

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

S.H., Appellant)	
)	
and)	Docket No. 08-1183
)	Issued: December 12, 2008
U.S. POSTAL SERVICE, POST OFFICE,)	
Philadelphia, PA, Employer)	
)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 14, 2008 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated February 6, 2008 setting appellant's schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has more than three percent impairment of her left upper extremity and more than one percent impairment to her right thumb.

FACTUAL HISTORY

This case has previously been before the Board. In a January 3, 2008 decision, the Board affirmed the Office's determination that appellant did not sustain a recurrence of disability commencing November 14, 2006 due to her accepted right thumb tenosynovitis condition. The

facts and the history as set forth in the prior decision are hereby incorporated by reference.¹ On April 6, 2006 appellant filed a claim for a schedule award.

On June 15, 2006 the Office referred appellant to Dr. Kevin F. Hanley, a Board-certified, orthopedic surgeon, for a second opinion examination. In a July 11, 2006 report, Dr. Hanley reviewed a history of injury and noted two prior negative diagnostic studies of the right thumb in 1994 and 2004. He described appellant's physical examination as normal with a full range of motion of all finger joints and the wrist. Grip strength was reported as normal with a negative Finkelstein's test. Dr. Hanley diagnosed an ill-defined pain syndrome affecting both upper extremities based on appellant's complaint of pain. He found that she did not have any permanent impairment and no disability that would prevent her from full-time work.

On July 17, 2006 Dr. Arnold T. Berman, an Office medical adviser, reviewed the medical evidence and concurred with the opinion of Dr. Hanley. As to appellant's complaint of pain, he noted that utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), she had three percent impairment under Table 18-2, page 574.²

On August 9, 2006 the Office granted appellant a schedule award for three percent impairment of her left upper extremity.

On January 5, 2007 appellant requested reconsideration of the schedule award determination. She submitted the November 14, 2006 report of Dr. George L. Rodriguez, a Board-certified physiatrist, who rated appellant's left upper extremity impairment as 34 percent. Dr. Rodriguez advised that appellant had 14 percent impairment due to constrictive tenosynovitis impairment of the left thumb,³ 21 percent impairment based on combined motor and sensory nerve impairment to the left upper extremity,⁴ and 3 percent for pain under Figure 18-1. With regard to her right upper extremity, Dr. Rodriguez found a total 52 percent impairment. He

¹ Docket No. 07-1706 (issued January 3, 2008). Appellant also has an accepted claim for left wrist tendinitis. On May 30, 2007 the case files were doubled.

² A.M.A., *Guides* 574, Figure 18-1.

³ Dr. Rodriguez noted that, pursuant to the A.M.A., *Guides*, digit impairment due to constrictive tenosynovitis of the left thumb of moderate severity was a 40 percent digit impairment and that the maximum allowed for impairment to the left upper extremity for impairment to the thumb was 36 percent, which resulted in a 14 percent impairment of the left upper extremity due to constrictive tenosynovitis impairment. A.M.A., *Guides* 507, Table 16-29; 499, Table 16-18.

⁴ Dr. Rodriguez categorized appellant's description of motor and sensory deficit in her radial, ulnar and median nerves as a Grade 4 under the A.M.A., *Guides*, or a 25 percent deficit under A.M.A., *Guides* 484, Table 16-11. He noted that the maximum values for combined motor and sensory deficit of the radial nerve was 5 percent, the resultant upper extremity impairment for Grade 4 impairment of the radial nerve was 1 percent (25 percent of 5 percent). The maximum deficit for the ulnar nerve was 40 percent which resulted in a 10 percent impairment of the left upper extremity (25 percent of 40). The maximum deficit for the median nerve was 45 percent resulting in an 11 percent impairment of the left upper extremity (25 percent of 45 percent). Using the combined tables, he concluded that appellant had a 21 percent impairment of the left upper extremity due to combined motor and sensory nerve development. A.M.A., *Guides* 492, Table 16-15.

found 7 percent impairment for constrictive tenosynovitis impairment in the right thumb,⁵ 46 percent combined motor and sensory nerve impairment,⁶ and 3 percent impairment for pain.⁷

On March 15, 2007 the Office referred appellant to Dr. Herbert Stein, a Board-certified orthopedic surgeon.⁸ In reports dated May 2 and 30, 2007, Dr. Stein reviewed a history of injury and medical treatment and noted her complaint of occasional pain in both wrists. On examination, he noted a full range of motion of the wrist without complaint with dorsiflexion of 70 degrees, palmar flexion of 60 degrees and full pronation/supination of 90 degrees in both directions. The right thumb revealed full extension with complaint of pain at the extreme of maximum flexion. Dr. Stein noted there was no clicking palpable in the flexor tendon sheath of the right thumb on flexion/extension or sliding nodule to indicate a stenosing tenosynovitis. There were burn scars on the dorsum of the right hand and wrist area from dropping a pot of water on it. Dr. Stein diagnosed a history of possible stenosing tenosynovitis of the right thumb and de Quervain's disease of the right wrist and a history of possible flexor tendinitis or tendinitis of the left wrist. He noted interphalangeal joint had retained flexion to 7 degrees, the metacarpophalangeal joint had retained active flexion to 62 degrees, and the carpometacarpal flexion was not measurable and that the carpometacarpal joint had full extension. Dr. Stein concluded that appellant had two percent impairment of the right thumb. With regard to the left wrist, he noted radial deviation of 25 degrees, ulnar deviation of 30 degrees, dorsal flexion of 75 degrees and palmar flexion of 55 degrees. He allowed an additional impairment of three percent of the left upper extremity due to weakness, atrophy, pain or discomfort to find a total four percent impairment of the left upper extremity.⁹

On June 8, 2007 Dr. Morley Slutsky, an Office medical adviser, noted that the impairment rating of Dr. Stein was confusing as he did not document all measurements of the various joints or make reference to the tables of the A.M.A. *Guides*. As to the right thumb, he noted that appellant had 70 degrees of flexion which represented one percent impairment.¹⁰ With regard to the left wrist, Dr. Slutsky noted that 55 degrees of flexion was one percent impairment.¹¹ The remainder of the left wrist motion values did not represent impairment.

⁵ Dr. Rodriguez noted that mild impairment resulted in a 20 percent impairment of the thumb, which had a maximum relative upper extremity impairment deficit of 36 percent. This yielded right upper extremity impairment of seven percent. A.M.A., *Guides* 499, Table 16-18; 507, Table 16-29.

⁶ Dr. Rodriguez noted that a Grade 4 impairment of the radial nerve resulted in an upper extremity deficit of 1 percent; a Grade 3 impairment of the ulnar nerve yielded 24 percent impairment and a Grade 3 impairment of the median nerve yielded a 27 percent impairment which resulted in a combined impairment of 46 percent. A.M.A., *Guides* 482, Table 16-10; 484, Table 16-11; 492, Table 16-15.

⁷ A.M.A., *Guides*, 507, section 16.7; 574, Figure 18-1.

⁸ See, *infra*, note 17 and accompanying text.

⁹ Although Dr. Stein indicated that the four percent impairment was to appellant's right upper extremity, he corrected it in a letter dated May 30, 2007 to indicate an impairment of the left upper extremity.

¹⁰ See A.M.A., *Guides* 456, Figure 16-12.

¹¹ See *id.* at 467, Figure 16-28.

In a June 25, 2007 letter, Dr. Stein was requested to explain his impairment ratings with reference to the A.M.A., *Guides*. In a July 3, 2007 response, he stated:

“Based on the range of motion that I indicated for the thumb, I used [T]able 16-15 for [metaphalangeal] MP joint motion indicating a one percent lack of flexion for the MP joint for impairment of the thumb. Using [T]able 16-12 there was a one percent lack of flexion of the [interphalangeal] joint of the thumb which gave a total of two percent impairment of the thumb. I did not find any significant loss of motion in abduction/adduction or opposition. Therefore, this is my total impairment for the thumb.

“As far as the wrist is concerned, for impairment of the left upper extremity I used [F]igure 16-31 to determine that there was no loss of radial deviation or ulnar deviation. On [F]igure 16-28 flexion/extension showed a one percent loss for flexion using the range of motion tables that I filled out for you.

“Finally, I used a three percent impairment of the left upper extremity based on the wrist using [T]able 18.3. I felt [appellant] painful symptoms fell in the mild to moderate category and for that I gave her a three percent impairment of the upper extremity adding one percent impairment for loss of motion of the wrist so there was a total impairment of four percent of the left upper extremity.

On January 15, 2008 Dr. Slutsky reviewed the medical evidence and noted that Dr. Stein did not provide clear diagnoses for either the right thumb or left wrist, in light of the normal diagnostic studies and no evidence of a sliding nodule in the flexor sheath of the right thumb. He stated that the A.M.A., *Guides* did not provide a rating for tendinitis absent objective findings on diagnostic testing. Based on the range of motion findings by Dr. Stein, the Office medical adviser found one percent impairment of the right thumb based on 70 degrees IP joint flexion. As to the left wrist, Dr. Slutsky agreed with the rating by Dr. Stein of one percent impairment for 55 degrees radial deviation.

By decisions dated February 6, 2008, the Office granted a schedule award for one percent impairment to the right thumb. It denied any additional schedule award for the left upper extremity as the weight of medical opinion did not establish more than the three percent previously awarded.

LEGAL PRECEDENT

Section 8107 of the Federal Employees’ Compensation Act 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.¹² 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

¹² 5 U.S.C. § 8107.

use of uniform standards applicable to all claimants.¹³ The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.¹⁴

ANALYSIS

The Office accepted appellant's claims for tenosynovitis of the right thumb and tendinitis of the left wrist. On July 11, 2006 Dr. Hanley examined appellant and reported that she did not have any permanent impairment due to her accepted right thumb and left wrist conditions. He reported a full range of motion of all joints of the fingers and wrists without loss of strength. Dr. Hanley described an ill-defined pain syndrome affecting appellant's upper extremities. Dr. Berman, an Office medical adviser, reviewed the evidence and advised that appellant had three percent impairment under Table 18-1, page 574 of the A.M.A., *Guides*. The August 9, 2006 schedule award was based on this assessment of appellant's left arm impairment. The Board notes, however, that the Office has advised its staff that Chapter 18 is "not to be used in combination with other methods to measure impairment due to sensory pain..."¹⁵ The record does not contain any discussion by the medical adviser explaining why Chapter 18 was appropriate to rate sensory loss to appellant's left upper extremity.

Thereafter, appellant submitted the report of Dr. Rodriguez, who rated her impairment as 34 percent of the left upper extremity and 52 percent to the right upper extremity. However, Dr. Rodriguez did not adequately explain the basis for his impairment ratings. As to the right upper extremity, the Board notes that the Office has only accepted tenosynovitis of the right thumb. Dr. Rodriguez advised that he applied Table 16-29, page 507, which provides 20 percent impairment for constrictive tenosynovitis. In turn, he converted the impairment to the thumb to seven percent impairment of the upper extremity using Table 16-18, page 499.¹⁶ However, Dr. Rodriguez did not explain his basis for rating impairment to the upper extremity as opposed to the digit or hand. Chapter 16.7 provides at page 499 that impairment ratings made under this category are to be used only when other criteria have not adequately encompassed the extent of impairment in order not to duplicate impairment ratings. Dr. Rodriguez next rated impairment for combined motor and sensory deficit under Table 16-15, page 492. He indicated that he utilized the maximum percentage deficit for the median nerve (45 percent below midforearm) and ulnar nerve (40 percent below midforearm) in addition to a radial nerve loss of 5 percent. The Board notes that, under Table 16-15, combined motor and sensory deficit of the median nerve for the radial palmar digital of the thumb is 7 percent of the upper extremity or of the ulnar palmar digital of the thumb is 11 percent of the upper extremity. It is not readily apparent why Dr. Rodriguez did not apply a maximum percentage noted specifically for the thumb rather than the other upper extremity maximum values. There is no discussion for his selection of the maximum values and it appears that his total rating of 46 combined motor and sensory loss to the upper extremity is overstated. Furthermore, having rated a combined motor and sensory

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ 20 C.F.R. § 10.404.

¹⁵ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4, Use of Fifth Edition of A.M.A., *Guides* (November 2002).

¹⁶ Dr. Rodriguez applied the 36 percent value for the entire thumb.

impairment, Dr. Rodriguez allowed an additional three percent for pain under Chapter 18. As noted, this chapter is not to be used in combination with the other methods used to rate impairment under other chapters. Moreover, it inflated the impairment estimate for sensory loss (pain). Dr. Rodriguez indicated that he utilized the same Tables to find 34 percent impairment to appellant's left upper extremity. For the reasons noted, this impairment estimate contains similar deficiencies and reduces the probative value of the physician's opinion.

The Board notes that the February 6, 2006 Office decisions characterize Dr. Stein as an impartial medical specialist selected to resolve a conflict in medical opinion between Dr. Hanley and Dr. Rodriguez. The Board notes, however, that the March 15, 2007 referral letter to Dr. Stein did not notify the physician that he had been selected as an impartial medical specialist; merely that he was to provide an examination addressing appellant's permanent impairment. The record does not demonstrate that Dr. Stein was selected according to the Office's established rotational system for resolving conflicts in medical opinion under section 8123.¹⁷ For this reason, the opinion of Dr. Stein must be treated as a second opinion evaluation.

Dr. Stein examined appellant at the request of the Office. He did not support the extent of permanent impairment as rated by Dr. Rodriguez. Rather, Dr. Stein noted a full range of motion of the left wrist and full extension of the right thumb with pain at the extreme of flexion. He advised that he found no clicking or sliding nodule of the tendon sheath of the right thumb to support the diagnosis of tenosynovitis. Dr. Stein noted the accepted conditions, by history. Based on his range of motion findings, he found two percent impairment of the right thumb and four percent impairment of the left upper extremity. As noted by Dr. Slutsky, however, Dr. Stein did not provide a full discussion of the range of measurements or address how he made his impairment rating in conformance with the A.M.A., *Guides*. Dr. Stein clarified his impairment rating, identifying one percent loss of flexion range of motion under Table 16-15 of the MP joint. Under Table 16-12, he found one percent impairment for loss of flexion of the IP joint. This resulted in a total two percent impairment of the right thumb. The Board notes, however, that under the fifth edition of the A.M.A., *Guides*, Table 16-15 and Table 16-12 do not pertain to impairment based on loss of range of motion.¹⁸ It is apparent that Dr. Stein was referring to "Figures" 16-12 and 16-28. Moreover, he noted that he, too, applied Chapter 18 to allow three percent impairment due to pain. Due to these deficiencies, the impairment rating of Dr. Stein is also of diminished probative value.

Based on the medical evidence of record, the Board cannot reasonably apply any of the findings on examination to rate appellant's impairment based on her accepted right thumb and left wrist conditions. The medical evidence does not allow the Board to fully visualize the nature or extent of any permanent impairment. The case will be remanded to the Office for appropriate development of the medical evidence.

¹⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (October 1995). See also *Henry J. Smith, Jr.*, 43 ECAB 892 (1992).

¹⁸ A.M.A., *Guides* 492, Table 16-15, pertains to upper extremity impairment due to unilateral motor and/or sensory deficits. A.M.A., *Guides* 485-86, Tables 16-12 a and b, rate impairment emanating from the brachial plexus.

CONCLUSION

The Board finds that this case is not in posture for decision on the issue of whether appellant has more than three percent impairment of her left wrist and one percent impairment of her right thumb.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 6, 2008 are set aside. The case is remanded for further development consistent with this opinion.

Issued: December 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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