

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

---

D.D., Appellant )

and )

DEPARTMENT OF JUSTICE, IMMIGRATION )  
& NATURALIZATION SERVICE, )  
Philadelphia, PA, Employer )

---

**Docket No. 07-1467**  
**Issued: February 13, 2008**

*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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 8, 2007 appellant, through counsel, filed a timely appeal of a November 3, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative finding that she had no more than a nine percent impairment of the left upper extremity, for which she received a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

**ISSUE**

The issue is whether appellant has more than a nine percent impairment to the left upper extremity, for which she received a schedule award.

**FACTUAL HISTORY**

On February 25, 1997 appellant, then a 41-year-old special agent, filed a traumatic injury claim. She alleged that on February 25, 1997 she hurt her left elbow and forearm when she fell onto a concrete floor in a garage. On July 25, 1997 the Office accepted the claim for left lateral

epicondylitis. It authorized four surgeries which were performed on appellant's left arm and elbow between August 16, 1997 and August 16, 1999.

On August 25, 2002 appellant filed a claim for a schedule award. She submitted an April 29, 2002 medical report of Dr. David Weiss, a family practitioner, who reviewed a history of appellant's February 25, 1997 employment injury, medical treatment and family, social and employment background. Dr. Weiss reported his findings on physical examination. He diagnosed chronic post-traumatic lateral epicondylitis to the left elbow, status post left elbow lateral epicondyle release two times in 1997 and 1998, status post granulomas surgery in 1998 and 1999, post-traumatic radial tunnel syndrome to the left arm, status post left radial nerve release and status post lateral epicondyle reconstruction to the left elbow in 1999. Dr. Weiss reported appellant's subjective and objective factors of disability. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed. 2001), he determined that 4/5 motor strength weakness of the left bicep constituted a 6 percent impairment (A.M.A., *Guides* 484, 492, Tables 16-11 and 16-15), 3/5 motor strength weakness of the left triceps constituted a 21 percent impairment (A.M.A., *Guides* 484 and 492, Table 16-11 and 16-15) and grip strength weakness constituted a 20 percent impairment (A.M.A., *Guides* 509, Table 16-34). Dr. Weiss combined these impairment ratings to determine that appellant sustained a 41 percent impairment of the left upper extremity. He further determined that she had a three percent impairment for pain (A.M.A., *Guides* 574, Figure 18-1). Dr. Weiss added the 41 percent impairment for motor and strength deficit and the 3 percent impairment for pain to calculate a 44 percent impairment of the left upper extremity. He concluded that appellant reached maximum medical improvement on April 29, 2002.

On October 30, 2002 Dr. M.F. Quinlan, an Office medical adviser, reviewed appellant's case record, including, Dr. Weiss' April 29, 2002 findings. Dr. Quinlan recommended a second opinion medical examination because Dr. Weiss reviewed the results of an electromyogram (EMG) and nerve conduction studies (NCV) that were five years old, he rated muscle weakness of the biceps and triceps which were above the level of the injury rather than distal to it and he included grip strength and pain, both of which were highly subjective.

By letter dated December 9, 2002, the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Richard H. Bennett, a Board-certified neurologist, for a second opinion medical examination. It requested that Dr. Bennett provide the date appellant reached maximum medical improvement, a description of any restricted motion, decrease in strength, atrophy, ankylosis, sensory changes or other objective findings as applicable and subjective complaints causing impairment and the extent of impairment based on the A.M.A., *Guides*. In a December 23, 2002 report, Dr. Bennett reviewed a history of appellant's February 25, 1997 employment injury, medical treatment and medical records. He reported his findings on physical and objective examination. Dr. Bennett diagnosed left lateral epicondylitis and found that appellant was status post percutaneous release and open epicondyle release of the left elbow. He noted her continuing employment-related residuals. Dr. Bennett determined that appellant sustained a one percent impairment for sensory deficit and an eight percent impairment for motor deficit. He combined the sensory and motor impairment ratings to calculate a nine percent impairment of the left upper extremity. Dr. Bennett further determined that appellant had a 1 percent impairment for radial sensory deficit and a 35 percent impairment for radial motor deficit. He combined these impairment ratings to calculate a 21

percent impairment. Dr. Bennett opined that the sum of impairment was 29 percent and 4 percent. He stated that his findings were based on Tables 16.3, 16.11, 16.13 and 16.15 of the A.M.A., *Guides*.

The Office requested clarification from Dr. Bennett regarding his December 23, 2002 findings. It noted that the last paragraph on page two of his report seemed to use motor and sensory impairment of the radial nerve twice. The Office stated that, if this was correct, then Dr. Bennett should explain how he arrived at this calculation. It noted that he cited Table 16-13 of the A.M.A., *Guides* for a spinal nerve injury while the injury sustained by appellant was to the radial nerve of the elbow which was governed by Table 16-15 of the A.M.A., *Guides*.

In a February 25, 2003 supplemental report, Dr. Bennett stated that page two of his prior report contained a typographical error. He related that the calculated impairment rating for radial nerve dysfunction was one percent for sensory deficit and eight percent for motor deficit. Dr. Bennett combined the sensory and motor impairment ratings to determine that appellant sustained a nine percent impairment of the left upper extremity based on Tables 16.3, 16.11 and 16.13 of the A.M.A., *Guides*.

On April 7, 2003 Dr. Quinlan reviewed Dr. Bennett's December 23, 2002 and February 25, 2003 findings. He found that appellant reached maximum medical improvement on December 23, 2002. Dr. Quinlan concurred with Dr. Bennett's February 25, 2003 finding that appellant sustained a nine percent impairment of the left upper extremity.

By decision dated April 22, 2003, the Office granted appellant a schedule award for a nine percent impairment of the left upper extremity based on the opinion of Dr. Bennett and Dr. Quinlan. In an April 25, 2003 letter, appellant, through counsel, requested an oral hearing before an Office hearing representative.

On October 22, 2003 a hearing representative set aside the April 22, 2003 decision and remanded the case to the Office for further development of the medical evidence. She found that Dr. Bennett failed to perform EMG studies as requested by Dr. Quinlan. The hearing representative stated that Dr. Bennett should perform a complete examination as requested and discuss the EMG findings and Dr. Weiss' findings, particularly regarding the biceps and triceps abnormalities and whether they contributed to any left upper extremity impairment stemming from the accepted employment injury.

On remand the Office was unable to obtain a supplemental report from Dr. Bennett as it was informed that he no longer performed second opinion medical examinations. By letter dated January 13, 2004, the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Joseph S. Lubeck, a Board-certified neurologist, for a second opinion medical examination. In a January 24, 2004 report, Dr. Lubeck reviewed a history of appellant's February 22, 1997 employment injury and medical treatment. He reported his essentially normal findings on neurological examination. Dr. Lubeck performed EMG/NCV studies which demonstrated mild bilateral entrapments of the median nerves at the wrists, worse on the right side and no evidence of a radial nerve injury. He stated that appellant suffered an injury to her left elbow with a secondary injury to her left radial nerve. Based on his examination, Dr. Lubeck opined that she only had a mild sensory impairment over the dorsum of

the left hand and forearm which were related to the accepted employment injury. Dr. Lubeck determined that appellant sustained a five percent impairment for sensory deficit or pain of the radial nerve. (A.M.A., *Guides* 492, Table 16-15). He stated that this was a Grade IV deficit and as the sensory deficit did not interfere with activity, appellant had a 25 percent impairment (A.M.A., *Guides* 482, Table 16-10). Dr. Lubeck multiplied the two impairment ratings to calculate a one percent impairment of the left upper extremity. He stated that appellant's limitations in strength were related to effort associated pain in the left elbow and not neurologic involvement of those muscles affected by the radial nerve. Dr. Lubeck thus concluded that there was no additional motor impairment.

On February 13, 2004 an Office medical adviser reviewed appellant's medical records, including Dr. Lubeck's January 24, 2004 findings. He determined that she reached maximum medical improvement on January 22, 2004 and opined that she sustained a one percent impairment of the left upper extremity.

By decision dated February 20, 2004, the Office found that appellant had no more than a nine percent impairment of the left upper extremity based on the opinions of Dr. Lubeck and the Office medical adviser. In a February 23, 2004 letter, appellant, through counsel, requested an oral hearing.

In a January 19, 2005 decision, a hearing representative set aside the February 20, 2004 decision and remanded the case to the Office. He found that a conflict existed in the medical opinion evidence between Dr. Lubeck and Dr. Weiss as to the extent of permanent impairment of appellant's left upper extremity.

On July 14, 2004 the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Linda K. Stallings Sykes, a Board-certified neurologist, to resolve the conflict in the medical opinion evidence between Dr. Lubeck and Dr. Weiss on the issue of appellant's left upper extremity impairment. In a September 20, 2005 report, Dr. Sykes reviewed a history of appellant's February 22, 1997 employment injury, medical treatment and work duties at the time of injury and her medical records. She reported essentially normal findings on neurological examination with the exception of minimally decreased range of motion of the neck, diminished grip strength of the left hand, mildly positive Tinel's sign over the median nerve of the left wrist, decreased sensation to pin over the thumb, index and middle fingers of the left hand and minimal decreased sensation over the dorsal surface of the base of the left thumb. Dr. Sykes stated that the issue in question was that of injury to or impairment of the radial nerve of the left arm. She noted that none of the three EMG/NCV studies performed over a seven-year span demonstrated abnormalities in the distribution of the radial nerve. There was at most, minimal sensory symptoms in the distribution of the cutaneous branch of the radial nerve and the majority of the currently described sensory symptoms primarily related to the median nerve correlating with findings of carpal tunnel syndrome as seen on the EMG performed by Dr. Lubeck in January 2004. Dr. Sykes stated that, as noted by Dr. Lubeck, the previously found weakness in appellant's biceps and triceps would not be attributable to radial nerve injury or damage. She opined that appellant's carpal tunnel syndrome was not related to the February 25, 1997 employment injury. Dr. Sykes stated that this condition was not present on the 1997 EMG or Dr. Bennett's December 2002 EMG. She opined that appellant's carpal tunnel syndrome developed since

December 2002 and was not attributable to the accepted employment injury or subsequent multiple left elbow surgeries. Dr. Sykes found that appellant sustained at most a five percent impairment for sensory deficit/pain as noted in the distribution of the unilateral radial nerve (A.M.A., *Guides* 492, Table 16-15). She determined that a minimal sensory deficit in this distribution over the limited portion of the dorsum of the left hand constituted a 25 percent impairment (A.M.A., *Guides* 482, Table 16-10). Dr. Sykes multiplied the above impairment ratings to calculate a one percent impairment of the left upper extremity. She concluded that appellant's impairment was limited to neurologic impairment and not any impairment of a joint pathology with associated limitation of range of motion, joint or ligamentous pain or abnormality. Dr. Sykes reiterated that her carpal tunnel syndrome developed subsequent to December 2002 and was not related to the February 22, 1997 employment injury.

On December 9, 2005 Dr. Arnold T. Berman, an Office medical adviser, reviewed appellant's medical records, including the findings of Dr. Sykes, Dr. Lubeck and Dr. Weiss. He noted the finding of Dr. Sykes and Dr. Lubeck that appellant sustained a one percent impairment of the left upper extremity. Dr. Berman found that Dr. Weiss improperly used Table 16-11 of the A.M.A., *Guides*. He stated that this table related to impairment of peripheral nerve disorders and Dr. Weiss incorrectly concluded that there was a peripheral nerve disorder that was causing weakness of appellant's biceps. Dr. Berman noted that this case involved the biceps and the radial nerve did not involve the biceps. He found that Dr. Weiss' 21 percent impairment rating for 3/5 motor strength weakness of the left triceps was incorrect as the triceps enervation by the radial nerve was much more proximal than where the radial nerve injury occurred below the elbow. Dr. Berman found that Dr. Weiss' determination that appellant sustained a 20 percent impairment for grip strength was inappropriate as manual muscle testing according to the A.M.A., *Guides* was considered highly subjective. He noted Dr. Weiss' three percent impairment rating for pain (A.M.A., *Guides* 574, Figure 18-1). Dr. Berman stated that he would not be opposed to adding a three percent impairment for pain to the one percent impairment recommended by Dr. Sykes and Dr. Lubeck. He related that it was conceivable that appellant's pain was attributable to other sources such as scarring and muscular abnormalities in and around the elbow that could have resulted from multiple operations. Dr. Berman concluded that appellant sustained a four percent impairment of the left upper extremity by adding one percent impairment due to sensory loss of the radial nerve and three percent impairment for pain. He further concluded that appellant reached maximum medical improvement on April 29, 2002.

By decision dated March 15, 2006, the Office found that appellant was not entitled to a schedule award for more than nine percent impairment of the left upper extremity. It stated that Dr. Sykes' and Dr. Berman's finding that appellant sustained one percent impairment and four percent impairment, respectively, was less than the schedule award she previously received. In a March 21, 2006 letter, appellant, through counsel, requested an oral hearing.

In a November 3, 2006 decision, a hearing representative affirmed the March 15, 2006 decision. She found that Dr. Sykes' September 20, 2005 opinion that appellant did not have more than a nine percent impairment of the left upper extremity was entitled to special weight accorded an impartial medical specialist.

## LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulations<sup>2</sup> set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.<sup>3</sup> However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.<sup>4</sup>

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.<sup>5</sup> Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.<sup>6</sup>

Section 8123 of the Act provides that, 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.<sup>7</sup> When there exist 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 upon a proper factual background, must be given special weight.<sup>8</sup>

## ANALYSIS

The Office accepted that appellant sustained lateral epicondylitis of the left elbow. An Office hearing representative found a conflict in the medical opinion evidence between

---

<sup>1</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>2</sup> 20 C.F.R. § 10.404.

<sup>3</sup> 5 U.S.C. § 8107(c)(19).

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *See Paul A. Toms*, 28 ECAB 403 (1987).

<sup>6</sup> A.M.A., *Guides*, Chapter 16, The Upper Extremities, pages 433-521 (5<sup>th</sup> ed. 2001).

<sup>7</sup> 5 U.S.C. § 8123.

<sup>8</sup> *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

Dr. Weiss, an attending physician, and Dr. Lubeck, an Office referral physician, as to the extent of permanent impairment of appellant's left upper extremity. Dr. Weiss opined that appellant sustained a 44 percent impairment of the left upper extremity. Dr. Lubeck opined that appellant had a one percent impairment of the left upper extremity.

The Office properly referred appellant to Dr. Sykes, selected as the impartial medical examiner, to resolve the conflict in the medical opinion evidence. In a September 20, 2005 report, she noted essentially normal findings on neurological examination with the exception of minimally decreased range of motion of the neck, diminished grip strength of the left hand, mildly positive Tinel's sign over the median nerve of the left wrist, decreased sensation to pin over the thumb, index and middle finger of the left hand and minimal decreased sensation over the dorsal surface of the base of the left thumb. Dr. Sykes found that none of the three EMG/NCV studies performed over a seven-year span demonstrated abnormalities in the distribution of the radial nerve. She stated that at most, there was minimal sensory symptoms in the distribution of the cutaneous branch of the radial nerve and the majority of the currently described sensory symptoms primarily related to the median nerve correlating with findings of carpal tunnel syndrome as seen on an EMG performed by Dr. Lubeck in January 2004. Dr. Sykes stated that as noted by Dr. Lubeck, the previously found weakness of biceps and triceps would not be attributable to radial nerve injury or damage. She opined that appellant's carpal tunnel syndrome was not related to the February 25, 1997 employment injury. Dr. Sykes stated that this condition was not present on the 1997 EMG or Dr. Bennett's December 2002 EMG. She concluded that appellant's carpal tunnel syndrome developed since December 2002 and was not attributable to the accepted employment injury or subsequent multiple left elbow surgeries. Dr. Sykes determined that appellant sustained at most a five percent impairment for sensory deficit/pain as noted in the distribution of unilateral radial nerve (A.M.A., *Guides* 492, Table 16-15). She further determined that a minimal sensory deficit in this distribution over the limited portion of the dorsum of the left hand constituted a 25 percent impairment (A.M.A., *Guides* 482, Table 16-10). Dr. Sykes multiplied the two impairment ratings to calculate a one percent impairment of the left upper extremity. She concluded that appellant's impairment was limited to neurologic impairment. Dr. Sykes reiterated that her carpal tunnel syndrome developed subsequent to December 2002 and was not related to the February 22, 1997 employment injury.

On December 9, 2005 Dr. Berman, an Office medical adviser, noted the finding of Dr. Sykes and Dr. Lubeck that appellant sustained a one percent impairment of the left upper extremity. Regarding Dr. Weiss' April 29, 2002 findings, Dr. Berman found that he improperly used Table 16-11 of the A.M.A., *Guides*. He explained that this table related to impairment of peripheral nerve disorders and Dr. Weiss incorrectly concluded that there was a peripheral nerve disorder that was causing weakness of appellant's biceps. Dr. Berman noted that this case involved the biceps and the radial nerve did not involve the biceps. He further found that Dr. Weiss' 21 percent impairment rating for 3/5 motor strength weakness of the left triceps was incorrect as the triceps innervation by the radial nerve was much more proximal than where the radial nerve injury occurred below the elbow. Dr. Berman found that Dr. Weiss' determination that appellant sustained a 20 percent impairment for grip strength was inappropriate as manual muscle testing according to the A.M.A., *Guides* was considered highly subjective. Noting Dr. Weiss' three percent impairment rating for pain (A.M.A., *Guides* 574, Figure 18-1), Dr. Berman stated that he would not be opposed to adding this impairment rating to the one

percent impairment recommended by Dr. Sykes and Dr. Lubeck, resulting in a four percent impairment of the left upper extremity. He explained that it was conceivable that appellant's pain was attributable to other sources, such as scarring and muscular abnormalities in and around the elbow that could have resulted from multiple operations. Dr. Berman, however, erroneously added to the pain impairment by allowing an additional three percent under Chapter 18, Figure 18-1. Section 18.3b of Chapter 18 at page 571 of the A.M.A., *Guides* clearly provide that examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters of the A.M.A., *Guides*. Dr. Berman did not explain why appellant's pain-related impairment could not be adequately addressed by applying Chapter 16 of the A.M.A., *Guides* which addresses upper extremity impairment, specifically section 16.15, Impairment of the Upper Extremities Due to Peripheral Nerve Injuries (A.M.A., *Guides* 492, Table 16-15). Table 16-10 explains the correct method for calculating impairment due to sensory deficits or pain resulting from peripheral nerve disorders (A.M.A., *Guides* 482, Table 16-10). Due to this deficiency, the Board finds that Dr. Berman's opinion is of diminished probative value.

Dr. Sykes properly applied the A.M.A., *Guides* and provided a detailed and well-rationalized report for rating a one percent impairment of the left upper extremity. The Board finds that Dr. Sykes' opinion is entitled to special weight as the impartial medical specialist. Appellant has no more than a nine percent impairment of the left upper extremity.

#### **CONCLUSION**

The Board finds that appellant has failed to establish that she has more than nine percent impairment of the left upper extremity.



**ORDER**

**IT IS HEREBY ORDERED THAT** the November 3, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board