United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 07-2303**
	)	**Issued: March 18, 2008**
U.S. POSTAL SERVICE, MARKET STREET POST OFFICE, Philadelphia, 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:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 10, 2007 appellant, through her attorney, filed a timely appeal from an August 30, 2007 decision of the Office of Workers' Compensation Programs regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained greater than a nine percent impairment of the right upper extremity, for which she received schedule awards. On appeal, appellant's attorney requested that the Board review the Office's schedule award assessment and pay rate calculation.

FACTUAL HISTORY

This is appellant's third appeal before the Board in this case. On the first appeal, by decision dated June 15, 2006,[1] the Board remanded the case to the Office for further

[1] Docket No. 06-258 (issued June 15, 2006).

development regarding whether appellant sustained greater than a five percent impairment of the right upper extremity, for which she received a schedule award. On the second appeal, by decision and order dated May 9, 2007,[2] the Board set aside an October 16, 2006 decision of the Office granting appellant an additional four percent impairment of the right upper extremity, for a total of nine percent. The Board found that the Office improperly relied on an Office medical adviser to resolve a conflict regarding the appropriate percentage of permanent impairment. The Board remanded the case for appointment for a new impartial medical examiner. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

In a June 4, 2007 file memorandum, the Office noted the conflict of medical opinion between Dr. George L. Rodriguez, an attending Board-certified physiatrist, and Dr. Richard J. Mandel, a Board-certified orthopedic surgeon and second opinion physician. To resolve the conflict, the Office referred appellant, the medical record and a statement of accepted facts to Dr. John R. Donahue, a Board-certified orthopedic surgeon, for an impartial medical opinion.[3]

Dr. Donahue submitted a July 18, 2007 report reviewing the medical record. He noted that appellant was very anxious and did not give a full effort on strength and range of motion testing. Appellant complained of pain and numbness throughout both upper extremities. Dr. Donahue found positive Phalen's and Tinel's signs bilaterally and limited flexion in the fingers of the right hand. He opined that appellant's presentation was most consistent with the October 16, 2003 examination performed by Dr. Rodriguez. Referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), Dr. Donahue opined that flexion of the proximal interphalangeal joint of the right second, third, fourth and fifth fingers limited to 95 degrees equaled a four percent impairment of the right upper extremity according to Tables 16-2,[4] 16-15 and 16-23.[5] He also affirmed Dr. Rodriguez's finding of a 3 percent impairment of the right upper extremity due to a Grade 4 or 25 percent loss of strength in the median nerve distribution, according to Table 16-11,

[2] Docket No. 07-214 (issued May 9, 2007).

[3] In a June 15, 2007 letter, appellant's attorney alleged that the Office did not follow its procedures for selecting impartial medical examiners because another of his compensation clients was still waiting for an impartial medical examination whereas appellant had already been scheduled. The Office responded by July 16, 2007 letter, explaining that the Office followed the appropriate procedures in appellant's case in selecting the impartial medical examiner. The Office explained that many variables affected appointment scheduling.

[4] A.M.A., *Guides* 439, Table 16-2 (fifth edition) "Conversion of Impairment of the Hand to Impairment of the Upper Extremity."

[5] *Id*. at 502, Table 16-23, "Joint Impairment Due to Excessive Passive Mediolateral Instability."

page 484[6] and Table 16-15.[7] Dr. Donahue combined the four and three percent impairments to find a seven percent total impairment of the right upper extremity.[8]

The Office submitted Dr. Donahue's July 18, 2007 report to an Office medical adviser for review. In an August 14, 2007 report, an Office medical adviser agreed with Dr. Donahue's calculation of a seven percent impairment of the right upper extremity. The medical adviser explained that Dr. Donahue properly utilized Tables 16-2, 16-15 and 16-23 to determine four percent impairment due to decreased motion of the carpometacarpal joint of the thumb and proximal interphalangeal joints of the second, third, fourth and fifth fingers. The medical adviser also found that Dr. Donahue properly used Table 16-15 to determine 10 percent impairment for median nerve motor deficit below the elbow. The 10 percent was then multiplied by 25 percent for a Grade 4 deficit according to Table 16-11. Multiplying 25 percent times 10 percent equaled 2.5 percent impairment, rounded off to 3 percent. Using the Combined Values Chart on page 604, four percent plus three percent equaled seven percent.

By decision dated August 30, 2007, the Office found that appellant had not established that she sustained greater than a nine percent impairment of the right upper extremity, for which she received schedule awards. The Office found that the weight of the medical evidence rested with Dr. Donahue, who found a seven percent impairment of the right upper extremity, less than the nine percent previously awarded.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[9] provides 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.[10] As of February 1,

[6] *Id*. at 484, Table 16-11, "Determining Impairment of the Upper Extremity Due to Motor and Loss-of-Power Deficits Resulting From Peripheral Nerve Disorders Based on Individual Muscle Rating."

[7] *Id*. at 492, Table 16-15, "Maximum Upper Extremity Impairment Due to Unilateral Sensory or Motor Deficits or to *Combined* 100 percent Deficits of the Major Peripheral Nerves."

[8] In a July 19, 2007 report, Dr. Joseph J. Thoder, an attending Board-certified orthopedic surgeon, noted that July 17, 2007 electromyography (EMG) and nerve conduction velocity (NCV) testing showed bilateral carpal tunnel syndrome, unchanged from prior studies.

[9] 5 U.S.C. §§ 8101-8193.

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

2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[11]

The standards for evaluating 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.[12] 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.[13]

Section 8123 of the Federal Employees' Compensation 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.[14] In situations where 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.[15]

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and stenosing tenosynovitis with trigger finger of the thumb, third and fourth digits of both hands. A conflict of medical opinion then arose between appellant's attending physician and a second opinion physician regarding the percentage of permanent impairment. To resolve this conflict, the Office referred appellant to Dr. Donahue, a Board-certified orthopedic surgeon, to ascertain the appropriate percentage of permanent impairment attributable to the accepted conditions.

Dr. Donahue provided a July 18, 2007 report finding a seven percent impairment of the right upper extremity. Referring to Tables 16-2, 16-15 and 16-23 of the A.M.A., *Guides*, he found that flexion of the proximal interphalangeal joint of the right second, third, fourth and fifth fingers limited to 95 degrees equaled a four percent impairment of the right upper extremity. Dr. Donahue also found a three percent impairment of the right upper extremity due to Grade 4 weakness in the median nerve distribution according to Tables 16-11 and Table 16-15.

[11] *See* FECA Bulletin No. 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).

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

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

[14] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[15] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

Dr. Donahue then used the Combined Values Chart, adding the four and three percent impairments to equal a seven percent impairment of the right upper extremity.

An Office medical adviser reviewed Dr. Donahue's report and explained that Dr. Donahue properly applied the appropriate tables and grading schemes in determining the percentage of permanent impairment. The medical adviser concurred with Dr. Donahue's assessment of a seven percent impairment of the right upper extremity. The Board finds that Dr. Donahue properly applied the grading schemes of the A.M.A., *Guides* in assessing the percentage of permanent impairment of the upper extremities.[16]

Dr. Donahue's evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no greater than the nine percent impairment of the right upper extremity previously awarded. The Board further finds that Dr. Donahue's opinion as impartial medical examiner is entitled to special weight as his opinion is based on a complete and accurate factual and medical history and properly applied the A.M.A., *Guides* to his clinical findings on examination.[17] Therefore, appellant has not established that she sustained greater than a nine percent impairment of the right upper extremity, for which she received schedule awards.

On appeal, appellant's attorney requested that the Board review the Office's pay rate calculations. The period covered by schedule awards commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.[18] The Office used the date of a June 17, 2005 impartial medical examination as the date of maximum medical improvement, in accordance with Board precedent. In a November 8, 2005 decision, the Office granted appellant a schedule award for a five percent impairment of the right upper extremity. The period of the award ran for 15.6 weeks, from June 17 to October 4, 2005. The Office calculated that appellant earned $846.41 a week, properly using March 12, 2002 as the effective date, the date of an accepted recurrence of disability following light duty since the injuries.[19] The Office multiplied $846.41 by the three-fourths rate as appellant had eligible dependents, equaling $667.00. The Office multiplied $667.00 by 15.6 weeks, resulting in a payment of $10,405.20 for the entire period. On October 20, 2006 the Office issued a schedule award for an additional four percent impairment of the right arm. The period of the award ran 12.48 weeks, from October 5 to December 31, 2005. The Office used the previously derived $667.00 weekly compensation rate, multiplied by 12.48 weeks, resulting in a single payment of $8,324.16. The Board also finds that the Office's mathematical calculations of the amount of the schedule award were correct. Therefore, the Board finds that the Office correctly calculated the monetary aspect of the schedule awards.

[16] The fifth edition of the A.M.A., *Guides* 494 provides that impairment for carpal tunnel syndrome be rated on motor and sensory impairments only. *See also Robert V. DiSalvatore*, 54 ECAB 351 (2003) (where the Board found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome be rated on motor and sensory impairments only, without additional impairment values for decreased grip strength).

[17] *Jacqueline Brasch (Ronald Brasch), supra* note 15.

[18] *James E. Earle*, 51 ECAB 567 (2000); *Yolandra Librera*, 37 ECAB 388 (1986).

[19] 5 U.S.C. § 8101(4).

CONCLUSION

The Board finds that appellant has not established that she sustained greater than a nine percent impairment of the right upper extremity, for which she received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 30, 2007 is affirmed.

Issued: March 18, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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