

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

S.M., Appellant	)	
	)	
and	)	<b>Docket No. 09-1063</b>
	)	<b>Issued: December 15, 2009</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer	)	
	)	

*Appearances:*  
Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 13, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated June 20 and December 17, 2008 regarding a schedule award. 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 appellant has more than 15 percent permanent impairment to her right arm.

**FACTUAL HISTORY**

The Office accepted that appellant sustained cervical and right shoulder strains, median nerve lesions and right carpal tunnel syndrome as a result of an August 19, 2002 lifting incident. Appellant received compensation for wage loss through May 13, 2006, when she elected Office of Personnel Management benefits.

In a report dated January 18, 2007, Dr. Nicholas Diamond, an osteopath, opined that appellant had 45 percent permanent impairment to the right arm. He found that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* appellant had 12 percent impairment for loss of shoulder range of motion, 31 percent for median nerve sensory deficit and 10 percent for right lateral pinch deficit.

The Office referred the case to Dr. Steven Valentino, an osteopath, for a second opinion evaluation.<sup>1</sup> In a report dated June 5, 2007, Dr. Valentino opined that appellant's employment-related conditions had resolved and she had no permanent impairment.

To resolve a conflict in the medical evidence,<sup>2</sup> the Office referred appellant to Dr. Herbert Stein, a Board-certified orthopedic surgeon. In a report dated October 22, 2007, Dr. Stein provided a history, results on examination and reviewed the medical evidence. He opined that appellant had three percent arm impairment due to loss of right shoulder abduction, and two percent for carpal tunnel syndrome pursuant to Table 16-10 of the A.M.A., *Guides*.

In a report dated November 7, 2007, the Office medical adviser reviewed the medical evidence. He opined that appellant had 10 percent impairment for loss of flexion and abduction, and 5 percent for carpal tunnel syndrome.

By decision dated December 6, 2007, the Office issued a schedule award for 15 percent right arm permanent impairment. The period of the award was 46.80 weeks from October 22, 2007.

Appellant requested a hearing before an Office hearing representative. By decision dated March 5, 2008, the hearing representative set aside the December 6, 2007 decision. The hearing representative directed the Office to refer the medical adviser's report to Dr. Stein for review and further explanation of his impairment calculations.

Dr. Stein submitted a May 5, 2008 report stating that he determined two percent impairment for carpal tunnel syndrome by using Table 16-15 of the A.M.A., *Guides*. He stated that the maximum for the median nerve was 39 percent, and he graded the impairment at 5 percent of the maximum because there was tingling only at the tips of the fingers. With respect to loss of motion, Dr. Stein stated that he did forget to report the loss of flexion. He reported, "Using the pie chart on Figure 16-40 on page 476 that came to four percent with loss of 60 degrees of abduction." Dr. Stein concluded that appellant had four percent for loss of forward flexion, three percent for loss of abduction and two percent for carpal tunnel syndrome.

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<sup>1</sup> 5 U.S.C. § 8123(a) provides: "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at times and places as may be reasonably required."

<sup>2</sup> Under 5 U.S.C. § 8123(a), "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 the examination." The implementing regulations state that this is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

In a report dated May 19, 2008, an Office medical adviser opined that Dr. Stein had incorrectly applied the A.M.A., *Guides*. The medical adviser again found that 90 degrees of flexion was six percent arm impairment, 90 degrees of abduction is four percent arm impairment. In addition, the medical adviser found that Dr. Stein did not properly apply Tables 16-15 and 16-10.

By decision dated June 20, 2008, the Office determined that appellant was not entitled to an additional schedule award. Appellant requested a hearing before an Office hearing representative, which was held on October 27, 2008. By decision dated December 17, 2008, the hearing representative affirmed the June 20, 2008 decision. The hearing representative found the weight of the evidence was represented by Dr. Stein.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>3</sup> Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>4</sup>

### **ANALYSIS**

The Office found a conflict existed on the issue of a right arm permanent impairment and the case was referred to Dr. Stein as a referee physician, in accord with 5 U.S.C. § 8123(a) and the Office's regulations. With respect to loss of range of motion, Dr. Stein provided measurements in his October 22, 2007 report. While appellant argues that Dr. Stein did not provide exact measurements, the referee physician did provide detailed findings as to loss of motion. For abduction and flexion, he reported 90 degrees. Under the appropriate figures (16-40 for flexion and 16-43 for abduction) appellant has six percent impairment for loss of flexion and four percent for loss of abduction.<sup>5</sup> Dr. Stein did not properly apply his own findings to the A.M.A., *Guides* as he found impairments of four percent for loss of flexion and three percent for loss of abduction.

With respect to an impairment for carpal tunnel syndrome, the Office medical adviser exceeded his authority. He offered his own opinion and used a different method for rating the impairment. When reviewing a referee's opinion, the medical adviser should not attempt to

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<sup>3</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>4</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>5</sup> A.M.A., *Guides* 476, Figure 16-40 and 477, Figure 16-43.

clarify or expand the opinion of the referee.<sup>6</sup> It is the referee, not the medical adviser, who must resolve a medical conflict.<sup>7</sup> In this case, Dr. Stein applied Tables 16-15 and 16-10 and explained how they were applied. He identified the median nerve and graded the impairment at 5 percent of the maximum, explaining that it involved only a portion of the fingers.<sup>8</sup> Dr. Stein performed the examination and provided an opinion as to impairment for sensory deficit under the A.M.A., *Guides*.

Based on the referee's reports, appellant's right arm impairment is therefore 10 percent for loss of range of motion and 2 percent for sensory deficit in the median nerve. She received a schedule award for 15 percent right arm impairment, and the Board finds no probative evidence of a greater impairment.

On appeal, appellant argued that Dr. Stein's report was not sufficient to carry the weight of the evidence, noting that Dr. Stein did not perform testing such as pinch strength. But pinch strength would be appropriate in strength deficit impairment under section 16.8 of the A.M.A., *Guides*.<sup>9</sup> Dr. Stein based his peripheral nerve impairment on the physical examination and relevant diagnostic tests.<sup>10</sup> Appellant further argued that Dr. Stein misapplied the A.M.A., *Guides* as he referred to page 495 regarding carpal tunnel syndrome. Dr. Stein applied Table 16-15 and referred to the appropriate page; it was the Office medical adviser who referred to the carpal tunnel discussion at page 495.

The Board finds that Dr. Stein provided a rationalized medical opinion that resolves the conflict in the medical evidence.<sup>11</sup> The evidence does not establish more than 15 percent right arm impairment, for which appellant received a schedule award on December 6, 2007.

### **CONCLUSION**

The Board finds that appellant had not established more than 15 percent right arm permanent impairment.

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<sup>6</sup> *Id.*; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

<sup>7</sup> *Richard R. LeMay*, 56 ECAB 341 (2005).

<sup>8</sup> A.M.A., *Guides* 492, Table 16-15 provides maximum impairments for sensory or motor deficits of the identified peripheral nerves. The maximum impairment is multiplied by the grade of severity as determined under Table 16-10.

<sup>9</sup> *Id.* at 507.

<sup>10</sup> Appellant also argues that Dr. Stein did not acknowledge a November 25, 2008 electromyogram. Since this diagnostic test occurred after Dr. Stein's reports, he would not be expected to discuss the results.

<sup>11</sup> It is well established that, when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight. *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 17 and June 20, 2008 are affirmed, as modified.

Issued: December 15, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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