

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
National Park, NJ, Employer**

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**Docket No. 09-1254
Issued: December 30, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 16, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 13, 2009 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over merits of the case.

ISSUE

The issue is whether appellant has more than a 10 percent permanent impairment to his right and left arms.

FACTUAL HISTORY

The Office accepted that appellant sustained bilateral carpal tunnel syndrome causally related to his duties as a letter carrier. In a report dated May 17, 2007, Dr. David Weiss, an osteopath, provided a history and results on examination. With respect to a permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, he found appellant had a 20 percent impairment of the right arm for lateral pinch deficit, and 24 percent for a median nerve sensory deficit. Dr. Weiss combined the 20 and 24

percents to total 39 percent right arm impairment. For the left arm, there was a 20 percent lateral pinch deficit and a 10 percent median sensory deficit, or a combined total of 28 percent impairment.

In a report dated September 21, 2007, an Office medical adviser reviewed the medical evidence and stated that the use of strength deficits was inappropriate. The medical adviser found that a Grade 4 sensory deficit was appropriate for both right and left arms, for 10 percent impairment to each arm.

The Office found a conflict in the medical evidence and referred appellant to Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon.¹ In a report dated January 15, 2008, Dr. O'Dowd provided a history and results on examination. He noted full range of motion for the shoulders, elbows and wrists, with slightly decreased subjective sensation in the median nerve distribution. Dr. O'Dowd stated that it was otherwise a normal examination, with no grip strength or other weakness. He diagnosed mild carpal tunnel syndrome. Dr. O'Dowd further stated:

“With regard to the assignment of disability rating, after my own review of this gentleman’s exam[ination] and review of the [A.M.A., *Guides*], and review of Dr. Weiss’ and [the Office medical adviser’s] evaluation, I essentially agree with Dr. Berman’s assignments. This is clearly stated in his note which he produced on [September 21, 2007]. The logical progression as he describes it on the bottom of [p]age 2 and the top of [p]age 3 is succinct and correct. I would therefore agree that this patient has a 10 percent impairment of the left upper extremity and a 10 percent impairment of the right upper extremity secondary to mild carpal tunnel syndrome.”

In a report dated February 29, 2008, another Office medical adviser concurred that appellant had 10 percent impairment of each arm, with a date of maximum medical improvement as January 15, 2008.

By decision dated August 21, 2008, the Office issued schedule awards for 10 percent permanent impairment to each arm. The period of the awards was 62.40 weeks commencing January 15, 2008.

By letter dated September 2, 2008, appellant requested a hearing before an Office hearing representative, which was held on December 17, 2008. By decision dated February 13, 2009, the hearing representative affirmed the August 21, 2008 decision.

¹ The Act provides that, if there is a 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. 5 U.S.C. § 8123(a). The implementing regulations state that, if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. 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).

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.² 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.³ As of February 1, 2001, the fifth edition of the A.M.A., *Guides* was to be used to calculate schedule awards.⁴

ANALYSIS

The Office found a conflict in the medical evidence between Dr. Weiss, who found a 39 percent right arm impairment and a 28 percent left arm impairment, and an Office medical adviser, who found a 10 percent bilateral arm impairment. To resolve the conflict, appellant was referred to Dr. O'Dowd as a referee physician.

Dr. O'Dowd provided an accurate factual background, provided results on examination and reviewed the medical evidence. He also indicated that he reviewed the A.M.A., *Guides*. Dr. O'Dowd opined that he agreed with the specific analysis of the impairment provided by the medical adviser. Under Table 16-15, the maximum impairment for median nerve sensory deficit or pain is 39 percent.⁵ The impairment is then graded for severity under Table 16-10. A Grade 4 impairment is for "distorted superficial tactile sensibility (diminished light touch), with or without minimal abnormal sensations or pain, that is forgotten during activity."⁶ The range of impairment is 1 to 25 percent of the maximum. A 25 percent grading is consistent with Dr. O'Dowd's minimal examination findings and represents 10 percent impairment to each arm.⁷

On appeal, appellant contends that Dr. O'Dowd did not perform adequate testing, such as Semmes-Weinstein, or provide grip or pinch strength testing.⁸ The Board notes that Dr. O'Dowd

² 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).

³ *A. George Lampo*, 45 ECAB 441 (1994).

⁴ FECA Bulletin No. 01-05 (January 29, 2001).

⁵ A.M.A., *Guides* 492, Table 16-15.

⁶ *Id.* at 482, Table 16-10.

⁷ 25 percent of 39 percent is 9.75 percent, which is rounded to 10 percent. See *Laura Heyen*, 57 ECAB 435 (2006); *Johnnie B. Causey*, 57 ECAB 359 (2006). As the Office's procedure manual explains with respect to hearing loss, the number is rounded up from .50 and down from .49. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2) (September 1994).

⁸ The Semmes-Weinstein monofilament test may a helpful adjunct to a two-point discrimination test. A.M.A., *Guides* 482. It is not required for a sensory deficit evaluation.

found that grip strength was normal and motor examination was normal. In this respect, he did not support the findings by Dr. Weiss that gave rise to the conflict in medical opinion. In addition, the A.M.A., *Guides* provide that only in “a rare case” should loss of strength represent an impairing factor, when not adequately considered by other methods.⁹ The Board finds Dr. O’Dowd provided a thorough examination and review of testing results.

Appellant also argues that Dr. O’Dowd relied on the Office medical adviser, rather than applying his own test results. Dr. O’Dowd provided his own examination and stated that he had reviewed the A.M.A., *Guides*. He addressed the reports of Dr. Weiss and the initial Office medical adviser, Dr. Berman. Dr. O’Dowd agreed with the specific discussion of Dr. Berman regarding the application of Tables 16-15 and 16-10. He stated that this corresponded to his own findings on examination and review of the evidence.

The Board finds that Dr. O’Dowd provided a rationalized medical opinion on the issue presented. 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.¹⁰ The Board finds that Dr. O’Dowd represents the weight of the evidence in this case and establishes a 10 percent permanent impairment in each arm based on median nerve sensory deficit.

The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the arm, the maximum number of weeks of compensation is 312 weeks. Since appellant’s impairment was 10 percent for each arm, he is entitled to 20 percent of 312 weeks, or 62.40 weeks of compensation. The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.¹¹ In this case, the Office medical adviser properly concluded that the date of maximum medical improvement was the date of examination by Dr. O’Dowd. The award therefore properly runs for 62.40 weeks commencing on January 15, 2008.

CONCLUSION

The Board finds the medical evidence does not establish more than 10 percent impairment to each arm.

⁹ A.M.A., *Guides* 508.

¹⁰ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

¹¹ *Albert Valverde*, 36 ECAB 233, 237 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 13, 2009 and August 21, 2008 are affirmed.

Issued: December 30, 2009
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