United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	
U.S. POSTAL SERVICE, POST OFFICE, Redbank, NJ, Employer	)	**Docket No. 07-1110** **Issued: November 8, 2007**

Appearances:
Thomas 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 March 19, 2007 appellant filed a timely appeal from an October 16, 2006 decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed a schedule award decision dated March 2, 2006. 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 five percent permanent impairment of his right upper extremity for which he received a schedule award.

FACTUAL HISTORY

On August 8, 2001 appellant, then a 42-year-old mail carrier, sustained injury to his right index finger when it became trapped between the metal slats of the rear door of his motor vehicle. He stopped work on August 8, 2001. The Office accepted appellant's claim for right index finger fracture, crushing injury of the right index finger and nail bed laceration of right

index finger. The Office authorized surgical reconstruction and physical therapy. Appellant received appropriate compensation benefits.

On June 14, 2003 appellant requested a schedule award. In a March 25, 2003 report, Dr. David Weiss, an osteopath and orthopedic surgeon, noted appellant's history of injury and treatment, which included a right medial and radial nerve block to the right wrist; irrigation and debridement of the skin, subcutaneous tissue tendon and bone; osteotomy of the distal phalanx; local flap rotation advancement; and a nail bed repair of the right index finger. He also noted that appellant had pain and that his activities of daily living were affected. Dr. Weiss advised that appellant had pain on a scale of 5 out of 10, while prior to the accident, appellant had no pain. He referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) and advised that for the amputation to the right index finger distal phalanx (DP) appellant was entitled to an impairment of 10 percent.[1] For the transverse sensory loss to the distal tuft index, he advised that 10 percent to the digit translated to 3 percent.[2] For range of motion, Dr. Weiss advised that right index metatarsal phalangeal (MP) joint extension equated to 10 percent[3] and that right index proximal interphalangeal (PIP) joint flexion equated to 6 percent.[4] He indicated that the range of motion deficit of the right index distal interphalangeal (DIP) joint flexion equated to 26 percent.[5] Dr. Weiss opined that the combined index digit impairment equated to 46 percent or 9 percent to the hand and that the range of motion deficit for the right middle finger DIP flexion was equal to 26 percent or 5 percent to the hand. He also provided findings for the range of motion deficits of appellant's other fingers, and determined that appellant had 20 percent impairment to the hand or total combined right upper extremity impairment of 26 percent. Dr. Weiss also noted that appellant had a pain-related impairment of 3 percent which he combined with the 26 percent for the right upper extremity and determined that appellant had a total right upper extremity impairment of 29 percent. He advised that appellant reached maximum medical improvement on March 25, 2003.

By letter dated January 28, 2005, the Office referred appellant for a second opinion to Dr. Irving Strouse, a Board-certified orthopedic surgeon. In a February 22, 2005 report, Dr. Strouse noted appellant's history of injury and treatment and noted findings on examination. He noted that appellant had a compound fracture distal phalanx right index finger with partial amputation. Regarding impairment, Dr. Strouse referred to the A.M.A, *Guides* and a 20 percent impairment to the right index finger for amputation of the distal phalanx,[6] a 10 percent impairment to the right index finger for partial sensory loss of the tip,[7] and 3 percent to the right index finger due to loss of full extension of the proximal interphalangeal joint of the right index

[1] A.M.A., *Guides* 443, Figure 16-5.

[2] *Id.* at 448, Table 16-7.

[3] *Id.* at 464, Figure 16-25.

[4] *Id*. at 463, Figure 16-23.

[5] *Id*. at 461, Figure 16-21.

[6] *Id*. at 443, Figure 16-5.

[7] *Id.* at 447, Table-16-5.

finger.[8] He determined that the combined value equated to 30 percent of the right index finger or 6.5 percent of the right hand and advised that appellant reached maximum medical improvement.

In a June 22, 2005 report, the Office medical adviser noted appellant's history of injury and treatment, including that maximum medical improvement was reached on February 22, 2005, the date of Dr. Strouse's final report. He referred to the A.M.A., *Guides* and noted 20 percent impairment for the amputation to his finger according to Figure16-5.[9] Regarding sensory loss, the Office medical adviser determined that appellant had 10 percent impairment pursuant to Figure 16-5.[10] Dr. Strouse provided an additional three percent for loss of extension according to Figure16-21.[11] The Office medical adviser noted that this resulted in a combined percentage of 30 percent which equated to an impairment of 6 percent to the hand or 5 percent to the right upper extremity.[12]

On August 26, 2005 the Office granted appellant a schedule award for five percent impairment of the right upper extremity. The award covered a period of 15.60 weeks from June 14 to October 1, 2003.

By letter dated September 13, 2005, appellant requested a hearing. On November 23, 2005 the Office hearing representative determined that the case was not in posture for a hearing due to a conflict in medical opinion between Dr. Weiss, Dr. Strouse and the Office medical adviser regarding the extent of impairment. The Office hearing representative directed that the Office refer appellant for an impartial medical examination. The Office hearing representative vacated the Office's August 26, 2005 schedule award.

On January 24, 2006 the Office referred appellant for an impartial medical examination to Dr. Robert Dennis, a Board-certified orthopedic surgeon. In a February 13, 2006 report, Dr. Dennis reviewed the history of injury and set forth findings on examination. He stated that appellant sustained a partial amputation of the distal tip and pulp of the index finger of the right hand, a fracture of the distal phalanx and a four millimeter distal amputation of the bone. Dr. Dennis explained that the index finger was very important for pinch and sensation and noted that he had taken this into consideration. He added that he had given the maximum benefit by assuming that there was an amputation just above the DIP joint of the index finger, despite the surgical repair. Dr. Dennis also advised that appellant sustained a crush injury and laceration of the nail bed, which was repaired with some re-growth of the nail and some deformity. He also noted that a plastic surgical repair preserved the majority portion of the tip of the index finger. Dr. Dennis referred to Table 16-4[13] and advised that this table summarized the worst case scenario which would be an amputation. Regarding the index/middle finger, at the DIP joint, a

[8] *Id*. at 461, Figure 16-21.

[9] *Id*. at 443.

[10] *Id.* at 44.

[11] *Id*. at 461.

[12] *Id*. at 438, 439, Table 16-2, Table 16-1.

[13] *Id*. at 440.

complete amputation would represent a 45 percent functional loss of the digit which would convert to a 6 percent functional loss of the hand, or a 5 percent impairment of the right upper extremity. Dr. Dennis noted that Dr. Weiss' findings were "redundant" and "overlapped." He further noted that, assuming that the amputation was not repaired, appellant could not receive greater than a six percent impairment of the hand, which converted to a five percent impairment of the right upper extremity.[14]

In a March 1, 2006 report, the Office medical adviser reviewed the reports of Dr. Dennis. He agreed that appellant had sustained a five percent permanent impairment to the right upper extremity.[15]

By decision dated March 2, 2006, the Office found that appellant had no more than five percent loss of use of the right arm, as was previously awarded.

By letter dated March 7, 2006, appellant's representative requested a hearing, which was held on June 30, 2006. By letter dated August 15, 2006, appellant's representative enclosed a statement from appellant. Appellant described his injury and how his activities of daily living were affected by the injury.

By decision dated October 16, 2006, the Office hearing representative affirmed the Office's March 2, 2006 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[16] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[17] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[18] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[19]

Section 8123(a) of the Act provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[20] Where a case is

[14] *Id*. at 439 and 438, Table 16-1 and 16-2.

[15] *Id*. at 442, Figure 16-3; 438, Table 16-1; 439, Table 16-2.

[16] 5 U.S.C. §§ 8101-8193.

[17] 5 U.S.C. § 8107.

[18] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[19] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

[20] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan*, 45 ECAB 207, 210 (1993).

referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[21]

ANALYSIS

The Office accepted that appellant sustained a right index finger fracture, crushing injury of the right index finger and nail bed laceration of right index finger in the performance of duty. The Office authorized surgical reconstruction and physical therapy. On November 23, 2005 the Office hearing representative determined that a conflict in medical opinion arose between the reports of appellant's treating physician, Dr. Weiss, and the second opinion physician, Dr. Strouse, and an Office medical adviser regarding the extent of impairment. On January 24, 2006 the Office referred appellant for an impartial medical examination with Dr. Robert Dennis, a Board-certified orthopedic surgeon.

In a February 13, 2006 report, Dr. Dennis noted appellant's history and listed findings on examination. He noted that to give appellant the maximum benefit of the doubt, he assumed that there was an amputation just above the DIP joint of the index finger, despite the surgical repair. Dr. Dennis referred to Table 16-4[22] and explained the worst case scenario for the index/middle finger, at the DIP joint, would be a complete amputation and it would equate to 45 percent functional loss of the digit which he converted to 6 percent functional loss of the hand, or 5 percent impairment of the right upper extremity. However, according to Table 16-1, the Board notes that 45 percent impairment of the index or middle finger represents 9 percent impairment of the hand.[23] It appears that Dr. Dennis inadvertently looked at the column for the ring or little finger, instead of the column for the index or middle finger. Accordingly, pursuant to Table 16-2, this represents eight percent impairment of the right upper extremity.[24] The Board finds that the thorough and rationalized report of Dr. Dennis is entitled to special weight. Dr. Dennis explained why he believed that appellant should receive the maximum benefit for the amputation. Appellant has eight percent impairment to the right arm.

The Office medical adviser, on March 1, 2006, opined that appellant had five percent impairment of the right arm. He noted that he differed with Dr. Dennis because he did not think the level of amputation warranted the degree of impairment found by Dr. Dennis. However, the Board has held that, where a medical conflict is present, to properly resolve the conflict, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides.* An Office medical adviser may review the opinion, but the resolution of the conflict is the

[21] *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

[22] *Supra* note 1 at 440.

[23] *Id*. at 438.

[24] The Board notes that the Office medical adviser translated Dr. Dennis' findings and arrived at five percent to the right upper extremity. Neither physician appeared to notice the translation error. However, since the Board is modifying based on the actual value, this is harmless error.

responsibility of the impartial medical specialist.[25] If the impartial specialist's opinion as to permanent impairment is in accordance with the A.M.A., *Guides,* then his report should be given the weight of medical opinion.[26] As noted, Dr. Dennis' report establishes that appellant has eight percent impairment of his right arm pursuant to the A.M.A., *Guides*.

Accordingly, the Board finds that appellant has no more than eight percent permanent impairment of the right arm.

CONCLUSION

The Board finds that appellant had no more than an eight percent impairment to the right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 16, 2006 is affirmed, as modified.

Issued: November 8, 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

[25] *Thomas J. Fragale*, 55 ECAB 619 (2004); *see Richard R. LeMay*, 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005).

[26] *Richard R. LeMay*, *supra* note 25.