

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

O.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Trenton, NJ, Employer**

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**Docket No. 07-2072
Issued: January 16, 2008**

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 August 6, 2007 appellant filed a timely appeal of the February 23, 2007 merit decision of the Office of Workers' Compensation Programs which affirmed a schedule award for bilateral upper extremity impairment. 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 more than 2 percent impairment of the right upper extremity and 12 percent impairment of the left upper extremity.

FACTUAL HISTORY

Appellant, a 35-year-old mail handler, has an accepted occupational disease claim for bilateral carpal tunnel syndrome which arose on or about December 1, 2003. She underwent a right carpal tunnel release on September 6, 2005 followed by a left carpal tunnel release on

October 11, 2005.¹ The Office authorized both procedures. Appellant returned to work December 7, 2005.

On May 16, 2006 appellant filed a claim for a schedule award. Dr. Nicholas P. Diamond, a specialist in pain management, provided a March 2, 2006 impairment rating. He found six percent impairment of the right upper extremity due to sensory deficits involving the ulnar nerve. Regarding appellant's left upper extremity, Dr. Diamond found impairment due to a combination of sensory deficits involving the median and ulnar nerves, as well as a lateral pinch deficit. The combined left upper extremity impairments totaled 42 percent. Dr. Diamond found that appellant reached maximum medical improvement on March 2, 2006.

On April 28, 2006 appellant's surgeon, Dr. Aland, reviewed the March 2, 2006 report and concurred with the impairment ratings provided for both the left and right upper extremities.

The Office subsequently referred the case record to its district medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon. In a July 1, 2006 report, Dr. Berman found 12 percent impairment of the left upper extremity and 2 percent impairment of the right upper extremity. He explained that Dr. Diamond had miscalculated the sensory deficit involving the left median nerve. Instead of 31 percent, the actual deficit was only 10 percent. Dr. Diamond similarly erred with respect to calculating the sensory deficit associated with the ulnar nerve in both upper extremities. Whereas he found six percent impairment bilaterally, Dr. Berman indicated that the correct rating would only be two percent for each arm. Dr. Berman also explained that it was not appropriate to combine impairments due to peripheral nerve injuries with muscle strength deficits. Therefore, the 10 percent impairment Dr. Diamond attributed to loss of pinch strength could not properly be combined with the left upper extremity sensory deficits involving the ulnar and median nerves.

On August 24, 2006 appellant received a schedule award for 2 percent impairment of the right upper extremity and 12 percent impairment of the left upper extremity. The award totaled 43.68 weeks' compensation, covering the period March 2, 2006 to January 1, 2007.

Appellant requested a hearing, which was held on December 11, 2006. Counsel argued that the case should be referred to an impartial medical examiner in light of the differing opinions between appellant's physician, Dr. Diamond, and Dr. Berman, the district medical adviser. In a decision dated February 23, 2007, the hearing representative affirmed the Office's August 24, 2006 schedule award.

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.² The Act, however, does not specify the manner by which the

¹ Dr. Christopher M. Aland, a Board-certified orthopedic surgeon, performed the September 6 and October 11, 2005 surgeries.

² The Act provides that, for a total or 100 percent loss of use, of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2000).

percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.³ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁴

ANALYSIS

Both Dr. Diamond and Dr. Berman agreed that the residuals of appellant's bilateral carpal tunnel syndrome were best measured in accordance with the requirements for determining impairments due to peripheral nerve disorders.⁵ The first step in the evaluation process is to grade the severity of the sensory deficit or pain in accordance with Table 16-10, A.M.A., *Guides* 482. With respect to appellant's left upper extremity, Dr. Diamond found a Grade 4 sensory deficit. Dr. Berman concurred with this classification. He also assigned a Grade 4 classification with respect to appellant's right upper extremity symptoms.⁶ A Grade 4 classification is characterized by "[d]istorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensation or pain that is forgotten during activity." This classification represents a 1 to 25 percent sensory deficit.⁷

The next step in the process is to identify the maximum upper extremity impairment value due to sensory deficit or pain for each affected nerve. Based on Dr. Diamond's March 2, 2006 examination, the major peripheral nerves involved were the median and ulnar nerves below the mid-forearm. According to Table 16-15, A.M.A., *Guides* 492, the maximum percentage upper extremity impairment due to sensory deficit or pain involving the median nerve (below mid-forearm) is 39 percent. For the ulnar nerve (below mid-forearm), the maximum percentage upper extremity impairment is seven percent.

To determine the upper extremity impairment, one multiplies appellant's Grade 4 classification (25 percent) by the maximum percentage loss due to sensory deficit or pain involving the median (39 percent) and the ulnar (7 percent) nerves. Applying this formula, appellant had 2 percent impairment for sensory deficit or pain (25 percent x 7 percent) involving the ulnar nerve, bilaterally. According to Dr. Diamond and Dr. Berman, there was no median nerve impairment of the right upper extremity. The left upper extremity median nerve

³ 20 C.F.R. § 10.404 (2007).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁵ See section 16.5, A.M.A., *Guides* 480-83.

⁶ Regarding upper extremity ulnar nerve impairment, Dr. Diamond assigned a Grade 2 severity on the right and a Grade 4 severity on the left, but despite the grading disparity, Dr. Diamond found that appellant's ulnar nerve sensory deficit was the same in both upper extremities which he indicated was six percent. Dr. Diamond did not specifically identify any examination findings that would support the disparity in grading between the left and right upper extremities. Therefore, it appears that the Grade 2 classification was merely a typographical error.

⁷ Table 16-10, A.M.A., *Guides* 482.

impairment was 10 percent (25 percent x 39 percent).⁸ The left upper extremity impairments involving the median (10 percent) and ulnar (2 percent) nerves were properly combined for a total left upper extremity impairment of 12 percent.⁹ Dr. Berman correctly noted that the A.M.A., *Guides* precluded combining appellant's left pinch strength deficit with the 12 percent peripheral nerve impairment.¹⁰ Accordingly, he recommended that appellant receive an award for 2 percent impairment of the right upper extremity and 12 percent impairment of the left upper extremity. This rating is consistent with Dr. Diamond's March 2, 2006 examination findings and conforms to the A.M.A., *Guides* (5th ed. 2001).¹¹ As such, Dr. Berman's July 1, 2006 impairment rating constitutes the weight of the medical evidence. Appellant has not presented any probative evidence that she has a greater impairment than what the Office has already awarded her.¹²

CONCLUSION

Appellant has not established that she has greater than 2 percent impairment of the right upper extremity and greater than 12 percent impairment of the left upper extremity.

⁸ Dr. Diamond inexplicably calculated 6 percent impairment for the ulnar nerve, bilaterally and 31 percent impairment for the median nerve.

⁹ See Combined Values Chart, A.M.A., *Guides* 604-06.

¹⁰ See Table 17-2, A.M.A., *Guides* 526.

¹¹ Contrary to counsel's argument, a referral to an impartial medical examiner is not required in this instance. Dr. Diamond's impairment rating is not consistent with the A.M.A., *Guides* and, therefore, it is not on par with Dr. Berman's report. The evidence is clearly not in equipoise.

¹² See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

ORDER

IT IS HEREBY ORDERED THAT February 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2008
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