

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

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**A.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Buck, NJ, Employer**

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**Docket No. 07-765  
Issued: July 9, 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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 25, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 27, 2006 regarding her entitlement to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has more than 8 percent impairment of her left lower extremity and 24 percent impairment of her right upper extremity for which she received schedule awards.

**FACTUAL HISTORY**

This is the second appeal in this case. On October 7, 2002 appellant, then a 41-year-old letter carrier, twisted her left ankle while dismounting from her employing establishment vehicle and fell injuring her right wrist and elbow. The Office accepted her claim for left ankle sprain and right wrist sprain. The Office subsequently accepted right lateral epicondylitis on

September 8, 2003 and authorized surgery to correct this condition. On October 27, 2003 appellant's attending physician, Dr. Arthur Vasen, a surgeon, performed a right lateral epicondyle debridement and reattachment with synovectomy of the radiocapitellar joint. The Office entered appellant on the periodic rolls on December 9, 2003 based on her date-of-disability pay rate of \$857.37 per week.

Dr. Vasen released appellant to return to full duty on March 22, 2004 and stated that she should return for treatment on an as needed basis. In a note dated May 18, 2004, he reported that appellant was lifting a tray in the performance of duty on April 1, 2004 and felt a pop in her right arm. Dr. Vasen reviewed a magnetic resonance imaging scan and found no evidence of abnormality. The Office accepted that appellant sustained a work-related aggravation of her epicondylitis on April 1, 2004.<sup>1</sup> On July 13, 2004 Dr. Vasen found that appellant had reached maximum medical improvement.

Appellant, through her attorney, requested a schedule award on November 22, 2004. In a report dated September 23, 2004, Dr. David Weiss, an osteopath, addressed her permanent impairment for schedule award purposes. He found that appellant exhibited a left lower extremity limp, tenderness of the lateral epicondyle in the right elbow, right elbow flexion of 145 degrees, right elbow pronation of 60 degrees and right elbow supination of 90 degrees. Dr. Weiss noted that grip strength testing on the right was 10 kilograms and 18 kilograms on the left. He found that muscle strength testing of the right elbow revealed strength of four out of five in the pronators and supinators. Dr. Weiss found that on manual muscle testing right wrist dorsiflexion and extension were four out of five. He noted appellant's right upper arm circumference was 24 centimeters while his left upper arm circumference was 25.5 centimeters. Appellant's right lower arm circumference was 21 centimeters and 22 centimeters on the left. Regarding his right wrist, Dr. Weiss found that appellant exhibited full range of motion with tenderness. Dr. Weiss examined appellant's left ankle and found anterior talofibular ligament tenderness as well as tenderness over the alteral malleolus. Manual muscle testing revealed four out of five strength in the ankle invertus.

Dr. Weiss rated 10 percent impairment of the right upper extremity due to resection arthroplasty, 1 percent impairment due to loss of elbow supination, 20 percent impairment due to loss of grip strength and 3 percent impairment due to pain. He concluded that appellant had 32 percent impairment of the right upper extremity. As to her left lower extremity, Dr. Weiss found that appellant had five percent impairment due to loss of muscle strength and three percent impairment due to pain. He reached a total left lower extremity impairment rating of eight percent.

By decision dated January 24, 2005, the Office issued appellant a schedule award for 8 percent impairment of her left lower extremity and 24 percent impairment of her right upper extremity. It based her schedule awards on a pay rate of \$857.37. Appellant, through her attorney, requested an oral hearing on February 2, 2005. She testified at the oral hearing on November 29, 2005. Appellant's attorney alleged that she was entitled to the pay rate associated with her April 1, 2004 employment injury of \$45,282.00 per year or \$870.90 per week. He noted

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<sup>1</sup> In the February 14, 2006 decision, the hearing representative directed the Office to combine files. The record before the Board does not contain documentation of appellant's April 1, 2004 employment injury.

that appellant's two right elbow injuries were listed under separate claim numbers and argued that the Office medical adviser improperly excluded appellant's right elbow surgery from his impairment rating.

In a decision dated February 14, 2006, the hearing representative found that the Office medical adviser properly determined appellant's permanent impairment for schedule award purposes. He noted that the Office medical adviser explained that appellant had not undergone a resection arthroplasty. The hearing representative found that appellant was entitled to be paid based on her pay rate at the time of her April 1, 2004 injury and directed the Office to combine appellant's files and recomputed her schedule award based on the higher pay rate.

In a letter dated November 7, 2006, the Office stated that it had recalculated appellant's schedule award based on the pay rate of \$45,282.00 or \$870.81 per week rather than \$857.37 per week as directed by the hearing representative. The Office noted that it had improperly paid appellant compensation for eight percent impairment to the foot rather than to the lower extremity which resulted in an additional underpayment. The Office concluded that appellant was entitled to \$64,480.25 in compensation under the schedule awards, that she had received payment of \$48,704.36 and that she was due additional compensation in the amount of \$15,775.89.

Appellant, through her attorney, appealed the February 14, 2006 decision<sup>2</sup> to the Board. By order dated November 20, 2006, the Board set aside the hearing representative's February 14, 2006 decision noting that the Office medical adviser's report was not included in the record before the Board and an informed adjudication would, therefore, not be possible. The Board remanded the case to the Office for inclusion of the Office medical adviser's report and a *de novo* decision.<sup>3</sup>

The Office medical adviser's January 13, 2005 report reviewed Dr. Weiss' report and found that the left lower extremity impairment rating was correct. However, the Office medical adviser found that appellant was not entitled to 10 percent impairment of the right upper extremity due to resection arthroplasty or excision of the radial head as this was not the surgery performed by Dr. Vasen. He noted that debridement of the extensor tendon right elbow involved soft tissue only and was not an impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Office medical adviser concurred with the 1 percent impairment due to loss of elbow pronation, 20 percent impairment due to loss of grip strength and 3 percent due to pain for a right upper extremity impairment rating of 24 percent.

By decision dated December 27, 2006, the Office found that appellant had no more than 8 percent impairment of her left lower extremity and 24 percent impairment of her right upper extremity for which she had received schedule awards.

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<sup>2</sup> The Board notes that the issue of pay rate was is not before the Board as the Office has not issued a final decision specifying the correct pay rate. 20 C.F.R. § 501.2(c).

<sup>3</sup> Docket No. 06-1587 (issued November 20, 2006).

## LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation<sup>5</sup> 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.<sup>6</sup> Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>7</sup>

Manual muscle testing assesses an individual's ability to move a joint through a full range of motion against gravity, or move it against additional resistance applied by the examiner, or to hold the joint position against resistance. Manual muscle testing is subject to the individual's conscious or unconscious control. The A.M.A., *Guides* provide that strength deficits measured by manual muscle testing should only be included in the calculation of upper extremity impairment when the examiner believes the individual's loss of strength represents an impairing factor that has not been adequately by other methods.<sup>8</sup> Regarding the lower extremity, the A.M.A., *Guides* provide that to be valid the results of manual muscle testing should be "concordant with other observable pathologic signs and medical evidence."<sup>9</sup>

Grip strength is used to evaluate power weaknesses related to the structures in the hand wrist or forearm.<sup>10</sup> The A.M.A., *Guides* do not encourage the use of grip strength as an impairment rating because strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* for the most part is based on anatomic impairment. Thus the A.M.A., *Guides* does not assign a large role to such measurements. Only in rare cases should grip strength be used, and only when it represents an impairing factor that has not been otherwise considered adequately.<sup>11</sup> The A.M.A., *Guides* state,

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

<sup>8</sup> A.M.A., *Guides* 508, section 16.8a; 509, section 16.8c.

<sup>9</sup> *Id.* at 531, section 17.2e.

<sup>10</sup> *Id.* at 508, section 16.8b.

<sup>11</sup> *Id.* at 507, section 16.8 Strength Evaluation; *Cerita J. Slusher*, 56 ECAB \_\_\_ Docket No. 04-1584 (issued May 10, 2005); *Mary L. Henninger*, 52 ECAB 408, 409 (2001).

“Otherwise, the impairment ratings based on objective anatomic findings take precedence.” (Emphasis in the original.)<sup>12</sup>

The fifth edition of the A.M.A., *Guides* allows for impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluation 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*.<sup>13</sup> The A.M.A., *Guides* provide and the Board has held that it is improper to combine impairments for decreased strength and decreased range of motion.<sup>14</sup>

### ANALYSIS

Appellant requested a schedule award based on the September 23, 2004 report of Dr. Weiss, who provided citations to the A.M.A., *Guides* for his impairment rating and awarded appellant 10 percent impairment of the right upper extremity due to resection arthroplasty,<sup>15</sup> 1 percent impairment due to loss of elbow supination,<sup>16</sup> 20 percent impairment due to loss of grip strength<sup>17</sup> and 3 percent impairment due to pain.<sup>18</sup> Dr. Weiss found that appellant had 32 percent impairment of the right upper extremity.

The Office medical adviser found that appellant was not entitled to 10 percent impairment of the right upper extremity due to resection arthroplasty or excision of the radial head as this was not the surgery performed by Dr. Vasen. He noted that debridement of the extensor tendon right elbow involved soft tissue only and was not an impairment under the A.M.A., *Guides*. The Board concurs with this finding of the Office medical adviser. Dr. Vasen did not describe the surgery on October 27, 2003 as a resection arthroplasty, but instead stated that he had performed a right lateral epicondyle debridement and reattachment with synovectomy of the radiocapitellar joint. As appellant did not undergo an arthroplasty of specific bones or

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<sup>12</sup> A.M.A., *Guides* 508.

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides*, 571, 18.3(b); *P.C.*, 58 ECAB \_\_\_\_ (Docket No. 07-410, issued May 31, 2007); *Frantz Ghassan*, 57 ECAB \_\_\_\_ (Docket No. 05-1947, issued February 2, 2006).

<sup>14</sup> A.M.A., *Guides* 526 Table 17.2; *Slusher*, *supra* note 11; *Patricia J. Horney*, 56 ECAB \_\_\_\_ (Docket No. 04 2013, issued January 14, 2005).

<sup>15</sup> A.M.A., *Guides* 506, Table 16-27.

<sup>16</sup> *Id.* at 474, Figure 16-37.

<sup>17</sup> *Id.* at 509, Table 16-34.

<sup>18</sup> *Id.* at 574, Table 18-1.

joints as described by the A.M.A., *Guides*, she is not entitled to a permanent impairment rating for this condition.<sup>19</sup>

The Office medical adviser concurred with the 1 percent impairment due to loss of elbow pronation, 20 percent impairment due to loss of grip strength and 3 percent due to pain for a right upper extremity impairment rating of 24 percent.<sup>20</sup> Neither Dr. Weiss nor the Office medical adviser provided adequate explanation for the usage of grip strength or for the inclusion of pain-related impairment under Chapter 18 of the A.M.A., *Guides* in their respective impairment ratings. Both physicians also improperly included impairments for both loss of strength and loss of range of motion in the impairment ratings for appellant's right upper extremity. As no physician has provided a description of appellant's impairment in accordance with the A.M.A., *Guides*, further development of the medical evidence is required to establish the degree of appellant's right upper extremity impairment.<sup>21</sup>

In regard to appellant's left lower extremity, Dr. Weiss found that she had five percent impairment due to loss of muscle strength as demonstrated through manual muscle testing<sup>22</sup> and three percent impairment due to pain.<sup>23</sup> She reached a total left lower extremity impairment rating of eight percent. The Office medical adviser reviewed Dr. Weiss' report and found that the left lower extremity impairment rating was correct. Neither physician explained the appropriateness of manual muscle testing in evaluating appellant's left lower extremity by describing other observable pathologic signs and medical evidence.<sup>24</sup> Regarding the application of the pain section of Chapter 18 of the A.M.A., *Guides*, neither physician explained why appellant's pain-related impairment could not be adequately address by applying Chapter 17 of the A.M.A., *Guides* which addresses lower extremity impairment. Therefore, they did not support the application of Chapter 18 of the A.M.A., *Guides* to appellant's left lower extremity.

### CONCLUSION

The Board finds that the case is not currently in posture for decision. Neither appellant's physician, Dr. Weiss, nor the Office medical adviser properly applied the A.M.A., *Guides* to appellant's physical findings in order to determine her impairment for schedule award purposes. On remand the Office should refer appellant to an appropriate physician to determine the extent of her permanent impairment and after such further development as the Office deems necessary issue an appropriate decision.

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<sup>19</sup> See *supra* note 17.

<sup>20</sup> This document was not included in the record at the time of the Board's November 20, 2003 order, setting aside the hearing representative's February 14, 2006 decision and remanding for a *de novo* decision. Docket No. 06-1587 (issued November 20, 2003).

<sup>21</sup> See *supra* note 14.

<sup>22</sup> A.M.A., *Guides*, 532, Table 17-8.

<sup>23</sup> See *supra* note 20.

<sup>24</sup> See *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 27, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: July 9, 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