

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

J.G., Appellant)
)
and)
)
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer)
)

**Docket No. 07-327
Issued: July 5, 2007**

Appearances:
Appellant, pro se
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 November 16, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 15, 2006 which denied further merit review of an Office schedule award decision dated June 2, 2006. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues on appeal are: (1) whether appellant met his burden of proof to establish that he has more than eight percent permanent impairment of his left and right upper extremities for which he received schedule awards; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 14, 2003 appellant, then a 55-year-old mail processing clerk, was injured when he felt something pull in his left elbow while pulling a container out of his truck at work.

He did not stop work. The Office accepted appellant's claim for bilateral medial epicondylitis with left elbow surgery.¹ Appellant received appropriate compensation benefits.

On February 27, 2004 appellant filed a schedule award claim. He was advised by the Office, in a letter dated April 19, 2005, that his schedule award claim could not be considered as the medical evidence indicated that his condition had not yet reached maximum medical improvement (MMI).

In an October 25, 2005 report, Dr. Daniel Murphy, a Board-certified orthopedic surgeon, diagnosed bilateral medial epicondylitis. He opined that appellant was unable to return to his regular duty and indicated that he would reach MMI in December 2005. In a December 9, 2005 report, Dr. Murphy noted that appellant had full motion in both upper extremities, soreness in the ulnar nerve on both sides and reasonable strength distally at about 5/5 with well-healed inclusions. He noted that appellant had lingering nerve irritation, but that he had reached MMI. Dr. Murphy opined that appellant had a permanent impairment of 15 percent of both upper extremities. He noted that appellant could continue to work within his restrictions but should avoid repetitive work.

By letter dated May 8, 2006, appellant advised the Office that he would retire on May 31, 2006. On May 9, 2006 he filed a Form CA-7 claim for a schedule award.

In a report dated May 18, 2006, the Office medical adviser reviewed the medical evidence of record and utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001). He advised that appellant had bilateral release medial epicondyle and neurolysis and anterior transposition of the ulnar nerve, bilateral. The Office medical adviser noted that appellant had Grade IV motor and sensory deficits of the bilateral ulnar nerves. He referred to Table 16-15 and combined it with Tables 16-10 and 16-11.² The Office medical adviser determined that appellant was entitled to eight percent impairment to each upper extremity.³

By decision dated June 2, 2006, the Office granted appellant schedule awards for eight percent permanent impairment of both the right and left upper extremities.

By letter dated July 20, 2006, appellant requested reconsideration and submitted additional evidence. He alleged that he was enclosing a copy of Dr. Murphy's June 9, 2006 progress note and his previous report dated December 9, 2005. Appellant also alleged that he did not receive a copy of the Office medical adviser's report.

¹ Appellant underwent surgery for his left elbow chronic ulnar nerve neuritis and cubital tunnel syndrome on September 23, 2003 and underwent surgery for his right elbow chronic medial epicondylitis on October 28, 2003. On February 16, 2005 he underwent cubital tunnel syndrome with ulnar nerve compression of the left elbow and on June 13, 2005 appellant underwent a cubital tunnel syndrome/ulnar nerve compression cubital tunnel of the right elbow.

² A.M.A., *Guides* 492, 483, 482.

³ The Office medical adviser determined that appellant was actually entitled to 7.5 percent for each upper extremity but rounded it up to 8 percent.

In a June 9, 2006 report, Dr. Murphy opined that appellant had a permanent impairment of 15 percent to both the right and left upper extremity.

By decision dated August 15, 2006, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request was repetitious and neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ 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 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.⁶

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.⁷ However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.⁸

ANALYSIS -- ISSUE 1

Regarding appellant's upper extremities, his treating physician, Dr. Murphy determined that appellant had had full range of motion in both upper extremities and opined that he was entitled to an impairment of 15 percent of each arm. However, he did not refer to or indicate that he had referenced the A.M.A., *Guides*. For example, Dr. Murphy did not list any tables, figures or pages in the A.M.A., *Guides* to which he had referred in making his findings. Thus, his report

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ A.M.A., *Guides* (5th ed. 2001).

⁷ See *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

⁸ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000); see also *Paul A. Toms*, 28 ECAB 403 (1987).

was of limited probative value, as it merely contained a percentage without any explanation of how he arrived at his conclusion pursuant to the A.M.A., *Guides*.⁹

The Office then referred the case to the Office medical adviser who in a May 18, 2006 report, applied the findings provided by Dr. Murphy to the A.M.A., *Guides*. The Board finds that the opinion of the Office medical adviser is insufficient to establish a permanent impairment rating of eight percent for both the right and left arms. While the Office medical adviser generally referenced the tables in the A.M.A., *Guides* on which he based his determination of eight percent permanent impairment for each upper extremity, he did not adequately explain his rating. He generally indicated that he utilized Table 16-15 and combined it with both Tables 16-10 and 11.¹⁰ However, it is unclear how the Office medical adviser applied a particular value for a particular nerve under Table 16-15 to determine the maximum impairments for either sensory or motor loss. Table 16-15 directs use of Table 16-10, page 482, sensory deficit and pain and Table 16-11, page 484, motor and loss of power deficit, to reach an impairment rating.¹¹ On each of these tables, the Office medical adviser rated appellant's deficit as a Grade 4, which indicates a deficit of 1 to 25 percent, but did not indicate the percentages or the affected nerve he used from Table 16-15, nor did he explain the reason why he selected Grade 4 in Tables 16-10 and 16-11.¹² Without this information the Board is unable to determine the basis for rating eight percent permanent impairment to each upper extremity.

CONCLUSION

The Board finds that this case is not in posture for decision as the permanent impairment rating on which the Office relied was insufficient to establish the schedule award.¹³

⁹ See *Shalanya Ellison*, 56 ECAB ___ Docket No. 04-824 (issued November 10, 2004) (schedule awards are to be based on the A.M.A., *Guides*; an estimate of permanent impairment is irrelevant and not probative where it is not based on the A.M.A., *Guides*).

¹⁰ A.M.A., *Guides* 492, 483, 482.

¹¹ *Id.*

¹² See *Tara L. Hein*, 56 ECAB ___ Docket No. 05-191 (issued April 4, 2005) (an Office medical adviser, as a nonexamining physician, cannot select a percentage without any explanation or reference to the examining physician's findings; such arbitrary selection precludes the Board from making an informed determination of the propriety of the Office medical adviser's calculation of the permanent impairment).

¹³ In light of the Board's findings on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 15 and June 2, 2006 are remanded.

Issued: July 5, 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