United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 08-162**
	)	**Issued: June 13, 2008**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Bensalem, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2007 appellant, through counsel, filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 16, 2007 granting her a schedule award for a three percent impairment of the right upper extremity. 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 has more than three percent impairment of the right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

This case has been before the Board on prior appeal.[1] In a March 7, 2006 decision, the Board found that the Office's refusal to authorize appellant's request for a change of physician

[1] Docket No. 05-1562 (issued March 7, 2006).

constituted an abuse of discretion and reversed the Office's July 20, 2005 decision. The facts of the prior decision are hereby incorporated by reference.[2]

On July 21, 2006 Dr. George L. Rodriguez, an attending Board-certified physiatrist, concluded that appellant had 70 percent permanent impairment of her right upper extremity. In reaching this determination, he found appellant had a Grade 3 or 60 percent sensory neurological impairment based on Table 16-10 at page 482 and Table 16-14 at page 490 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.) and a Grade 4 or 25 percent motor neurological deficit based upon Table 16-11 at page 484 and 16-14 at page 490.

On September 23, 2006 appellant filed a claim for a schedule award.

On November 15, 2006 Dr. Kevin P. Hanley, a second opinion Board-certified orthopedic surgeon, diagnosed right upper extremity ill-defined syndrome with significant possibility of symptom magnification. He concluded that appellant had no right upper extremity impairment. A physical examination revealed symmetric shoulder girdle musculature, normal hand sweating and normal blood flow to the hand. Dr. Hanley opined "[o]ne would expect to see fairly significant amount of disuse atrophy on the right but staring at the shoulder one sees none." He also reported finding no evidence of reflex dystrophy, normal radial enervated muscle strength and normal back of the hand sensation.

By letter dated June 21, 2007, the Office referred appellant to Dr. Roy T. Lefkoe, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence between Dr. Rodriguez and Dr. Hanley. In a July 13, 2007 report, Dr. Lefkoe opined that appellant sustained 70 percent impairment of the right upper extremity due to her brachial plexus condition based on the fifth edition of the A.M.A., *Guides*. He found appellant had reached maximum medical improvement as of March 3, 1989. A physical examination revealed a positive Tinel's sign over the right ulnar nerve at the elbow, negative Tinel's sign at the right radial and median nerves, positive right Adson, Wright and Roos tests, diminished hand sensation and diminished right upper extremity strength in all muscle groups which he graded as 4/5. Deep tendon reflexes in the brachioradialis, triceps and biceps were symmetrical and 2+. Using Table 16-11 at page 484 and Table 16-14 at page 490, Dr. Lefkoe concluded that appellant had a Grade 4 motor impairment resulting in 25 percent motor sensory impairment of the right upper extremity and 60 percent sensory impairment based upon a Grade 3 sensory impairment using Table 16-10 at page 482 and Table 16-14 at page 490. He then used the Combined Values Charts at pages 604 to 606 to determine a total 70 percent right upper extremity impairment.

On September 17, 2007 Dr. Arthur T. Berman, an Office medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Lefkoe's findings. He noted Dr. Lefkoe's impairment

[2] On March 3, 1989 appellant, then 39-year-old data transcriber, sustained injury when she tripped over boxes. The Office accepted the claim for contusion to the right elbow, shoulder and neck which was later expanded to include a cervical strain and right brachial plexus lesion. The Office also authorized right radial nerve mobilization surgery, which was performed on January 17, 1992. Appellant stopped work on March 3, 1989 and was placed on the periodic rolls.

rating, stating that he "gave no basis for his calculations and did not quote any tables or pages in regard to his calculation." Dr. Berman determined that appellant sustained a three percent impairment of the right upper extremity and that the date of maximum medical improvement was July 13, 2007, the date of Dr. Lefkoe's report. Utilizing Table 16-10, page 482 and Table 16-15, Dr. Berman found 3 percent impairment of the right upper extremity (Grade 3 equals 60 percent which when multiplied by 5 percent results in 3 percent impairment).

By decision dated October 16, 2007, the Office granted appellant a schedule award for three percent impairment of the right upper extremity based on Dr. Berman's September 17, 2007 opinion.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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.[5] 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.[6]

Office procedures[7] provide that upper extremity impairment secondary to carpal tunnel syndrome and other entrapment neuropathies should be calculated using section 16.5d and Tables 16-10, 16-11 and 16-15.[8]

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 the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9] When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[10]

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[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.404.

[5] 5 U.S.C. § 8107(c)(19).

[6] 20 C.F.R. § 10.404.

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). *See also Cristeen Falls*, 55 ECAB 420 (2004).

[8] A.M.A., *Guides* 491, 482, 484, 492, respectively; *see Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[9] *J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[10] *Phillip H. Conte*, 56 ECAB 213 (2004).

ANALYSIS

The Office determined that a conflict in the medical opinion evidence arose between Dr. Rodriguez, an attending Board-certified physiatrist, and Dr. Hanley, a second opinion Board-certified orthopedic surgeon, as to the extent of permanent impairment of appellant's right upper extremity due to her employment-related contusion to the elbow, shoulder and neck, cervical strain and right brachial plexus lesion.

In a July 13, 2007 report, Dr. Lefkoe, the physician selected as the impartial medical specialist, opined that appellant sustained 70 percent impairment of the right upper extremity due to her brachial plexus condition based on the fifth edition of the A.M.A., *Guides*. He found appellant reached maximum medical improvement as of March 3, 1989. A physical examination revealed a positive Tinel's sign over the right ulnar nerve at the elbow, negative Tinel's sign at the right radial and median nerves, positive right Adson, Wright and Roos tests, diminished hand sensation and diminished right upper extremity strength in all muscle groups which he graded as 4/5. Deep tendon reflexes in the brachioradialis, triceps and biceps were symmetrical and 2+. Using Table 16-11 at page 484 and Table 16-14 at page 490, Dr. Lefkoe concluded that appellant had a Grade 4 motor impairment resulting in 25 percent motor sensory impairment of the right upper extremity and 60 percent sensory impairment based upon a Grade 3 sensory impairment using Table 16-10 at page 482 and Table 16-14 at page 490. He then used the Combined Values Charts at pages 604 to 606 to determine a total 70 percent right upper extremity impairment.

On September 17, 2007 Dr. Berman, an Office medical adviser and Board-certified orthopedic surgeon, opined that appellant had three percent impairment of the right upper extremity. He stated that Dr. Lefkoe "gave no basis for his calculations and did not quote any tables or pages in regard to his calculation." While Dr. Lefkoe provided tables and page numbers from the A.M.A., *Guides* he did not explain how he arrived at his calculation using the A.M.A., *Guides*. The Board has held that, where a medical conflict is present, to properly resolve the conflict, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An Office medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[11] As the Office did not request a supplemental opinion from Dr. Lefkoe, the selected impartial medical specialist, the Board finds that the conflict in medical opinion remains unresolved.

The case will be remanded for the Office to secure a supplemental report from Dr. Lefkoe regarding the extent of appellant's permanent impairment of the right upper extremity. If he is unable to clarify or elaborate on his opinion or if the opinion is not forthcoming, the Office should refer the case to another appropriate impartial medical examiner.[12] After such further development as the Office deems necessary, it should issue a *de novo* decision on the extent and degree of any employment-related impairment involving appellant's right upper extremity which may entitle appellant to a schedule award.

[11] *See Richard R. LeMay*, 56 ECAB 341 (2005); *Thomas J. Fragal*e, 55 ECAB 619 (2004).

[12] *See Nancy Keenan*, 56 ECAB 687 (2005); *see also Leonard W. Waggoner*, 35 ECAB 461 (1983).

CONCLUSION

The Board finds that the conflict in the medical evidence was not properly resolved and the case requires further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 16, 2007 is set aside the case is remanded for further action consistent with this decision.

Issued: June 13, 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