

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

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**M.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Southeastern, PA, Employer**

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**Docket No. 07-2282  
Issued: June 3, 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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On September 5, 2007 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated October 27, 2006 and March 22, 2007 denying his request for a 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 established entitlement to a schedule award.

**FACTUAL HISTORY**

This is the second time this case has been before this Board. On February 26, 1997 appellant, then a 39-year-old mail handler, filed an occupational disease claim alleging that he had pain and numbness in both his wrists due to unnatural grip in steering of the tow motor and repeated handling 12-pound hooks in the course of his federal employment. The Office accepted appellant's claim for right wrist fracture and bilateral de Quervain's disease. Appropriate treatment and compensation benefits were authorized.

On February 1, 2002 appellant filed a claim for a schedule award. After development of the medical evidence, the Office, in a decision dated December 16, 2002, denied appellant's claim for a schedule award and this decision was affirmed by the hearing representative in a decision dated September 28, 2005. In a decision dated July 21, 2006, this Board vacated the September 28, 2005 decision. The Board found that there was an unresolved conflict in the medical evidence between Dr. David Weiss, appellant's treating osteopath, and the Office referral physician, Dr. Steven Valentino, an osteopathic orthopedic surgeon, regarding appellant's impairment. Specifically, the Board noted that Dr. Weiss found that appellant had a work-related impairment to his right upper extremity of 43 percent and 28 percent to his left upper extremity, whereas Dr. Valentino determined that appellant had a 0 percent impairment. To resolve this conflict of medical opinion, the Board remanded the case to the Office for referral of appellant to an appropriate impartial medical specialist. The complete facts of this case are set forth in the Board's July 21, 2006 decision and are hereby incorporated by reference.<sup>1</sup>

By letter dated August 25, 2006, the Office referred appellant to Dr. Barry Silver, a Board-certified orthopedic surgeon, for an impartial medical examination. In an opinion dated September 15, 2006, Dr. Silver noted:

"To summarize, I believe [appellant] presently does not have carpal tunnel, cubital tunnel syndrome or de Quervain's, but clearly has a cyst with some persistent pain in his right navicular, but is presently healed at this point.

"I have carefully reviewed all previous doctors' disability awards and I am quite familiar with the steps that are suggested in the [American Medical Association], *Guides to the Evaluation of Permanent Impairment*. Chapter 16 clearly gives a summary of steps to evaluate impairment of the upper extremity and I would like to state that starting with page 511 in that is clear that [appellant] has had complete recovery of any sensory loss and therefore should not be awarded any sensory deficit at the present time. As far as motor power evaluation, which is part of the evaluation, [appellant] has no motor loss at the present time. He also has no abnormal motion. [Appellant] has no amputations. At the present time, evaluating grip and pinch strength as is suggested on page 508 16.8b, [he] clearly has at the present time normal grip and normal pinch strength and therefore should not be awarded anything in terms of impairment of the extremity due to that. Since he has pretty much resolved his carpal tunnel syndrome clinically, and since he has resolved his cubital syndrome clinically he, based on assessment of deficits due to entrapment of compression neuropathy, would fit as per page 495 number 3, which is normal sensibility and normal opposition strength and therefore should be awarded no impairment based on that either."

He noted that he was more in agreement with Dr. Valentino than Dr. Weiss. Dr. Silver noted that, although appellant did not need surgery at the present time, he did still have a cyst in his navicular and recommended repeat x-rays and magnetic resonance imaging scan. He stated,

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<sup>1</sup> Docket No. 06-645 (issued July 21, 2006).

“[A]lthough [appellant] has in my opinion a zero percent impairment rating, he certainly does at the present time deserve to see a hand specialist regarding this.” Dr. Silver further noted that appellant did not have a grip strength problem at the present time.

By letter dated September 22, 2006, the Office asked the Office medical adviser to review and comment on Dr. Silver’s report. On October 10, 2006 the Office medical adviser responded that, based on Dr. Silver’s “well-rationalized” report, there is no residual impairment in either of appellant’s upper extremities. He further noted that there was no measurable percentage of impairment for cyst in the navicular. Finally, the Office medical adviser noted that Dr. Silver found appellant’s grip strength to be normal.

By decision dated October 27, 2006, the Office found that appellant had not established entitlement to a schedule award. The Office noted that the weight of the medical evidence was represented by the opinion of the impartial medical examiner and was supported by the Office medical adviser.

By letter dated November 2, 2006, appellant, through his attorney, requested a hearing. At the hearing held on February 6, 2007, appellant’s attorney argued that Dr. Silver did not provide objective measurements or list specific tests to support his conclusions. Furthermore, appellant’s attorney contended that Dr. Silver indicated that appellant still had a cyst in his navicular that was asymptomatic, but that appellant should still see a hand specialist. He argued that Dr. Silver’s report was not well reasoned and that appellant should be sent to a different impartial medical examiner.

In a decision dated March 22, 2007, the hearing representative affirmed the Office’s October 27, 2006 decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees’ Compensation Act<sup>2</sup> provides for compensation to employees sustaining permanent 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* (5<sup>th</sup> ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>3</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>4</sup>

### ANALYSIS

In the instant case, this Board previously found that a conflict existed between the opinion of appellant's treating osteopath, Dr. Weiss, and the second opinion physician, Dr. Valentino, with regard to impairment to both of appellant's upper extremities. Pursuant to the Board's remand instructions, the Office referred appellant to Dr. Silver to resolve the conflict. Dr. Silver reviewed appellant's medical records and conducted a physical examination. He then applied the A.M.A., *Guides* and determined that appellant had no impairment. Specifically, Dr. Silver noted, citing page 511 of the A.M.A., *Guides*, that appellant had no sensory loss, no motor loss, no abnormal motion and no amputations. Referring to the grip and pinch strength tests on page 508 of the A.M.A., *Guides*, he noted that appellant had normal grip and pinch strength and that he would therefore not be entitled to any impairment due to that criteria. Although appellant's attorney challenges Dr. Silver's report on the basis that he did not provide specific measurements, his report is entitled to the special weight accorded an impartial medical specialist as he found that appellant had no sensory or motor loss and accordingly specific measurements were not required. Appellant's attorney correctly notes that Dr. Silver improperly referenced page 495 of the A.M.A., *Guides* as this page refers to recovery after carpal tunnel surgery and would not be appropriate to this case. However, as Dr. Silver properly found no impairment as appellant had no sensory, motor or motion loss, the fact that he also indicated that appellant had no impairment under this section is harmless error. Although Dr. Silver did note that appellant had a cyst in his navicular, he indicated that this caused no impairment. After reviewing Dr. Silver's "well-rationalized" report, the Office medical adviser agreed that there was no residual impairment in either of appellant's upper extremities. He also noted that there was no measurable percent of impairment for cyst in the navicular.

The Board finds that Dr. Silver's conclusion that appellant did not have an impairment in his upper extremities is well rationalized and based on a proper interpretation of the A.M.A., *Guides*. He cites appropriate pages of the A.M.A., *Guides* for support and explains his findings. Furthermore, the Office medical adviser agreed that appellant had no impairment. As appellant was referred to Dr. Silver for resolution of the conflict in the medical evidence, his well-rationalized opinion must be given special weight.<sup>5</sup> Accordingly, the Office properly found that appellant had no impairment to his upper extremities.

### CONCLUSION

The Board finds that the Office properly determined that appellant has not established entitlement to a schedule award.

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<sup>4</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>5</sup> *Solomen Polen*, 51 ECAB 341, 343 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 22, 2007 and October 27, 2006 are affirmed.

Issued: June 3, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board