

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

---

L.C., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE  
CONTRACT MANAGEMENT AGENCY,  
Philadelphia, PA, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 08-1943  
Issued: February 4, 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 July 1, 2008 appellant timely appealed the March 31, 2008 merit decision of the Office of Workers' Compensation Programs, which affirmed a schedule award for permanent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

**ISSUE**

The issue is whether appellant has more than nine percent impairment of the right upper extremity.

**FACTUAL HISTORY**

This case was previously before the Board. Appellant, a 55-year-old support services clerk, sustained a right distal bicep tear on June 28, 2004. The bicep tear was surgically repaired in August 2004 and appellant was eventually able to resume his regular duties. On January 12, 2006 appellant received a schedule award for nine percent impairment for the right upper

extremity. The Office based the award on the October 6, 2005 report of its district medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon. The district medical adviser reviewed a June 3, 2005 report from Dr. David Weiss, a Board-certified orthopedist, who found 18 percent impairment of the right upper extremity. Dr. Weiss' rating included 3 percent impairment for pain, 6 percent impairment for motor strength deficit involving the right bicep, and 10 percent impairment for loss of grip strength. The district medical adviser did not believe that an additional 10 percent impairment for loss of grip strength was appropriate. Therefore, he found only 9 percent impairment of the right upper extremity. By decision dated July 17, 2006, the Branch of Hearings and Review affirmed the Office's January 12, 2006 schedule award.

On appeal, the Board set aside the July 17, 2006 decision and remanded the case for further medical development. In its June 1, 2007 decision, the Board found that the district medical adviser had not adequately explained his reason for disallowing Dr. Weiss' 10 percent impairment rating for loss of grip strength.<sup>1</sup>

On remand, the Office referred the case record to Dr. Berman in accordance with the Board's instructions. In an August 9, 2007 report, the district medical adviser explained, among other things, that grip strength could not be rated in the presence of pain. As such, he adhered to his initial recommendation that appellant only be awarded nine percent impairment of the right upper extremity due to motor strength deficit (six percent) and pain (three percent).

On August 17, 2007 the Office found that appellant had only nine percent impairment of the right upper extremity, which he had previously been awarded. This decision was subsequently affirmed by the Branch of Hearings and Review on March 31, 2008.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>2</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>3</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>4</sup>

---

<sup>1</sup> Docket No. 07-593 (issued June 1, 2007). The Board's June 1, 2007 decision is incorporated herein by reference.

<sup>2</sup> The Act provides that for a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2000).

<sup>3</sup> 20 C.F.R. § 10.404 (2008).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

## ANALYSIS

In its June 1, 2007 decision, the Board found that the combined nine percent impairment for muscle weakness and pain was appropriate under the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>5</sup> The only remaining question was whether appellant should receive any additional schedule award for loss of grip strength. Dr. Weiss reported measurements of 40 kilograms (kg) in appellant's right, dominant hand and 50 kg in his left hand. Based on these measurements, Dr. Weiss calculated 10 percent impairment due to loss of grip strength, citing Table 16-34, A.M.A., *Guides* 509. In his June 3, 2005 report, Dr. Weiss also noted that appellant complained of intermittent right bicep and elbow pain. His elbow range of motion was reportedly painful in flexion-extension. Dr. Weiss also noted some tenderness involving the distal aspect of the bicep at its insertion. Appellant rated his right upper extremity pain as 7 on a scale of 0 to 10.

Citing section 16.8a, A.M.A., *Guides* 508, Dr. Berman, the district medical adviser, explained that decreased strength cannot be rated in the presence of "painful conditions." The A.M.A., *Guides* indicate that factors such as decreased motion and painful conditions may prevent effective application of maximal force in the region being evaluated.<sup>6</sup> Because of the reported pain and tenderness in appellant's right upper extremity, the grip strength measurements reported by Dr. Weiss may not accurately reflect the extent of appellant's right upper extremity impairment. Dr. Berman explained that grip strength would not apply in this instance because it is both "volitional and painful." For this reason, the district medical adviser properly excluded the additional 10 percent impairment for loss of right grip strength. The Board finds that Dr. Berman's August 9, 2007 explanation for excluding loss of grip strength from appellant's overall impairment rating is consistent with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001), and thus, represents the weight of the medical evidence.

Appellant's counsel argues that a conflict in medical opinion exists between the district medical adviser and Dr. Weiss, requiring referral to an impartial medical examiner. For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>7</sup> Dr. Weiss' impairment rating is not on par with Dr. Berman's rating, and therefore, no conflict exists. Accordingly, the case need not be remanded for an impartial medical evaluation.

## CONCLUSION

Appellant has not established that he has greater than nine percent impairment of the right upper extremity.

---

<sup>5</sup> See A.M.A., *Guides* 484, Table 16-11; A.M.A., *Guides* 510, Table 16-35; A.M.A., *Guides* 573, section 18.3d; A.M.A., *Guides* 574, Figure 18-1; A.M.A., *Guides* 604-05, Combined Values Chart.

<sup>6</sup> A.M.A., *Guides* 508, section 16.8a.

<sup>7</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 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