United States Department of Labor
Employees' Compensation Appeals Board

T.H., Appellant	)	
and	)	**Docket No. 06-1500**
	)	**Issued: January 31, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Southhampton, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2006 appellant, through his attorney, filed a timely appeal from a February 7, 2006 merit decision of a hearing representative of the Office of Workers' Compensation Programs denying his claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a 21 percent permanent impairment of each upper extremity for which he received schedule awards.

FACTUAL HISTORY

This case is before the Board for the second time. On July 5, 2002 the Board reversed September 20 and February 1, 2001 decisions terminating appellant's medical benefits for his

accepted condition of thoracic outlet syndrome.[1] The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

Appellant received schedule awards for an 18 percent impairment of his right and left upper extremities. On July 26, 2003 he filed a claim for an additional schedule award. In support of his request, appellant submitted an impairment evaluation dated May 5, 2003 from Dr. David Weiss, an osteopath, who discussed appellant's complaints of numbness, tingling and weakness of the upper extremities bilaterally and intermittent pain and stiffness of the neck and upper back. Dr. Weiss described appellant's difficulties performing activities of daily living. He listed measurements for grip strength and range of motion of the bilateral shoulders, hands and wrists. Dr. Weiss further found a sensory deficit at the C5 to C7 dermatomes of the bilateral upper extremities. Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), he determined that appellant had a 21 percent impairment of both the right and left upper extremity due to sensory deficits at C5-7 and loss of grip strength. Dr. Weiss found that appellant had an additional 3 percent bilateral impairment due to pain according to Chapter 18 of the A.M.A., *Guides*, for a total right and left upper extremity impairment of 24 percent.

An Office medical adviser reviewed Dr. Weiss' report on September 26, 2003. He determined that, according to Table 15-17 on page 424 of the A.M.A., *Guides*, appellant had a 21 percent impairment of the both the right and left upper extremity. The Office medical adviser found that Dr. Weiss erred in including an additional three percent award for pain under Chapter 18.

By decision dated October 29, 2003, the Office granted appellant a schedule award for an additional three percent impairment of the right and left arm. The period of the award ran for 18.72 weeks from May 3 to September 11, 2003. Appellant requested a hearing, which was held on July 1, 2004. In a decision dated October 18, 2004, an Office hearing representative set aside the October 29, 2003 decision after finding a conflict in medical opinion between Dr. Weiss and the Office medical adviser.

On December 6, 2004 the Office referred appellant to Dr. Charles R. Levine, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion on the extent of his permanent impairment of the upper extremities. In a report dated January 13, 2005, Dr. Levine diagnosed bilateral thoracic outlet syndrome. He found that appellant had full range of motion of the shoulders, no atrophy and "excellent bicep and tricep strength bilaterally." Dr. Levine described his complaints of pain in his arms with overhead activity. He listed findings of "diminished pin prick sensation in both hands along the C5, C6 and C7 nerve root distribution." Dr. Levine found full range of motion of the wrists with negative Tinel's sign and Phalen's test and good grip strength bilaterally. He stated, "[b]ecause [appellant's] presenting complaints are those of neuroimpingment, I have chosen to use the neurological deficits as a basis for his disability evaluation. Also, [he] does not reveal any diminished joint motion and has no detectable muscle weakness on physical examination." Citing Table 15-17 on page 424 of the A.M.A., *Guides*, Dr. Levine determined that appellant had a 5 percent impairment of the nerve

[1] *Thomas J. Hartkorn*, Docket No. 02-514 (issued July 5, 2002).

root at C5, a 5 percent impairment of the nerve root at C7 and an 8 percent impairment of the nerve root at C6, for an 18 percent total impairment of each upper extremity.

On January 20, 2005 an Office medical adviser reviewed Dr. Levine's January 13, 2005 report. He found that Dr. Levine erred in applying Table 15-17 on page 424 of the A.M.A., *Guides*. The Office medical adviser determined that the maximum impairment due to sensory deficit or pain according to Table 15-17 was five percent at C5, eight percent at C6 and five percent at C7. He noted that the proper procedure under the A.M.A., *Guides* is to consider each nerve root separately and grade the impairment under either Table 15-15 for sensory deficit or pain or under Table 15-16 for motor impairments. The Office medical adviser graded appellant's pain as 25 percent based on Dr. Levine's finding of decreased pin prick along the nerve roots at C5 through C7.[2] He multiplied the 25 percent for graded pain by the maximum impairment of the nerve root at C5 and C7 to find a 1.25 percent impairment, respectively. The Office medical adviser then multiplied the 25 percent graded pain by the 8 percent maximum impairment of the nerve root at C6 to find a 2 percent impairment. He added the nerve root impairments to find a total right and left upper extremity impairment of 4.5 percent. The Office medical adviser added 3 percent for pain according to Figure 18-1 on page 574 of the A.M.A., *Guides* to find a total impairment of both the right and left upper extremity of 7.5 percent. He noted that the date of maximum medical improvement was January 14, 2005.

By decision dated February 2, 2005, the Office denied appellant's claim for an increased schedule award after finding that the evidence established that he had no more than a 21 percent impairment of each upper extremity.

Appellant requested an oral hearing, which was held on February 7, 2005. In a decision dated February 7, 2006, the Office hearing representative affirmed the February 2, 2005 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[3] and its implementing federal regulation,[4] 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 for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) as the uniform standard applicable to all claimants.[5]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities. The nerves

[2] A.M.A., *Guides* 424, Table 15-15.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] 20 C.F.R. § 10.404(a).

involved are first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[6]

The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[7] The Office has stated that a separate pain calculation under Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain as outlined in Chapter 13, 16 and 17 of the fifth edition of the A.M.A., *Guides*.[8]

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and an aggravation of thoracic outlet syndrome causally related to factors of his federal employment. He received schedule awards for an 18 percent impairment of both his right and left upper extremity. On July 26, 2003 appellant filed a claim for an additional schedule award.

An Office hearing representative determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Weiss, who found that he had a 24 percent impairment of each upper extremity and the Office medical adviser, who opined that he had a 21 percent impairment of each upper extremity. The Office referred appellant to Dr. Levine for resolution of the conflict.

In an impairment evaluation dated January 13, 2005, Dr. Levine diagnosed bilateral thoracic outlet syndrome. He listed findings of unrestricted range of motion, full bicep and tricep strength and no atrophy. Dr. Levine found decreased sensation to pin prick in the hands along the C5 through C7 nerve roots. He further found negative Tinel's sign and Phalen's test,

[6] A.M.A., *Guides* 423; *see also B.C.*, 58 ECAB ___ (Docket No. 06-925, issued October 13, 2006).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

[8] *Id.*

[9] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

full range of motion of the wrists and good bilateral grip strength. Dr. Levine determined that appellant had a 5 percent impairment of the C5 nerve root, a 5 percent impairment of the C7 nerve root and an 8 percent impairment of the C6 nerve root according to Table 15-17 of the A.M.A., *Guides*, which he added to find an 18 percent impairment of each upper extremity.

An Office medical adviser reviewed Dr. Levine's January 13, 2005 report and applied the A.M.A., *Guides* to his findings. He properly applied Table 15-17 on page 424, which provides the maximum percent of loss of function for nerve root impairments affecting the upper extremity. The Office medical adviser found that the maximum impairment for sensory loss was five percent at C5 and C7 and eight percent at C6. He graded appellant's impairment under Table l5-15 on page 424 as Grade 4, or 25 percent, due to Dr. Levine's finding of diminished pin prick sensation of both hands along the C5 through C7 nerve roots. The Office medical adviser properly multiplied the maximum sensory loss impairment of 5 percent at C5, 8 percent at C6 and 5 percent at C7 by the graded 25 percent impairment for sensory loss to find a 1.25 percent, a 2 percent and a 1.25 percent impairment, respectively.[10] He then added the impairments due to sensory loss to find a 4.5 percent upper extremity impairment bilaterally. The Office medical adviser determined that appellant was entitled to an additional 3 percent impairment due to pain according to Figure 18-1 on page 574. The Board notes, however, that according to section 18.3(b) of the A.M.A., *Guides*, examiners should not use this chapter to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[11] Office procedures provide that Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain.[12] As appellant received an award for sensory loss pursuant to Tables 15-15 and 15-17 on page 424 of the A.M.A., *Guides*, he is not entitled to an additional award for pain under Chapter 18. The Board, consequently, finds that he has no more than a 21 percent impairment of each upper extremity.

On appeal appellant's attorney contends that Dr. Levine erred in failing to properly cite to the A.M.A., *Guides* and in failing to provide range of motion, atrophy and grip strength measurements. He further argues that Dr. Levine did not provide an impairment rating for appellant's carpal tunnel syndrome. Dr. Levine, however, found no loss of range of motion, atrophy or strength on physical examination of the shoulders, arms and wrists. He further found negative Tinel's sign and Phalen's test.

Appellant additionally argues that Dr. Levine's opinion is insufficient to resolve the conflict in medical opinion. There exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13] Dr. Levine discussed appellant's complaints and provided a thorough examination such that the Office medical adviser was able

[10] *Id*. at 423.

[11] *Id*. at 517.

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[13] *David W. Pickett, supra* note 9.

to apply the A.M.A., *Guides* to his findings. His report, consequently, is sufficient to resolve the conflict in medical opinion.

CONCLUSION

The Board finds that appellant has no more than a 21 percent permanent impairment of each upper extremity for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 7, 2006 is affirmed.

Issued: January 31, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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