

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

M.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Reading, MA, Employer**

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**Docket No. 08-1348
Issued: July 6, 2009**

Appearances:
Appellant, pro se
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 7, 2008 appellant filed a timely appeal from a January 30, 2008 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination in this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she has more than 5 percent impairment of the right upper extremity and 15 percent impairment of the left upper extremity, for which she received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated October 29, 2004, the Board found that an overpayment in compensation was created but that the Office did not fully explain how the amount of the overpayment was determined and improperly found appellant to be at fault. The Board remanded the case to the Office to determine the amount of

the overpayment and whether appellant was entitled to waiver.¹ The law and the facts of the previous Board decision are incorporated herein by reference. In a March 9, 2005 decision, the Office found appellant without fault in the creation of an overpayment in compensation in the amount of \$2,122.62 and waived recovery of the overpayment.

Appellant has accepted upper extremity conditions of tendinitis of the right hand, left ulnar nerve entrapment, and right lateral epicondylitis.² He was granted a schedule award on June 12, 1993 for 10 percent permanent impairment of the left arm. A June 8, 2004 electromyography (EMG) evaluation was interpreted as demonstrating a mild, right ulnar mononeuropathy at the ulnar groove (cubital tunnel) with no electrophysiologic evidence of right cervical radiculopathy. On June 25 and November 30, 2004 appellant filed schedule award claims. In reports dated February 19, April 1 and June 10, 2004, Dr. Mark A. Lapp, a Board-certified orthopedic surgeon, discussed appellant's cervical spine and bilateral arm conditions. On July 8, 2004 Dr. Steven Alter, Board-certified in orthopedic and hand surgery and an associate of Dr. Lapp, reviewed appellant's EMG findings and discussed treatment options.

By letter dated August 5, 2004, the Office requested that appellant have her attending physician provide an impairment analysis in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³ By report dated September 24, 2004, Dr. Charles Cassidy, Board-certified in orthopedic and hand surgery, noted his review of medical records. He provided physical examination findings and diagnosed bilateral cubital tunnel syndrome and bilateral lateral epicondylitis. Dr. Cassidy reported having a long discussion with appellant regarding her impairment and recommended right ulnar nerve transposition surgery. A form report dated September 29, 2004 with an illegible signature, advised that appellant had normal upper extremity range of motion and 15 percent impairment of each arm due to weakness, atrophy or pain.⁴

In a January 2, 2005 report, Dr. David I. Krohn, a district medical adviser Board-certified in internal medicine, reviewed the evidence of record. He recommended referral for an impairment evaluation in accordance with the A.M.A., *Guides*. By report dated January 31, 2005, Dr. Samuel D. Gerber, a Board-certified orthopedic surgeon, noted that he last saw appellant on August 30, 2004 with complaints of permanent numbness in the middle, ring and pinky fingers, sore and tender forearm muscles, and continual finger and joint pain. He advised that appellant "feels as though she has 15 percent impairment" of both upper extremities due to left and right nerve entrapment and epicondylitis. By report dated June 6, 2005, Dr. Gerber noted that appellant had continued symptoms of little and ring finger paresthesias in her right upper extremity and positive Tinel's signs at both cubital tunnels. He opined that she had 15 percent impairment on both sides and had reached a medical end point. On July 26, 2005

¹ Docket No. 04-1379 (issued October 29, 2004).

² These claims were adjudicated by the Office under file numbers xxxxxx000, xxxxxx004 and xxxxxx024 respectively. The latter two cases were doubled, with xxxxxx004 becoming the master file.

³ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁴ The signature does not appear to be that of Dr. Cassidy.

Dr. Krohn reviewed Dr. Gerber's report. Although Dr. Gerber had provided an impairment rating, he did not provide an analysis in accordance with the A.M.A., *Guides*. Dr. Krohn recommended that appellant be referred for an examination to determine the extent of impairment in accordance with the A.M.A., *Guides*.

The Office determined that a conflict in medical evidence had been created between the opinions of Dr. Gerber and the Office medical adviser regarding appellant's impairment. On July 28, 2006 it referred appellant to Dr. William C. Walsh, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated August 15, 2006, Dr. Walsh noted his review of the medical record, statement of accepted facts and appellant's complaints of third, fourth and fifth volar digit numbness with radiating pain into the ring and middle fingers of both hands and intermittent discomfort of both elbows. He provided examination findings, noting normal neck, shoulder, elbow, wrist and digital range of motion, no loss of strength, wasting or atrophy, and a mild to moderate sensory loss to light touch at the hypothenar eminence and palmar aspect of the long, ring and small fingers of both hands and mild tenderness over the lateral epicondyle of both elbows. Dr. Walsh diagnosed mild lateral epicondylitis of both elbows and moderate isolated ulnar sensory neuropathy of both arms. He advised that, in accordance with the fifth edition of the A.M.A., *Guides*, under section 16.7d, appellant would not be entitled to an impairment rating for lateral epicondylitis because there was no objective evidence of strength deficit since her Jaymar Dynamometer values were well within the expected guidelines found in Table 16-32 for her age. Under Table 16-15, Dr. Walsh found that ulnar neuropathy below the midforearm yielded a maximum seven percent upper extremity deficit. He found a Grade 3 sensory deficit under Table 16-10, and concluded that appellant had three percent impairment.

On September 18, 2006 Dr. Gerber noted appellant's continued complaints of elbow pain and hand numbness. He diagnosed bilateral hand paresthesias, ulnar mononeuropathy, and a disc herniation at C5-6. In an October 29, 2006 report, Dr. Krohn reviewed the medical record, including Dr. Walsh's report. He agreed that, under Table 16-15, an ulnar nerve impairment below the midforearm yielded a seven percent impairment. Dr. Krohn assigned a Grade 2 or 70 percent impairment under Table 16-10, stating that appellant's condition prevented her from keyboarding, and concluded that 7 percent times 70 percent yielded 4.9 percent impairment which, when round up, yielded 5 percent impairment of each upper extremity.

By decision dated December 4, 2006, appellant was granted a schedule award for five percent impairment of each upper extremity, or 31.20 weeks of compensation. The award ran from June 14, 2004, the date of maximum medical improvement, to January 25, 2005.

On November 6, 2007 appellant requested reconsideration and submitted reports dated May 7, 2007 to January 24, 2008 from Dr. Gerber who noted appellant's complaint of increased pain in her forearms and reiterated his previous diagnostic conclusions. Dr. Gerber reported that appellant was to have cervical spine surgery in February.

By report dated January 7, 2008, Dr. George L. Cohen, a district medical adviser and Board-certified internist, reviewed the evidence of record and determined that, in accordance with Table 16-15 of the fifth edition of the A.M.A., *Guides*, appellant had an impairment for pain and sensory deficit of 7 percent, and determined that she had a Grade 3 impairment, for pain that

interfered with some activities, under Table 16-10, or 60 percent impairment. He found that 60 percent of 7 percent yielded 4 percent impairment of each upper extremity. The Office medical adviser further found that, under section 16.7d of the A.M.A., *Guides*, appellant was not entitled to an additional impairment for lateral epicondylitis as the condition was relatively mild with no weakness, and no surgery had been performed.

In a merit decision dated January 30, 2008, the Office modified the December 4, 2006 schedule award decision to reflect that appellant was entitled to four percent impairment of each upper extremity. It found that the prior decision was issued in error because, following Dr. Walsh's referee examination, the Office referred the case back to Dr. Krohn for review of the file. However, since Dr. Krohn created a conflict, the Office should have referred the file to a different medical adviser. The Office reopened the case for further consideration and referred Dr. Walsh's report to Dr. Cohen. It found that Dr. Cohen explained his findings in accordance with the A.M.A., *Guides*. The Office further noted that it also erred in issuing an award of compensation for five percent impairment of each upper extremity because it did not take into consideration the June 2, 1993 schedule award and that appellant was receiving compensation for loss of wage-earning capacity under file number xxxxxx004. It concluded that the decision dated December 4, 2006 should be modified and that an amended schedule award was to be issued for four percent permanent impairment of each upper extremity. The Office further noted that it would take into consideration the previously issued schedule awards as well as compensation paid under file number xxxxxx004 in determining the amount of an overpayment incurred in this case.⁵

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulations⁷ 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. The Act, however, 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

⁵ The record before the Board does not contain an amended schedule award decision or a preliminary or final overpayment decision. The Board also notes that under file number xxxxxx004 appellant filed a recurrence claim on January 23, 2008 alleging that on that day she stopped work because her job duties exacerbated her accepted bilateral ulnar nerve and epicondylitis conditions. Her supervisor noted that on January 11, 2008 appellant had filed a claim for neck pain, adjudicated under Office file number xxxxxx584. By decision dated April 1, 2008, the Office denied the recurrence claim, and in a February 6, 2009 decision, an Office hearing representative affirmed the April 1, 2008 decision, noting that the appellant's neck claim had been accepted for cervical myelopathy and disc herniation at C5-6 and she had been compensated for wage loss under that claim beginning on January 23, 2008 when she stopped work. Appellant has not filed an appeal with the Board regarding the April 1, 2008 or February 6, 2009 decisions.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 20 C.F.R. § 10.404.

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.⁹ Section 16.5b of the A.M.A., *Guides* describes the methods for evaluating upper extremity impairments due to peripheral nerve disorders and provides that the severity of the sensory or pain deficit and motor deficit should be classified according to Tables 16-10a and 16-11a respectively. The impairment is evaluated by multiplying the grade of severity of the sensory or motor deficit by the respective maximum upper extremity value resulting from sensory or motor deficits of each nerve structure involved. When both sensory and motor functions are involved, the impairment values derived for each are combined.¹⁰

Office procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present.¹¹

ANALYSIS

The Board finds this case is not in posture for decision. The record reflects that appellant received a schedule award for 10 percent impairment of the left upper extremity on June 12, 1993 and a schedule award for 5 percent impairment of each upper extremity on December 4, 2006.

The Office determined that a conflict in medical evidence was created between Dr. Gerber, an attending orthopedic surgeon, and Dr. Krohn, an Office medical adviser, regarding the degree of appellant's upper extremity impairments and referred appellant to Dr. Walsh for an impartial evaluation. Section 8123(a) of the Act provides that, 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 an examination.¹² The Board, however, finds that there was no disagreement between Dr. Gerber and Dr. Krohn. The only medical reports that discussed a specific impairment rating prior to the referral to Dr. Walsh in July 2006 were the September 29, 2004 form report with an illegible signature that concluded that appellant had bilateral upper extremity impairments of 15 percent and Dr. Gerber's June 6, 2005 conclusory opinion that appellant had 15 percent bilateral upper

⁸ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ A.M.A., *Guides*, *supra* note 3 at 433-521.

¹⁰ *Id.* at 481; *Kimberly M. Held*, 56 ECAB 670 (2005).

¹¹ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002); *Frantz Ghassan*, 57 ECAB 349 (2006).

¹² 5 U.S.C. § 8123(a).

extremity impairments. The 2004 report is insufficient to establish that appellant was entitled to an increased schedule award as reports with illegible signatures do not constitute competent medical evidence.¹³ Similarly, Dr. Gerber's June 6, 2005 report is of little probative value because he provided no analysis in accordance with the A.M.A., *Guides*.¹⁴ Thus, there was no conflict in the medical evidence as contemplated under section 8123(a) requiring a referee examination.¹⁵ The referral to Dr. Walsh was for a second opinion examination.¹⁶

In an August 15, 2006 report, Dr. Walsh referenced the fifth edition of the A.M.A., *Guides*, and properly advised that, under section 16.7d, appellant was not entitled to an impairment rating for her accepted lateral epicondylitis because there was no objective evidence of a strength deficit.¹⁷ He advised that, under Table 16-15,¹⁸ ulnar neuropathy below the midforearm was allowed a maximum 7 percent sensory impairment and found a Grade 3 deficit under Table 16-10.¹⁹ Dr. Walsh concluded that appellant had three percent bilateral upper extremity impairments.²⁰

In an October 29, 2006 report, Dr. Krohn reviewed the medical record. He agreed that, under Table 16-15, an ulnar nerve impairment below the midforearm was a maximum 7 percent impairment. Dr. Krohn assigned a Grade 2 or 70 percent deficit under Table 16-10, stating that appellant's condition prevented her from keyboarding. He utilized Table 16-10 by multiplying the 7 percent found in Table 16-15 by the 70 percent Grade 2 impairment to yield a 4.9 percent impairment which, when round up, yielded a 5 percent impairment of each upper extremity. The Office used Dr. Krohn's report as the basis of the December 4, 2006 schedule award.

On reconsideration the Office referred Dr. Walsh's report to Dr. Cohen, a second Office medical adviser, for review. On January 7, 2008 Dr. Cohen found that, in accordance with Table 16-15, appellant had an impairment for pain and sensory deficit of seven percent. He determined that under Table 16-10 she had a Grade 3 or 60 percent deficit for pain that interfered with some activities. Dr. Cohen properly multiplied the 60 percent by the maximum 7 percent to yield a 4 percent impairment of each upper extremity. He further found that, under section 16.7d of the A.M.A., *Guides*, appellant was not entitled to an additional impairment for lateral epicondylitis as the condition was relatively mild with no weakness and no surgery had been performed.

¹³ *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007).

¹⁴ *Richard A. Neidert*, 57 ECAB 474 (2006).

¹⁵ *Id.*

¹⁶ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁷ A.M.A., *Guides*, *supra* note 3 at 507.

¹⁸ *Id.* at 492.

¹⁹ *Id.* at 482.

²⁰ The Board notes that in his report Dr. Walsh did not provide a percentage of impairment under Table 16-10 which provides that a Grade 3 impairment can have a range of between 26 and 60 percent. *Id.* It would, however, appear, that he rated appellant's impairment in the 42 to 43 percent range.

Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.²¹ In this case, there are various medical opinions among the three physicians representing the government. Dr. Walsh, who provided a second opinion evaluation for the Office, determined that appellant had a Grade 3 bilateral upper extremity deficit. Drs. Krohn and Cohen, Office medical advisers, found Grade 2 and Grade 3 deficits in rendering their impairment estimates. The case will be remanded to the Office for clarification.²² Following such development, as the Office deems necessary, it shall issue an appropriate merit decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2008 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for proceedings consistent with this opinion of the Board.

Issued: July 6, 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

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002).

²² See *Richard F. Williams*, 55 ECAB 343 (2004).