

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

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C.J., personal representative of the Estate of C.J., Appellant)	
)	
and)	Docket No. 08-371
)	Issued: September 11, 2008
)	
U.S. POSTAL SERVICE, POST OFFICE, Stratford, NJ, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Thomas R. Uliase, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
 DAVID S. GERSON, Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2007 appellant filed a timely appeal from the November 21, 2006 merit decision of the Office of Workers' Compensation Programs, which awarded schedule compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office hearing representative's June 19, 2007 decision affirming the schedule award.

ISSUE

The issue is whether the employee had more than a 24 percent permanent impairment of his left upper extremity or more than a 21 percent permanent impairment of his right.

FACTUAL HISTORY

On March 21, 2000 the employee, then a 53-year-old custodian, filed a claim for compensation alleging that his bilateral carpal tunnel syndrome and left elbow nerve damage was a result of his federal employment. The Office accepted his claim for bilateral ulnar neuropathy

and carpal tunnel syndrome.¹ The employee underwent a right carpal tunnel release on February 6, 2001 and a left carpal tunnel release on October 9, 2001. On May 13, 2003 he underwent an ulnar nerve transposition in the left elbow.

The employee requested a schedule award. On April 5, 2006 the Office issued a schedule award for a six percent permanent impairment of the employee's left upper extremity and a four percent permanent impairment of his right based on ulnar sensory deficits at the elbows. On July 3, 2006 an Office hearing representative found that further medical development was warranted because no physician had properly applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). For example, Dr. Nicholas Diamond, an osteopath provided by the employee's attorney, improperly included impairment values for decreased motion and decreased pinch strength. The hearing representative remanded the case for a second opinion evaluation of impairment "under the standards and procedures in the fifth edition of the A.M.A., *Guides*."

The Office referred the employee to Dr. William Dinenberg, an orthopedic surgeon, for a proper evaluation of impairment. On September 27, 2006 Dr. Dinenberg examined the employee and reported his findings on physical examination. He found a six percent impairment of the left upper extremity due to ulnar nerve sensory deficit or pain above the midforearm. Dr. Dinenberg also found an eight percent impairment of each upper extremity due to loss of wrist motion.

On October 23, 2006 an Office medical adviser reviewed Dr. Dinenberg's findings. For the left upper extremity, he concurred with the six percent rating for decreased sensation of the ulnar nerve. In addition, the Office medical adviser reported a 12 percent rating for decreased grip strength, a 5 percent rating for loss of flexion and extension in the wrist and a 4 percent rating for loss of radial and ulnar deviation in the wrist. From this, he calculated a 24 percent impairment of the left upper extremity.

For the right upper extremity, the Office medical adviser reported identical sensory and strength losses at the elbow. He also reported a five percent rating for loss of flexion and extension in the wrist. The Office medical adviser calculated a 21 percent impairment of the right upper extremity.

In a decision dated November 21, 2006, the Office issued a schedule award for an additional 18 percent impairment of the left upper extremity (24 percent total) and an additional 17 percent impairment of the right (21 percent total).

The employee passed away on December 10, 2006.

In a decision dated June 19, 2007, an Office hearing representative affirmed the November 21, 2006 schedule award.

¹ An electromyogram and nerve conduction study on March 9, 2000 showed bilateral carpal tunnel syndrome and left ulnar neuropathy at the elbow "and probable right ulnar neuropathy, though not definitively localized to the elbow."

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act² authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.⁴

ANALYSIS

The Office accepted the employee's claim for bilateral ulnar neuropathy and carpal tunnel syndrome, both of which are entrapment or compression neuropathies. The A.M.A., *Guides* states that in entrapment or compression neuropathies, sensory and motor deficits are evaluated according to the chapter on peripheral nerve disorders. This means following the grading scheme and procedure for rating sensory and motor deficits under Table 16-10, page 482, and Table 16-11, page 484, respectively. The A.M.A., *Guides* makes clear: "In compression neuropathies, additional impairment values are not given for decreased grip strength. In the absence of CRPS [complex regional pain syndrome], additional impairment values are not given for decreased motion."⁵ So in the absence of CRPS, as in this case, no claimant is entitled to a schedule award for entrapment or compression neuropathies that includes a rating for decreased motion.

The hearing representative remanded this case for further development on July 3, 2006. She found that Dr. Diamond, the osteopath, had improperly included impairment values for decreased motion. Notwithstanding the hearing representative's finding, and notwithstanding the language of the A.M.A., *Guides*, Dr. Dinenberg, the Office referral orthopedic surgeon, also included impairment values for decreased motion. Further, the Office medical adviser who reviewed Dr. Dinenberg's findings recommended that the employee receive an award for decreased motion. His rationale -- that both Dr. Diamond and Dr. Dinenberg had included ratings for decreased motion -- conflicts with the proper application of the A.M.A., *Guides*.

The Office medical adviser also gave an impairment rating for 4/5 grip strength bilaterally. This is similarly prohibited by the A.M.A., *Guides*. The Office medical adviser gave the employee a six percent rating for sensory deficit of the ulnar nerve at the right elbow, which Dr. Dinenberg did not evaluate.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁵ A.M.A., *Guides* 494.

When evaluating impairment due to carpal tunnel syndrome, the A.M.A., *Guides* states that the diagnosis should be documented by electromyography as well as sensory and motor nerve conduction studies.⁶ Dr. Dinenberg did not obtain an electromyogram or nerve conduction study, and he did not reference any recent testing. Giving the employee the benefit of a doubt that such testing would have confirmed the presence of a residual carpal tunnel syndrome,⁷ the A.M.A., *Guides* still requires the physician to follow the grading scheme and procedure for evaluating sensory and motor deficits, which Dr. Dinenberg did not do. Dr. Dinenberg limited his evaluation of carpal tunnel syndrome to range of motion, which, again, the A.M.A., *Guides* prohibits.

This case is not in posture for decision. The Office issued a schedule award that is not in compliance with the A.M.A., *Guides*. The Board will therefore set aside the Office's November 21, 2006 and June 19, 2007 decisions. The Office should refer the case to Dr. Dinenberg for clarification as to the extent of permanent impairment. In cases involving posthumous schedule awards, where a physician is able to render an opinion as to the permanent loss of use of the injured member with reasonable medical certainty, such evidence should be given credence. Upon receiving his supplemental report, the Office should refer the case to a different Office medical adviser to determine whether the employee's bilateral carpal tunnel syndrome falls within Scenario 1, page 495, of the A.M.A., *Guides*, and if so, whether a proper rating may be given for peripheral nerve disorder under Table 16-10 or Table 16-11. The Office medical adviser should provide rationale for selecting the reports or findings or complaints that best represent the employee's clinical picture in 2006.⁸ The Office medical adviser shall also review the medical evidence to determine whether the employee should receive a rating for any sensory or motor deficit in his right elbow and whether Dr. Dinenberg's impairment rating for ulnar sensory deficit at the left elbow is proper under Table 16-10. The Office shall then issue an appropriate final decision on the employee's claim for a schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted.

⁶ *Id.* at 493.

⁷ *See id.* at 495 (Scenario 1).

⁸ *See Irving Brichke*, 32 ECAB 1044 (1981) (Office medical adviser provided no rationale for selecting one evaluation of the four that were conducted within a span of five months); *John C. Messick*, 25 ECAB 333 (1974) (when several audiograms are in the case record and all are made within approximately two years of one another and are submitted by more than one physician, the Office should give an explanation for selecting one audiogram over the others).

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2007 and November 21, 2006 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: September 11, 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