United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 07-2096**
	)	**Issued: February 25, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Bluebell, PA, Employer	)	

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 10, 2007 appellant filed a timely appeal from a February 23, 2007 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained greater than a one percent impairment of the right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

The Office accepted that on March 25, 2003 appellant, then a 39-year-old supervisor, slipped and fell on a wet floor, sustaining a right shoulder strain, basal fracture of the first

metacarpal of the right thumb, a right elbow contusion and right knee contusion.[1] She was off work through May 4, 2003. Appellant returned to part-time limited duty on May 5, 2003 and to full duty on August 30, 2003. She received compensation for these absences.[2]

On December 18, 2004 appellant claimed a schedule award. She submitted a September 9, 2004 report from Dr. David Weiss, an osteopathic physician. On examination of the right shoulder, Dr. Weiss noted forward elevation and abduction limited to 130 degrees, internal rotation limited to 80 degrees and Grade 4/5 weakness of the supraspinatus. On examination of the right thumb, he found a mildly positive Finklestein's test and a full range of motion in all joints. Grip strength testing showed 20 kilograms (kg) on the right and 32 kg on the left, "markedly abnormal as [appellant was] a right hand dominant female." Pinch strength was six kg on the right and eight kg on the left. Regarding the right leg, Dr. Weiss found patellar crepitance with compression, no atrophy and no loss of strength. He diagnosed post-traumatic chondromalacia of the right knee, post-traumatic acromioclavicular joint arthropathy, impingement of the right shoulder, rotator cuff tendinitis and post-traumatic de Quervain's tendinitis of the right wrist. Referring to the fifth edition of the American Medical Association, "*Guides to the Evaluation of Permanent Impairment*" (hereinafter, "A.M.A., *Guides*"), Dr. Weiss noted a three percent impairment of right shoulder flexion according to Figure 16-40, page 476[3] and a two percent impairment of abduction according to Figure 16-43, page 477.[4] He found a 20 percent impairment due to grip strength deficit according to Table 16-34, page 509.[5] Dr. Weiss combined the 5 percent impairment for loss of motion with the 20 percent grip strength deficit to equal 24 percent. He also noted a three percent impairment due to pain according to Table 18-1, page 574.[6] This totaled a 27 percent impairment of the right upper extremity. Regarding the right leg, Dr. Weiss noted an eight percent impairment due to right calf

[1] April 1, 2003 x-rays of the right shoulder showed no fracture, dislocation, degenerative changes or peritendinous calcifications. April 1, 2003 lumbar, right hand, right knee and right hip x-rays were unremarkable. August 8, 2003 electromyogram and nerve conduction volecity studies of the upper extremities were within normal limits.

[2] Appellant remained under treatment medical treatment after she returned to work. In a May 20, 2003 letter, Dr. R. Bruce Heppenstall, an attending Board-certified orthopedic surgeon, noted that a magnetic resonance imaging scan showed possible mild impingement syndrome with degenerative changes. Dr. Matthew L. Ramsey, an attending Board-certified orthopedic surgeon, submitted a June 4, 2003 report noting limited internal rotation of the right shoulder and mild tendinosis of the rotator cuff without a full thickness tear. In reports from July 24, 2003 to June 15, 2004, Dr. David A. Lenrow, an attending Board-certified physiatrist, diagnosed adhesive capsulitis, rotator cuff tendinitis and possible cervical radiculopathy.

[3] Figure 16-40, page 476 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Impairments Due to Lack of Flexion and Extension of Shoulder."

[4] Figure 16-43, page 477 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Impairments Due to Lack of Abduction and Adduction of Shoulder."

[5] Table 16-34, page 509 of the fifth edition of the A.M.A., *Guides* is entitled, "Upper Extremity Joint Impairment Due to Loss of Grip or Pinch Strength."

[6] Table 18-1, page 574 of the fifth edition of the A.M.A., *Guides* is entitled, "Algorithm for Rating Pain-Related Impairment in Conditions Associated With Conventionally Related Impairment."

atrophy according to Table 17-6, page 530[7] and a three percent impairment due to pain according to Table 18-1. He totaled these impairments to equal an 11 percent permanent impairment of the right leg.

On January 5, 2005 the Office referred Dr. Weiss' report to an Office medical adviser to determine percentage of permanent impairment. In a January 9, 2005 report, an Office medical adviser concurred with Dr. Weiss' determination of a five percent upper extremity impairment due to restricted flexion and abduction. He explained that the A.M.A., *Guides* precluded grip strength and pain as elements of an impairment rating for restricted motion. The medical adviser also opined that Dr. Weiss' diagnosis of atrophy in the right lower extremity was not clinically supported.

On January 25, 2005 the Office referred appellant to Dr. Kevin Hanley, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Hanley submitted a February 9, 2005 report finding that appellant had reached maximum medical improvement. He reviewed the medical record and statement of accepted facts. On examination, Dr. Hanley found a 10 degree loss of flexion in the right shoulder and no objective deficits of the right leg. He diagnosed a resolved right shoulder contusion with underlying acromioclavicular joint arthrosis, a resolved right hand and thumb sprain and resolved right hip contusion. Dr. Hanley concluded that appellant had a one percent impairment of the right upper extremity according to Figure 16-40, page 476 and a zero percent impairment of the right lower extremity.

The Office referred Dr. Hanley's report to an Office medical adviser for review. In a May 25, 2005 report, the Office medical adviser concurred that appellant did not have a ratable impairment of the right lower extremity. The adviser stated that his recommendation of a five percent impairment of the right upper extremity remained unchanged.

The Office determined there was a conflict of medical opinion between Dr. Weiss, for appellant, and Dr. Hanley, for the government. On August 25, 2005 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Barry Snyder, a Board-certified orthopedic surgeon, for an impartial medical opinion. In a December 23, 2005 report, Dr. Snyder reviewed the statement of accepted facts and provided a history of injury and treatment. On examination of the right upper extremity, he observed 7 kg grip strength on the right and 19 kg on the left and flexion limited to 110 degrees. Dr. Snyder found normal reflexes, strength and muscle mass of the lower extremities. He diagnosed an idiopathic osteoarthrosis of the right acromioclavicular joint with mild impingement, a resolved right thumb fracture and nonoccupational bilateral genu valgus. Dr. Snyder commented that appellant's bilateral knee symptoms were attributable to her morbid obesity, as she was 65 inches tall and weighed 210 pounds. Regarding appellant's right shoulder, he opined that a loss of 30 degrees of flexion equaled a two percent impairment, a loss of 60 degrees abduction equaled a three percent impairment and internal rotation limited to 35 degrees equaled a two percent impairment. Dr. Snyder totaled these percentages to equal a seven percent impairment of the right upper extremity. He did not refer to specific elements of the A.M.A., *Guides*.

[7] Table 17-6, page 530 of the fifth edition of the A.M.A., *Guides* is entitled, "Impairment Due to Unilateral Leg Muscle Atrophy."

On January 20, 2006 the Office referred the medical evidence to an Office medical adviser to determine the appropriate percentages of permanent impairment. In a January 20, 2006 report, the Office medical adviser opined that Dr. Hanley's measurements were the most reliable. He therefore concurred with Dr. Hanley's rating of a one percent permanent impairment of the right upper extremity based on restricted shoulder flexion. The medical adviser opined that appellant had reached maximum medical improvement as of February 9, 2005, the date of Dr. Hanley's examination.

By decision dated January 31, 2006, the Office granted appellant a schedule award for a one percent impairment of the right upper extremity.

On February 3, 2006 appellant requested a hearing.

By decision dated and finalized April 20, 2006, an Office hearing representative found that the case was not in posture for a decision. The hearing representative set aside the January 31, 2006 decision, finding that the Office improperly relied on Dr. Hanley's opinion as second opinion specialist and not Dr. Snyder's opinion as impartial medical examiner. The hearing representative noted that Dr. Snyder opined both that appellant had a seven percent impairment of the right upper extremity and that there were no residuals of the accepted injury. The hearing representative directed that the Office to obtain a supplemental report from Dr. Snyder addressing the extent and cause of any permanent impairment.

In May 10 and July 20, 2006 letters, the Office requested that Dr. Snyder submit a supplemental report explaining the nature and extent of any residuals of the March 25, 2003 injuries. On August 7, 2006 Dr. Snyder stated that there were "no objective findings of impairment of [the] right upper extremity causally related to the March 25, 2003 work injury." He found that appellant had no impairment according to the A.M.A., *Guides*.

By decision dated August 31, 2006, the Office affirmed the January 31, 2006 decision, finding that appellant had not established that she sustained greater than a one percent impairment of the right upper extremity. The Office found that the weight of the medical evidence continued rested with Dr. Snyder as impartial medical examiner, who opined that appellant had no impairment related to the accepted March 25, 2003 injuries.

On September 6, 2006 appellant requested a hearing, held December 11, 2006. At the hearing, she asserted that she could not clean her home or style her hair due to pain and immobility in her right arm. Appellant alleged that Dr. Hanley did not properly examine her. She asserted that the Office medical adviser improperly selected elements from among the three impairment ratings and that she was entitled to a schedule award for impairment of the right knee.

By decision dated and finalized February 23, 2007, an Office hearing representative affirmed the August 31, 2006 decision, finding that appellant did not have more than one percent impairment of the right upper extremity. The hearing representative found that Dr. Snyder's opinion as impartial medical examiner represented the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act[8] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[9] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[10]

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.[11] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, loss of sensation, or loss of strength.[12] Chapter 17 of the A.M.A., *Guides* sets forth the grading schemes and procedures for evaluating impairments of the lower extremities.[13]

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[14] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[15]

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires

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[8] 5 U.S.C. §§ 8101-8193.

[9] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[10] *See* FECA Bulletin 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

[11] *See Paul A. Toms*, 28 ECAB 403 (1987).

[12] A.M.A. *Guides* 433-521, Chapter 16, "The Upper Extremities," (5th ed. 2001).

[13] *Id*. at 523-61, Chapter 17, "The Lower Extremities," (5th ed. 2001).

[14] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991)

[15] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[16] If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.[17] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act[18] will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[19] While an Office medical adviser may review the opinion of an impartial medical specialist, the resolution of the conflict is the responsibility of the impartial medical specialist.[20]

ANALYSIS

The Office accepted that appellant sustained a right shoulder strain, fracture of the first metacarpal of the right thumb, right elbow contusion and right knee contusion. She claimed a schedule award, submitting a September 9, 2004 report from Dr. Weiss, an attending osteopath. Referring to the A.M.A. *Guides*, Dr. Weiss found a three percent impairment due to limited right shoulder flexion and a two percent impairment due to limited abduction. He noted additional impairments for pain and weakness, totaling a 27 percent impairment of the right arm. Dr. Weiss also opined that appellant had an 11 percent impairment of the right leg due. An Office medical adviser concurred only with Dr. Weiss' assessment of a five percent impairment of the right arm due to restricted motion.

The Office obtained a second opinion from Dr. Hanley, a Board-certified orthopedic surgeon. In a February 9, 2005 report, he opined that appellant had a one percent impairment of the right upper extremity due to restricted shoulder flexion. Dr. Hanley found no impairment of the right leg.

The Office found a conflict of opinion between Dr. Weiss, for appellant, and Dr. Hanley, for the government. The Office referred appellant to Dr. Snyder, a Board-certified orthopedic surgeon, as the impartial medical examiner. He submitted a December 23, 2005 report finding a seven percent impairment of the right upper extremity due to restricted flexion, abduction and internal rotation.

In a January 20, 2006 report, an Office medical adviser selected Dr. Hanley's one percent impairment rating over Dr. Snyder's seven percent rating. Based on the Office medical adviser's report, the Office issued the January 31, 2006 schedule award for a one percent impairment of the right arm. An Office hearing representative vacated the schedule award on April 20, 2006, finding that the Office medical adviser improperly failed to rely on Dr. Snyder's opinion as

[16] *Harry T. Mosier*, 49 ECAB 688 (1998).

[17] *Guiseppe Aversa*, 55 ECAB 164 (2003).

[18] 5 U.S.C. § 8123(a).

[19] *Harold Travis*, 30 ECAB 1071 (1979).

[20] *See, e.g., Willie C. Howard*, 55 ECAB 564 (2004) (where the Office medical adviser concurred that the impartial medical specialists' impairment rating was appropriate under the fifth edition of the A.M.A., *Guides*).

impartial medical examiner. The Office obtained an August 7, 2006 supplemental report from Dr. Snyder, who opined that appellant had no impairments related to the accepted injuries. Obtaining this clarification was in accordance with the Office's procedures.[21] By August 31, 2006 decision, the Office again found that appellant had a one percent impairment of the right arm. Although the Office stated that it accorded Dr. Snyder the weight of the medical evidence, it clearly relied on Dr. Hanley's opinion. Following an oral hearing, the Office issued a February 23, 2007 decision affirming the August 31, 2006 decision. The Office again proffered its reliance on Dr. Snyder's opinion but found Dr. Hanley's assessment controlling.

The Board finds that the Office improperly failed to rely on the opinion of Dr. Snyder, the impartial medical examiner. Instead, the Office relied on the Office medical adviser's interpretation of the various schedule award assessments of record. As set forth above, an Office medical adviser may review the opinion of an impartial medical specialist. However, the resolution of the conflict is the responsibility of the impartial medical specialist.[22] In this case the Office medical adviser circumvented the Office's procedures for ensuring that section 8123(a) of the Act was properly implemented.[23] Therefore, the case must be remanded for further development.

On remand of the case, the Office shall request that Dr. Snyder submit a second supplemental report regarding whether the impairments he noted on examination were related to the accepted injuries. This report shall refer to the relevant tables and grading schemes of the A.M.A., *Guides.* The Office should also develop whether appellant sustained any impairment of the right lower extremity caused by the accepted injuries.[24] Following this and any other development deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for a decision. The case will be remanded to the Office for further development regarding the appropriate percentages of permanent impairment related to the accepted injuries.

[21] *Harry T. Mosier*, 49 ECAB 688 (1998).

[22] *Willie C. Howard*, *supra* note 20.

[23] *Harold Travis*, *supra* note 19.

[24] The Board notes that appellant asserted her entitlement to a schedule award for right lower extremity impairment and submitted medical evidence addressing such impairment. The Office did not formally adjudicate whether appellant established any permanent impairment of the right lower extremity related to the accepted March 25, 2003 injuries.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2007 is set aside and the case remanded for further development consistent with this decision and order.

Issued: February 25, 2008
Washington, DC

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

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

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