United States Department of Labor
Employees' Compensation Appeals Board

T.E., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer**	)	**Docket No. 08-1362** **Issued: August 26, 2009**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 8, 2008 appellant filed an appeal of the Office of Workers' Compensation Programs' November 26, 2007 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the evidence establishes that appellant has more than an 18 percent permanent impairment of the right upper extremity (RUE) and a 5 percent permanent impairment of the left upper extremity (LUE).

On appeal, appellant's representative argues that there is an unresolved conflict in medical opinion which requires further development and referral to an impartial medical examiner.

FACTUAL HISTORY

On January 31, 1990 appellant filed an occupational disease claim alleging that she sustained bilateral wrist conditions due to employment activities. The Office accepted the claim

for bilateral carpal tunnel syndrome (CTS); aggravation of nerve root plexis disorder; and thoracic outlet syndrome (TOS). Appellant underwent approved right carpal tunnel release surgery on May 11, 1992.

In support of her claim for a schedule award, appellant submitted a December 31, 2001 report from her treating physician, Dr. David Weiss, a Board-certified orthopedist, who opined that she had a 31 percent impairment of the RUE and a 26 impairment of the LUE, pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Examination revealed full range of motion (ROM) of the shoulders and wrists, as well as positive Tinel's and Phalen's signs. Grip strength testing via Jamar indicated 18 kilograms (kg) of force strength in the bilateral hands. Manual muscle testing showed 4/5 strength of the supraspinatus bilaterally; 5/5 of the deltoids bilaterally; 5/5 of the biceps on the left; 4/5 of the biceps on the right; and 5/5 of the triceps bilaterally. Sensory examination was normal. Upper arm circumference was 31 centimeters (cm) on the right and 32 cm on the left 3 inches above the elbow and was 25 cm bilaterally 3 inches below the elbow. Dr. Weiss stated: appellant had a 20 percent permanent impairment of the RUE for right grip strength deficit per tables according to Tables 16-31 and 16-34 at page 509 of the A.M.A., *Guides*; a 4 percent permanent impairment of the RUE for 4/5 motor strength deficit right supraspinatus under Table 16-15 at page 492 and Table 16-11 at page 484; and a 6 percent permanent impairment for a 4/5 motor strength deficit right biceps under Tables 16-16 and 16-11. These combined to 28 percent permanent impairment of the RUE. Dr. Weiss added 3 percent impairment under Figure 18-1 at page 574, for a total of 31 percent permanent impairment of the RUE. On the left, he allocated a 20 percent impairment for grip strength deficit pursuant to Tables 16-31 and 16-34 at page 509, and a 4 percent permanent impairment per Table 16-11 at page 492 for motor strength deficit left supraspinatus, for a combined total of 23 percent. Dr. Weiss then added 3 percent for pain under Figure 18-1 at page 474 for a total LUE impairment of 26 percent.

The Office referred appellant to Dr. Richard Bennett, a Board-certified neurologist, for a second opinion examination and an opinion as to whether appellant had a permanent partial impairment as a result of her accepted injury. In a February 11, 2003 report, Dr. Bennett found that appellant had no objective evidence of CTS or TOS. Stating that she had nonanatomically defined sensory deficits that were inconsistent with any specific nerve root problem, he opined that appellant had no permanent motor or sensory impairment due to CTS or TOS.

The Office found a conflict in medical opinion between Dr. Weiss and Dr. Bennett as to whether appellant had permanent impairment related to her accepted injury, and referred her to Dr. Marcia L. Halpern, a Board-certified neurologist, in order to resolve the conflict. In a July 8, 2003 report, Dr. Halpern found no objective motor impairment, consistent sensory abnormalities or atrophy. She concluded that, therefore, appellant had no permanent impairment under the A.M.A., *Guides*.

By decision dated August 25, 2003, the Office denied appellant's schedule award request, based on Dr. Halpern's July 8, 2003 report. On July 6, 2004 an Office hearing representative affirmed the August 25, 2003 decision.

On April 6, 2005 appellant requested reconsideration. She submitted an October 19, 2004 report from Dr. Weiss, who opined that appellant had a total LUE impairment of 37 percent and a total RUE impairment of 47 percent pursuant to the fifth edition of the A.M.A., *Guides*. Left shoulder ROM was 180 degrees forward elevation. Left wrist ROM was 76 degrees dorsiflexion, 76 degrees palmar flexion, 20 degrees radial deviation, and 36 degrees ulnar deviation. Right shoulder ROM was 170 degrees forward elevation, 170 degrees abduction, 76 degrees adduction. and 80 degrees external rotation. Right wrist ROM was 76 degrees dorsiflexion, 76 degrees palmar flexion, 20 degrees radial deviation and 36 degrees ulnar deviation. Dr. Weiss further found positive Tinel's and Phalen's signs. Manual muscle testing of the supraspinatus was 4/5 bilaterally, deltoid was 5/5 bilaterally, triceps was 5/5 bilaterally and biceps testing was 5/5 on the left and 4/5 on the right. Grip strength testing by Jamar was 14 kg on the right and 18 kg on the left. Pinch key unit was four kg on the right versus five kg on the left. Upper arm circumference was 32 cm on the right and 31 cm on the left. Lower arm circumference was 25 cm on the right versus 24 cm on the left. Sensory examination revealed "perceived sensory deficits over the C6 dermatomes and over the median nerve distributions bilaterally."

Dr. Weiss rated appellant's RUE impairment as follows: 31 percent impairment under Tables 16-10 and 16-15; 4 percent permanent impairment for 4/5 motor strength deficit right supraspinatus under Table 16-11 and 16-15; 6 percent permanent impairment for 4/5 motor strength deficit right biceps per Tables 16-11 and 16-15; 10 percent impairment for right lateral pinch deficit per Table 16-34; and 3 percent impairment for pain per Table 18-1, for a total combined RUE impairment rating of 47 percent. He rated the LUE impairment as follows: 5 percent permanent impairment under Table 16-11 and 16-15 for 4/5 motor strength deficit left supraspinatus; 31 percent permanent impairment under Table 16-10 and 16-15 for sensory deficit left median nerve. Dr. Weiss then added 3 percent permanent impairment for pain, for a combined total of 37 percent impairment of the LUE. He opined that maximum medical improvement (MMI) was achieved on October 19, 2004.

The Office found a conflict in medical opinion between Dr. Weiss and Dr. Halpern and referred appellant to Dr. James Gaul, a Board-certified neurologist, to resolve the conflict as to the existence and degree of permanent impairment related to appellant's accepted conditions. In an October 25, 2005 report, Dr. Gaul found positive Adkin's maneuver and Tinel's signs. Grip strength weakness was noted at 4/5 bilaterally. Examination revealed diminished pin sensitivity in the fifth digit of the right hand, which Dr. Gaul attributed to appellant's brachial plexus/thoracic outlet disorder, lower trunk or portion thereof, constituting a 20 percent impairment. He awarded a 25 percent impairment for motor deficit in each hand, likely due to a combination of median dysfunction and the TOS. Utilizing the Combined Values Chart, Dr. Gaul opined that appellant had a 40 percent impairment of the RUE and a 25 percent impairment of the LUE for sensory and motor deficits. He stated that MMI has been achieved.

The Office forwarded Dr. Gaul's report to the district medical adviser for review. In a November 8, 2005 report, the district medical adviser recommended that appellant receive a schedule award for a 1 percent impairment of her RUE and a 10 percent impairment of her LUE under the A.M.A., *Guides*, based on Dr. Gaul's examination findings. Applying Table 16-10 at page 482, for determining impairment due to sensory deficits and pain and peripheral nerve disorders, he recommended a Grade 4 median nerve deficiency bilaterally, resulting in a 25

percent sensory deficit. Noting that the maximum upper extremity impairment due to unilateral sensory deficit related to the median nerve is 39 percent under Table 16-15 at page 492, the district medical adviser opined that appellant had a 10 percent sensory loss bilaterally (.25 x .39 = 9.75 percent). In calculating the degree of impairment on the right related to thoracic outlet syndrome, he referred to Table 16-13 at page 489 for determining maximum upper extremity impairment due to unilateral sensory or motor deficits of individual spinal nerves and suggested that the C8 with five percent sensory maximum be considered. Pursuant to Table 16-10 at page 482, the district medical adviser recommended a Grade 4 median nerve deficiency, resulting in a 25 percent sensory deficit. He opined that appellant had a one percent sensory loss related to thoracic outlet syndrome. (.25 X .05 = 1.25 percent) The district medical adviser recommended no award for motor deficit.[1]

By decision dated November 27, 2006, the Office issued a schedule award for a 10 percent impairment of the LUE and a 1 percent impairment of the RUE. It found that the date of MMI was October 19, 2004. On December 1, 2006 appellant requested an oral hearing.

In a decision dated March 15, 2007, an Office hearing representative set aside the November 27, 2006 decision. She found that Dr. Weiss' October 19, 2004 report did not create a conflict with the opinion of Dr. Halpern, the impartial medical examiner. Therefore, Dr. Gaul's report should be considered a second opinion report, rather than a referee report, and is not entitled to special weight. The hearing representative found that the case was not in posture for a decision and remanded the case for further development of the medical evidence. She specifically instructed the Office to obtain a supplemental report from Dr. Gaul concerning whether appellant's condition had worsened since Dr. Halpern's examination and, if so, whether the worsening was work related. The Office was also instructed to obtain "an unequivocal opinion," together with medical reasoning, on the degree of permanent impairment to [appellant's] upper extremities.

On remand, the Office asked Dr. Gaul for a supplemental report which addressed whether his examination findings supported a worsening of appellant's employment-related condition since Dr. Halpern's July 8, 2003 report. Dr. Gaul was asked to provide rationale for his conclusions as to the worsening of appellant's condition and the degree of permanent impairment.

In a May 24, 2007 report, Dr. Gaul opined that appellant had a 29 percent impairment of the RUE and a 17 percent impairment of the LUE pursuant to the fifth edition of the A.M.A., *Guides.* He stated that there were new sensory, motor and mechanical findings on examination that were not demonstrated by Dr. Halpern. Dr. Gaul indicated that his examination findings supported the conclusion that appellant's condition had worsened, and that the worsening was a consequence of her original and underlying work duty, despite the fact that she stopped working in 2000, noting that injuries such as CTS and brachial plexus injuries, once incited, can progress due to day-to-day "wear and tear." On examination, he noted a positive Adkin's maneuver, which caused a numbness to radiate to the hands bilaterally. Dr. Gaul also found mild grip

[1] The Board notes that the district medical adviser's final recommendation of 1 percent permanent impairment for the RUE is not consistent with his analysis, which reflects a recommendation of an 11 percent RUE impairment rating.

strength weakness, right worse than left (6 kg on the right, 4 kg on the left, by hand-held dynamometer), and diminished pin sensitivity in the fifth digit of the right hand, which he opined was "due to appellant's brachial plexus/thoracic outlet disorder, lower trunk or portion thereof.

Dr. Gaul opined that appellant had a 14 percent sensory impairment of the RUE. He noted that Table 16-14 at page 490 provides that the maximum upper extremity impairment due to sensory deficit or pain in the lower trunk is 20 percent. After assigning a Grade 3 classification for sensory deficit or pain under Table 16-10, at page 482, Dr. Gaul concluded that appellant had a 14 percent RUE sensory loss (.20 x .70 = 14). He concluded that appellant had a 17 percent RUE motor impairment. Dr. Gaul assigned a Grade 3 impairment rating under Table 16-11 at page 484 due to a combination of median dysfunction (CTS and TOS), stating that appellant had a 33 percent motor deficit. Based on the 10 percent maximum upper extremity impairment due to median motor deficits pursuant to Table 15-15 at page 492, he concluded that appellant had a 3 percent motor impairment due to a combination of median dysfunction (CTS and TOS). Dr. Gaul further determined that appellant had an additional 14 percent motor impairment due to the lower trunk brachial plexus motor disorder. He noted that Table 16-14 at page 490 provides that the maximum upper extremity impairment due to motor deficit in the lower trunk is 70 percent. Dr. Gaul assigned a Grade 4 classification for motor loss and found a 20 percent deficit under Table 16-11, at page 484, resulting in a 14 percent RUE motor impairment due to lower trunk brachial plexus motor disorder. Combining his recommended 14 percent sensory impairment with the 17 percent motor impairment under the Combined Values Chart on page 604, he concluded that appellant had a 29 percent RUE impairment.

Dr. Gaul determined that appellant had a 17 percent left hand motor impairment due to a combination of median nerve dysfunction (CTS and TOS), "as calculated above." He noted that there were no objective sensory findings in the LUE. Dr. Gaul indicated that MMI had been achieved.

In a June 10, 2007 report, the district medical adviser agreed with Dr. Gaul's opinion that appellant's work-related condition had worsened since she was examined by Dr. Halpern on July 8, 2003. However, he disagreed with Dr. Gaul's recommended impairment ratings and opined that appellant had an 18 percent impairment of her RUE and a 5 percent impairment of her LUE. The district medical adviser stated that Dr. Gaul had not justified his Grade 3 calculation with regard to sensory deficit due to TOS, because he did not make a determination of two-point discrimination. He determined that appellant had a Grade 4 (25 percent) sensory deficit, which equated to a 5 percent impairment of the RUE. The district medical adviser also stated that Dr. Gaul had not justified his rating with regard to motor loss due to TOS, because, according to the principles delineated on page 508 of the A.M.A., *Guides*, decreased strength cannot be rated in the presence of painful conditions. He further stated that Dr. Gaul had not explained or showed a basis for his Grade 3 calculation with regard to motor loss due to CTS. Rejecting Dr. Gaul's classifications, the district medical adviser determined that appellant had a Grade 4 motor loss (25 percent), which applied to a CTS maximum motor loss deficit of 10 percent was equal to a 2.5 percent (rounded up to 3 percent) impairment of the RUE. He also opined that appellant's impairment rating for sensory loss due to right CTS should he based on page 495 of the A.M.A., *Guides*. The district medical adviser applied a Grade 4 classification (25 percent) for right hand decreased sensation over the median nerve distribution, a classification which he noted had been recommended by "multiple physicians." Applying this

calculation to Table 16-15 at page 492, he determined that appellant had a 10 percent RUE sensory impairment due to CTS. The district medical adviser concluded by adding the recommended 5 percent RUE impairment due to TOS sensory loss, the 3 percent impairment due to CTS motor loss; and the 10 percent impairment due to CTS sensory loss, resulting in an 18 percent permanent impairment of the RUE.

The district medical adviser stated that Dr. Gaul had failed to justify his impairment rating for the LUE. Accordingly, he provided his own ratings, utilizing page 490, Table 16-14, which provided a maximum of 20 percent impairment for sensory deficit or pain. Applying a Grade 4 classification (25 percent) under Table 16-10 at page 482, the district medical adviser concluded that appellant had a 5 percent sensory deficit of the LUE. He stated that there was no basis for an award for motor loss.

In a decision dated June 26, 2007, the Office granted appellant a schedule award for an additional eight percent impairment to her left upper extremity and an additional four percent impairment to her right upper extremity. The period of the award was from June 17, 2005 to March 6, 2006. The Office found that the date of MMI was October 19, 2004. On June 29, 2007 appellant, through her representative, requested an oral hearing.

At the October 16, 2007 hearing, appellant's representative argued that there existed an unresolved conflict in medical opinion between appellant's treating physician, Dr. Weiss, and Dr. Gaul, the second opinion physician. He contended that the case should be remanded for a referee opinion.

By decision dated November 26, 2007, an Office hearing representative found that the June 10, 2007 report of the district medical adviser constituted the weight of the medical evidence and established that appellant had an 18 percent permanent impairment of the RUE and a 5 percent permanent impairment of the LUE. Noting that the Office's previous decision contained a typographical error which reversed the impairment percentages for the right and left extremities, the representative affirmed the June 26, 2007 decision as modified.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing federal regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

applicable to all claimants.[4] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[5]

No schedule award is payable for a member, function, or organ of the body that is not specified in the Act or in the implementing regulations. The Act identifies members such as the arm, leg, hand, foot, thumb and finger, functions such as loss of hearing and loss of vision and organs to include the eye.[6] Section 8107(c)(22) provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor. The Secretary of Labor has made such a determination and, pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.[7]

A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.[8]

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[9] While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[10] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[11]

ANALYSIS

The Board finds that this case is not in posture for a decision. In her March 15, 2007 decision, the Office hearing representative set aside the Office's November 27, 2006 schedule award decision and remanded the case for further development of the medical record. She specifically instructed the Office to obtain a supplemental report from Dr. Gaul concerning whether appellant's condition had worsened since Dr. Halpern's June 8, 2003 examination and, if so, whether the worsening was work related. The Office was also instructed to obtain "an unequivocal opinion," together with medical reasoning, on the degree of permanent impairment to [appellant's] upper extremities. However, Dr. Gaul's May 24, 2007 supplemental report does not provide sufficient information or reasoning from which an informed decision can be made as

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[4] *Id.* at § 10.404(a).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Award*s, Chapter 3.700, Exhibit 4 (June 2003).

[6] *See supra* note 2.

[7] 20 C.F.R. § 10.404; *Henry B. Ford, III*, 52 ECAB 220 (2001).

[8] *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215, 219 (1991).

[9] *Vanessa Young*, 55 ECAB 575 (2004).

[10] *Richard E. Simpson*, 55 ECAB 490 (2004).

[11] *Melvin James*, 55 ECAB 406 (2004).

to the degree of appellant's permanent impairment. Therefore, the case must be remanded for further development of the medical evidence.

Although Dr. Gaul provided an opinion as to the degree of appellant's impairment, he failed to adequately explain how he arrived at his conclusion. In his first report, dated October 25, 2005, he opined that appellant had a 25 percent impairment of her LUE and a 40 percent impairment of her RUE. On May 24, 2007 Dr. Gaul opined that appellant had a 17 percent impairment of the LUE and a 29 percent impairment of the RUE. However, he did not address why his 2007 rating conflicted with his 2005 rating, particularly in light of the fact that his reports were based on the same examination.

Dr. Gaul concluded that appellant had a 14 percent RUE sensory impairment, based on a Grade 3 classification for sensory deficit or pain under Table 16-10, at page 482. He also concluded that appellant had a 17 percent RUE motor impairment, based on a Grade 3 classification under Table 16-11 at page 484 due to median motor deficits, (3 percent) and a Grade 4 classification for motor impairment due to lower trunk brachial plexus motor disorder (14 percent). However, Dr. Gaul did not adequately explain how or why he concluded that appellant's condition warranted the respective grade assigned.[12] Therefore, his opinion is of diminished probative value. Dr. Gaul also determined that appellant had a 17 percent left hand motor impairment due to a combination of median nerve dysfunction (CTS and TOS), "as calculated above." As he did not provide any rationale for his conclusion, his opinion is of limited probative value.[13]

Dr. Gaul states unequivocally that appellant's condition worsened following Dr. Halpern's July 8, 2003 examination. However, given the inconsistency in his opinions as to the degree of appellant's permanent impairment, and his failure to state a date of MMI, his May 24, 2007 report is unclear as to the progression and current status of appellant's work-related condition.[14]

The district medical adviser's June 10, 2007 report, which the Office found constituted the weight of the medical evidence, identified numerous deficiencies in Dr. Gaul's May 24, 2007 report, which he opined rendered the report insufficient to form the basis for a schedule award. He contended that Dr. Gaul failed to explain the basis of his Grade 3 classification for motor

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[12] Dr. Gaul incorrectly assigned a 70 percent sensory loss based on a Grade 3 rating, which is incorrect. The maximum sensory loss allowed under Grade 3 is 60 percent. Therefore, appellant would have a 12 percent impairment according to Dr. Gaul's assessment. (.20 x .60 = 12 percent).

[13] *See Vicky L. Hannis*, 48 ECAB 538 (1997) (medical conclusions unsupported by rationale are of diminished probative value). The Board notes that Dr. Gaul did not explain why he provided an impairment rating for decreased strength, in light of appellant's complaints of pain. Section 16.8a of the A.M.A., *Guides* provides that decreased strength is not to be rated in the presence of painful conditions that prevent effective application of maximum force in the region being evaluated. A.M.A., *Guides* 508. Therefore, Dr. Gaul's failure to discuss whether he found objective evidence of pain which impeded his strength evaluation diminishes the probative value of his report.

[14] Dr. Gaul's October 25, 2005 report formed an insufficient basis for a schedule award. The report provided minimal examination findings and was devoid of rationale as to how he calculated the degree of appellant's permanent impairment. *See Vicky L. Hannis, supra* note 13. Additionally, Dr. Gaul did not provide a date of MMI.

impairment due to CTS or for sensory deficit resulting from peripheral nerve disorders. The district medical adviser also stated that Dr. Gaul inappropriately rated appellant's decreased strength in the presence of pain, which is precluded by the A.M.A., *Guides*, and failed to conduct the Jaymar strength testing in an appropriate manner, thereby compromising his recommended motor impairment rating. Selecting Grade 4 classifications for sensory and motor impairment, the district medical adviser concluded that appellant had an 18 percent impairment of her LUE and a 5 percent impairment of her RUE. His report supports the conclusion that Dr. Gaul's report is requires clarification and expansion, but it is insufficient to constitute the weight of the medical evidence.[15]

A district medical adviser's opinion may constitute the weight of the medical evidence in schedule award cases where an opinion of percentage of impairment and a description of physical findings is on file, but the physician's percentage estimate is not based on the A.M.A., *Guides*. In this case, Dr. Gaul's estimates were based on the A.M.A., *Guides*. However, the information and explanation provided by the second opinion physician was insufficient to provide a basis for the schedule award. The Board notes that the district medical adviser's opinion was not based on his examination of appellant, but rather was based on a review of the record, including Dr. Gaul's reports, which he determined were inadequate to provide the basis for a schedule award. Therefore, the district medical adviser, too, has failed to provide justification for his classification of appellant's sensory and motor deficits. Additionally, his report contains errors in the calculation of his recommended impairment rating. For example, the district medical adviser added impairment ratings due to RUE sensory loss (5 percent); CTS motor loss (3 percent); and CTS sensory loss (10 percent), rather than combining them, as indicated under section 16.5 of the A.M.A., *Guides* at page 480. Additionally, he did not explain why his November 8, 2005 opinion (that appellant had a 1 percent impairment of her RUE and a 10 percent impairment of her LUE) differed from his June 10, 2007 opinion (that she had an 18 percent impairment of the RUE and a 5 percent impairment of her LUE). For these reasons, the Office incorrectly found that the district medical adviser's report constituted the weight of the medical evidence.[16]

On March 15, 2007 an Office hearing representative remanded the case to the Office with specific instructions to obtain a supplemental report from Dr. Gaul, the second opinion physician, containing an unequivocal, rationalized opinion on the degree of permanent impairment to appellant's upper extremities. Dr. Gaul's May 24, 2007 report falls short of that directive. It is well established that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[17] While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that

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[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(h) (October 2005) In this case, Dr. Gaul's estimates were based on the A.M.A., *Guides*. However, the information and explanation provided by the second opinion physician was insufficient to provide a basis for the schedule award.

[16] Before concluding that the weight of medical evidence is represented by a district medical adviser's report, the claims examiner must ensure that the district medical adviser has properly considered all reported findings, has given rationale, and has used the A.M.A., *Guides* correctly in determining the percentage of impairment. *Id.*

[17] *Vanessa Young*, *supra* note 9.

justice is done.[18] As the Office undertook development of the medical evidence by referring appellant to Dr. Gaul for a second opinion examination, and requesting a supplemental report, it has an obligation to secure a report adequately addressing the relevant issue of the extent of appellant's upper extremity impairment.[19] Moreover, the Office did not comply with the rearing representative's directive to obtain a rationalized opinion as to the degree of appellant's permanent impairment. The case will be remanded for the Office to obtain clarification of Dr. Gaul's opinion on the extent of appellant's permanent impairment in accordance with the A.M.A., *Guides*. If the Office is unable to obtain such clarification, then appellant should be referred to another Board-certified specialist for an examination and an opinion on the issue of her permanent impairment.

The Board notes that the Office's November 26, 2007 decision identified October 19, 2004 as the date of MMI. A retroactive date for MMI carries with it certain disadvantages and may result in payment of less compensation. Therefore, the Board has been reluctant to find a date of MMI which is retroactive to the award, and requires persuasive proof of MMI in the selection of a retroactive date.[20] The determination ultimately rests with the medical evidence[21] and is usually considered to be the date of the evaluation by the physician which is accepted as definitive by the Office.[22] Although Dr. Gaul stated that appellant had achieved MMI, he did not address the date it was attained, or explain why the date of MMI should not be the date of his examination of appellant, namely October 25, 2005. Thus, the Office improperly selected October 19, 2004 as the date of MMI. The Board finds, however, that the case is not in posture for a decision as to the date of MMI, as further development of the medical evidence is required.[23]

CONCLUSION

The Board finds that the case is not in posture for decision. The case shall be remanded for further development of the medical evidence, to be followed by an appropriate merit decision.

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[18] *Richard E. Simpson, supra* note 10.

[19] *See Peter C. Belkind,* 56 ECAB 580 (2005) (where the opinion of the Office's second opinion physician was unclear on whether the claimant had any permanent impairment due to his accepted employment injury, the Board found that the Office should secure a report adequately addressing the relevant issue). *See also Melvin James*, *supra* note 11.

[20] *J.C.*, 58 ECAB ___ (Docket No. 06-1018, issued January 10, 2007).

[21] *L.H.*, 58 ECAB ___ (Docket No. 06-1691, issued June 18, 2007).

[22] *Mark Holloway*, 55 ECAB 321, 325 (2004).

[23] Appellant's representative contends that an unresolved conflict exists between Dr. Weiss and Dr. Gaul. However, as Dr. Weiss was on one side of the conflict that was resolved by Dr. Halpern, his report is insufficient to create a new conflict. *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2007 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 26, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board