

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

K.F., Appellant

and

**U.S. POSTAL SERVICE, SCHUYLKILL
STATION, Philadelphia, PA, Employer**

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**Docket No. 07-610
Issued: June 12, 2007**

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 December 28, 2006 appellant, through counsel, filed a timely appeal of a July 17, 2006 decision of the Office of Workers' Compensation Programs' hearing representative who determined that appellant was not entitled to a schedule award as she did not sustain any permanent impairment of her right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award claim.

ISSUE

The issue is whether appellant has met her burden of proof to establish entitlement to a schedule award for permanent impairment to her right upper extremity.

FACTUAL HISTORY

This case was before the Board on a prior appeal. By decision dated September 22, 2004, the Board found that a conflict existed between Dr. David Weiss, an examining osteopath, and Dr. Anthony W. Salem, a second opinion Board-certified orthopedic surgeon, regarding whether

appellant sustained any permanent impairment to her right upper extremity.¹ The Board remanded the case for resolution of the conflict. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

The Office referred appellant, together with a statement of accepted facts and medical records, to Dr. George P. Glenn, Jr., a Board-certified neurologist, selected as the impartial medical specialist. In a report dated July 18, 2005, Dr. Glenn provided a history and detailed results on examination. He noted that a physical examination revealed "no tenderness over the lateral epicondyle" or "any tenderness in the extensor muscle mass." Dr. Glenn noted that appellant "did describe pain involving the medial elbow, with ulnar deviation of the wrist against resistance." He reported that Jamar Dynamometer testing revealed 0 kilograms at positions 1, 2, 3 and 4 on the right and 10 kilograms at positions 1, 2 and 4 and 15 kilograms at position 3. Dr. Glenn noted that appellant commented that her right elbow hurt when her right arm was squeezed, which he stated would render the test invalid by definition. Physical examination revealed adequate muscle tone and strength from the shoulders to the wrist with no evidence of atrophy. Dr. Glenn stated that "the sensory pattern was normal to gross touch, fine touch and pinprick throughout," and that "[p]ain was not produced by the usual maneuvers, which render symptomatic, a lateral epicondylitis." He reported that "it is obvious from the flat response and zero degrees of force that the patient was utilizing less than maximum effort." Dr. Glenn opined that appellant's right lateral epicondylitis had resolved without impairment.

In a decision dated October 6, 2005, the Office determined that appellant was not entitled to a schedule award.

On October 12, 2005 appellant, through counsel, requested an oral hearing before an Office hearing representative, which was held on May 9, 2006.

By decision dated July 17, 2006, the Office hearing representative affirmed the denial of appellant's claim for a schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.² Neither the Act nor the implementing regulation,³ specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association,

¹ Docket No. 04-1269 (issued September 22, 2004). On January 29, 1998 appellant, then a 52-year-old window clerk, filed an occupational disease claim alleging that her epicondylitis was employment related. The Office accepted appellant's claim for right lateral epicondylitis.

² 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

³ 20 C.F.R. § 10.404.

Guides to the Evaluation of Permanent Impairment as the uniform standard applicable to all claimants.⁴

In situations where there are 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 on a proper factual background, must be given special weight.⁵

ANALYSIS

Pursuant to the Board's remand instructions, the Office properly referred appellant to Dr. Glenn, a Board-certified neurologist, for an impartial evaluation to resolve the conflict.⁶ The Board finds that Dr. Glenn's report is sufficiently well rationalized such that it can be accorded special weight.⁷

In a comprehensive July 18, 2005 report, Dr. Glenn concluded that appellant did not sustain any permanent impairment to her right upper extremity. Examination findings demonstrated no tenderness over the lateral epicondyle or in the extensor muscle mass. Dr. Glenn found adequate muscle tone and strength from the shoulders to the wrist, with no evidence of atrophy and a normal sensory pattern. He advised that grip strength on the right was influenced by pain, which would render the test invalid. Dr. Glenn advised that "it is obvious from the flat response and zero degrees of force that the patient was utilizing less than maximum effort." His diagnostic conclusion was that appellant's right lateral epicondylitis had objectively resolved. Dr. Glenn provided examination findings and properly provided analysis under the A.M.A., *Guides*, his opinion constitutes the weight of the evidence.⁸ The Board finds that the Office properly denied appellant's claim for a schedule award as her accepted condition had resolved as there was no objective evidence of impairment and no subjective complaints of tenderness.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish entitlement to a schedule award for permanent impairment to her right upper extremity.

⁴ *Billy B. Scoles*, 57 ECAB ____ (Docket No. 05-1696, issued December 7, 2005).

⁵ *Darlene R. Kennedy*, 57 ECAB ____ (Docket No. 05-1284, issued February 10, 2006).

⁶ *Manuel Gill*, 52 ECAB 282 (2001).

⁷ *Darlene R. Kennedy*, 57 ECAB ____ (Docket No. 05-1284, issued February 10, 2006).

⁸ *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 17, 2006 is affirmed.

Issued: June 12, 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