence to support this rating. The medical adviser opined that appellant sustained a zero percent impairment of the right upper extremity.

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

In a letter dated September 21, 2005, the Office provided appellant with a copy of the medical advisers report. It requested that she consult with her physician and provide additional information to substantiate an impairment rating.

In an October 6, 2005 report, Dr. Lourie noted that, in accordance with the A.M.A., *Guides*, appellant sustained a 17 percent impairment of the whole person. He noted range of motion findings for the right elbow of pronation of 40 degrees for an impairment rating of 7 percent;[2] supination of 50 degrees for an impairment rating of 5 percent;[3] extension of 30 degrees for an impairment rating of 6 percent;[4] flexion of 120 degrees for an impairment rating of 8 percent;[5] and loss of radial nerve function and sensory disturbances for an impairment rating of 3 percent, for a 29 percent permanent impairment of the upper extremities or a 17 percent whole person impairment.

In a report dated October 25, 2005, the Office medical adviser determined that appellant had nine percent permanent impairment of the right upper extremity based on Dr. Lourie's reports. He noted range of motion findings for the right elbow for pronation of 40 degrees for an impairment rating of three percent;[6] supination of 50 degrees for an impairment rating of one percent;[7] extension of 30 degrees for an impairment rating of three percent;[8] and flexion of 120 degrees for an impairment rating of two percent,[9] for a nine percent permanent impairment of the right upper extremity. Although Dr. Lourie granted appellant an additional three percent impairment due to loss of radial nerve function and sensory disturbances of the right elbow, this rating was not supported by the evidence of record.

On February 27, 2006 the Office determined that a conflict of medical opinion had been established between Dr. Lourie, appellant's treating physician and the Office medical adviser, regarding the permanent impairment due to appellant's work-related injury. On February 27, 2006 the Office referred appellant to an impartial medical specialist, Dr. Neil C. Berry, a Board-certified orthopedic surgeon. In a report dated March 14, 2006, Dr. Berry reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury and that Dr. Lourie determined that appellant reached maximum medical improvement on August 23, 2005. Dr. Berry noted findings upon physical examination of symmetrical alignment and contour of both elbows, the right elbow had full extension and flexion, flexion was 135 degrees, supination and pronation measured 90 degrees, dorsiflexion

[2] *See* A.M.A., *Guides* 474, Figure 16-37 (5th ed. 2001).

[3] *Id.*

[4] *See* A.M.A., *Guides* 472, Figure 16-34 (5th ed. 2001).

[5] *Id.*

[6] *See* A.M.A., *Guides supra* note 2.

[7] *Id.*

[8] *See* A.M.A., *Guides supra* note 4.

[9] *Id.*

and palmer flexion of both wrists measured 65 to 70 degrees, radial and ulnar deviation revealed no loss of wrist motion and minimal decrease in grip strength. He diagnosed status post chronic epicondylitis of the elbow with release of lateral epicondyle and status post release of posterior innerosseous nerve. Dr. Berry noted that, although appellant complained of moderate pain, he could not find any physical findings to substantiate her claim. He noted that there was full range of motion of the elbow and wrist and motor and grip strength was satisfactory. Dr. Berry opined that appellant sustained a zero percent impairment of the upper extremities.

In a report dated April 4, 2006, the Office medical adviser concurred in Dr. Berry's determination that appellant did not have any permanent impairment of the right upper extremity.

In a decision dated April 19, 2006, the Office denied appellant's claim for a schedule award.

By letter dated April 26, 2006, appellant requested an oral hearing before an Office hearing representative. The hearing was held on October 11, 2006. In a report dated June 1, 2006, Dr. Lourie noted that he reviewed the impairment ratings provided by the medical adviser and the impartial medical specialist. Due to the discrepancy in the determinations, he recommended referral to an independent functional capacity evaluator. On September 15, 2006 appellant filed a claim for a schedule award. In an October 20, 2006 report, Dr. John G. Seiler, III, a Board-certified orthopedic surgeon, noted that she presented with persistent right elbow pain and requested a reevaluation of her impairment. He noted findings upon physical examination of no objective focal deficit to manual motor testing, range of motion for the right elbow for flexion was 100 degrees, extension was "-20" degrees, there was full pronation and limited grip strength. Dr. Seiler noted that appellant had mild osteoarthritis in her hands and mild elbow synovitis. He diagnosed right elbow pain and opined that in accordance with the A.M.A., *Guides* appellant had a seven percent upper extremity impairment or a four percent whole person impairment due to mild elbow synovitis.

In a decision dated December 18, 2006, the hearing representative affirmed the April 19, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[10] and its implementing regulation[11] set 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

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[12]

ANALYSIS

On appeal appellant asserts that she is entitled to a schedule award for permanent impairment of the right upper extremity. The Office accepted her claim for right lateral epicondylitis, lesion of the right radial nerve and authorized a right lateral epicondylectomy which was performed in 1999 and a right radial tunnel release which was performed on May 18, 2005. The Office determined that a conflict existed in the medical evidence between appellant's attending physician, Dr. Lourie, and an Office medical adviser concerning the permanent impairment of her right upper extremity. Consequently, the Office referred appellant to Dr. Berry to resolve the conflict.[13]

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[14]

Dr. Berry reviewed appellant's history, reported findings, and noted an essentially normal physical examination. He noted that Dr. Lourie determined that appellant reached maximum medical improvement on August 23, 2005. Dr. Berry noted findings upon physical examination of symmetrical alignment and contour of both elbows, the right elbow had full flexion, extension, supination and pronation, there was no loss of wrist motion and minimal decreased grip strength. Dr. Berry diagnosed status post chronic epicondylitis of the elbow with release of lateral epicondyle and status post release of posterior innerosseous nerve. He indicated that he could not find any physical findings to substantiate appellant's complaints of moderate pain. Dr. Berry opined that appellant sustained a zero percent impairment of the upper extremities.

Dr. Berry properly applied the A.M.A., *Guides* and reached an impairment rating of zero percent of the right upper extremity. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant does not have an impairment rating of the upper extremities. The Board finds that the opinion of Dr. Berry is sufficiently well rationalized and based upon a proper factual background. It is entitled to special weight and establishes that appellant does not have impairment related to her accepted conditions.

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[12] *See id*.; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[13] The Board notes that Dr. Lourie's report dated October 6, 2005 incorrectly calculated the following range of motion measurements for the right elbow: pronation of 40 degrees for an impairment rating of seven percent, rather this calculates to a three percent impairment, the A.M.A., *Guides*, *supra* note 2, supination of 50 degrees for an impairment rating of five percent, rather this calculates to a one percent impairment; extension of 30 degrees for an impairment rating of six percent, rather this calculates to a three percent impairment, see A.M.A., *Guides supra* note 4; and flexion of 120 degrees for an impairment rating of eight percent, rather this calculates to a two percent impairment. These findings are not in conflict with the findings of the medical adviser. However, Dr. Lourie also determined that appellant sustained a loss of radial nerve function and sensory disturbances for an impairment rating of three percent which is contrary to the findings of the medical adviser and serves as the basis of the conflict of opinion.

[14] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

Appellant submitted a report from Dr. Seiler dated October 20, 2006. He determined that appellant sustained a seven percent upper extremity impairment due to mild elbow synovitis. The Board has carefully reviewed Dr. Seiler's report of October 20, 2006, and notes that Dr. Seiler failed to provide a history of the injury or note the accepted work-related conditions.[15] Additionally, he did not adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides*.[16] Dr. Seiler noted findings upon physical examination of flexion of 100 degrees for the right elbow, extension was "-20 degrees," there was full pronation and limited grip strength on the right. Although Dr. Seiler noted flexion of the right elbow measured 100 degrees,[17] he did not provide a rationalized opinion regarding the causal relationship between the impairment and the accepted work injury.[18] Additionally, the Board notes that Dr. Seiler incorrectly noted that extension was measured at "-20 degrees" as this figure does not conform with the fifth edition of the A.M.A., *Guides.*[19] He determined that appellant sustained a seven percent permanent impairment of the right upper extremity but failed to cite to specific tables or charts in support of this determination. Therefore, the Board finds that Dr. Seiler did not properly follow the A.M.A., *Guides.* An attending physician's report is of diminished probative value where the A.M.A., *Guides* are not properly followed.[20]

[15] *Frank Luis Rembisz,* 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[16] *See Tonya R. Bell,* 43 ECAB 845, 849 (1992).

[17] *See* A.M.A., *Guides supra* note 4.

[18] *Jimmie H. Duckett,* 52 ECAB 332 (2001); *Franklin D. Haislah,* 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[19] *See* A.M.A., *Guides supra* note 4.

[20] *See Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin,* 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 18 and April 19, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 20, 2007
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