United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 08-1465**
	)	**Issued: July 27, 2009**
DEPARTMENT OF VETERANS AFFAIRS, JAMES J. HOWARD VETERANS ADMINSTRATION OUTPATIENT CLINIC, Brick, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2008 appellant, through her attorney, filed a timely appeal of the May 2 and December 7, 2007 merit decisions of the Office of Workers' Compensation Programs, finding a 10 percent impairment of the left upper extremity. 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 a 10 percent impairment of the left upper extremity, for which she received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. In an October 3, 2006 decision, the Board found an unresolved conflict in the medical opinion evidence between appellant's attending physician, Dr. David Weiss, an osteopath, and an Office medical adviser regarding the

extent of permanent impairment of her left upper extremity.[1] The Board remanded the case back to the Office for referral of appellant to an impartial medical specialist to resolve the conflict. The facts and the history relevant to the present appeal are hereafter set forth.[2]

On remand, the Office, by letter dated February 20, 2007, referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Elliot C. Semet, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 26, 2007 medical report, Dr. Semet reviewed a history of appellant's medical treatment, employment and family background. He reported essentially normal findings on physical examination regarding the left shoulder and bilateral hands. Dr. Semet also reported essentially normal findings on sensory examination with the exception of sensation to the blue monofilament of the median nerve in both hands and slightly smaller circumference of the left upper extremity compared to the right upper extremity. He reviewed appellant's case record which revealed diagnoses of repetitive trauma disorder, rotator tendinitis, acromioclavicular (AC) joint arthropathy and crepitus of the left shoulder, bilateral carpal tunnel syndrome, intersection syndrome of the left forearm and carpometacarpal arthritis of the left thumb. Dr. Semet classified appellant's sensory impairment as Grade 4 for decreased light cutaneous sensation with no reported discomfort which constituted a 25 percent impairment (American Medical Association, *Guides to the Evaluation of Permanent Impairment,* 482, Table 16-10) (A.M.A., *Guides*) (5th ed. 2001). He stated that this could be due to a deficiency to the median nerve for which a maximum of 39 percent impairment was allowed for the left upper extremity. This resulted in a 23 percent impairment of the whole person (A.M.A., *Guides* 492, 439, Tables 16-15, 16-3). Dr. Semet then determined that appellant had a 10 percent impairment of the left upper extremity without taking into consideration the objective findings of minor upper extremity atrophy. He noted that there were no significant differences in motion. Dr. Semet stated that this would result in a 12 percent impairment of the whole person. He noted that appellant rated her pain as 7 out of 10 which he classified as Class 1 for mild pain. Dr. Semet determined that such pain did not result in any significant impairment (A.M.A., *Guides* 576 through 584, Tables 18-14 through 18-7).[3] He determined that appellant sustained a "+ or –" 3 percent impairment of the whole person due to pain, noting that he was not sure whether her AC arthropathy/impingement syndrome was work related. Dr. Semet concluded that appellant sustained a 12 to 15 percent impairment of the whole person.

On April 27, 2007 Dr. Henry Magliato, an Office medical adviser, reviewed Dr. Semet's March 26, 2007 report and stated that his conclusions were vague and that the impartial specialist had confused impairment ratings for the whole person and upper extremity. He stated that

[1] Docket No. 06-1116 (issued October 3, 2006).

[2] On November 16, 2000 appellant, then a 40-year-old nurse practitioner, filed an occupational disease claim assigned number xxxxxx177 alleging that on March 6, 2000 she first realized symptoms related to her left forearm was caused by repetitive use of a computer during the course of her federal employment. By letter dated June 9, 2001, the Office accepted appellant's claim for left forearm tendinitis. In an October 13, 2005 decision, it granted appellant a schedule award for a 10 percent impairment of the left upper extremity.

[3] The Board notes that it appears that Dr. Semet inadvertently referenced Table 18-14 rather than Table 18-4 in addressing appellant's impairment for pain as Table 18-14 is not contained in the A.M.A., *Guides*.

Dr. Semet's 10 percent impairment rating of the left upper extremity was the same rating previously awarded by the Office in 2005, although he provided roundabout rationale to support his rating. Dr. Magliato believed that he multiplied the 25 percent sensory impairment by the 39 percent median nerve impairment to calculate 10 percent impairment (A.M.A., *Guides* 482, 492, Tables 16-10, 16-15). He stated that Dr. Semet mixed up impairments for the whole person and extremities especially in discussing his three percent impairment rating for pain. Dr. Magliato further stated that his finding of a "+ or –" three percent impairment for pain was too vague. He concluded that appellant sustained a 10 percent impairment of the left upper extremity.

In a decision dated May 2, 2007, the Office found that appellant had no more than a 10 percent impairment of the left upper extremity.

By letter dated May 8, 2007, appellant, through her attorney, requested an oral hearing before an Office hearing representative. At the September 26, 2007 oral hearing, counsel contended that Dr. Semet's impartial medical opinion should not be accorded special weight because the Office did not properly select him from the Physicians Directory System (PDS). Alternatively, counsel contended that Dr. Semet's impairment rating was not based on the fifth edition of the A.M.A., *Guides* and his medical examination was not thorough.

By decision dated December 7, 2007, an Office hearing representative affirmed the May 2, 2007 decision. She found that the Office properly selected Dr. Semet as an impartial medical specialist from the PDS. The hearing representative also found that Dr. Semet's opinion was entitled to special weight accorded an impartial medical specialist in determining that appellant was not entitled to an additional schedule award for the left upper extremity. The hearing representative further determined that his opinion was supported by Dr. Magliato.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[6] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[7]

Section 8123 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

[4] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8107(c)(19).

[7] *Supra* note 5.

shall appoint a third physician, who shall make an examination.[8] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

The Office granted appellant a schedule award for 10 percent impairment of the left upper extremity due to his employment-related left forearm tendinitis. On appeal, appellant contends that he has greater impairment of her left arm. The Board finds that the case is not in posture for decision.

The Board previously found a conflict in the medical opinion evidence between Dr. Weiss, an attending physician, and an Office medical adviser as to the extent of permanent impairment to appellant's left upper extremity. The Office subsequently referred appellant to Dr. Semet, selected as the impartial medical specialist. However, the Board finds that Dr. Semet provided inadequate rationale for his impairment rating. The Board has held that a medical opinion lacking in rationale is of diminished probative value.[10]

Dr. Semet incorrectly calculated a 10 percent impairment of the left upper extremity based on his finding of 25 percent impairment for sensory loss and 39 percent impairment of the whole person. The Act does not provide for whole person impairments, only impairments to specified members of the body as specified under 5 U.S.C. § 8107 and 20 C.F.R. § 10.404.[11] Further, Dr. Semet's opinion that appellant sustained a "+ or –" three percent impairment rating for pain is vague. He did not provide an unequivocal opinion addressing the extent of impairment due to pain. The Board has held that medical opinions that are speculative or equivocal in nature are of diminished probative value.[12] Moreover, Dr. Semet did not explain how or why appellant was entitled to an additional impairment of the left upper extremity for pain under Chapter 18 of the A.M.A., *Guides*. The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments

[8] 5 U.S.C. § 8123.

[9] *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[10] *Cecilia M. Corley*, 56 ECAB 662 (2005); *see Tara L. Hein*, 56 ECAB 431 (2005) (medical consultant's failure to explain selection of sensory deficit value on Table 16-10, page 482, basis for remand of case).

[11] *Janae J. Triplette*, 54 ECAB 792 (2003).

[12] *L.R. (E.R.)*, 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007); *D.D.*, 57 ECAB 734 (2006); *Cecelia M. Corley*, 56 ECAB 662 (2005).

should not be assessed using Chapter 18.[13] Therefore, the Board finds that Dr. Semet's impairment rating was not based upon a proper application of the A.M.A., *Guides*. Dr. Magliato addressed the deficiencies in Dr. Semet's opinion. He characterized the report as vague and noted that Dr. Semet improperly applied the A.M.A., *Guides* as he confused his impairment ratings for the whole person and left upper extremity. Dr. Magliato opined that appellant sustained a 10 percent impairment of the left upper extremity. The Board notes, however, that resolution of the conflict is the responsibility of the impartial medical specialist.[14]

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.[15] If the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rational, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[16] In the present case, Dr. Semet failed to properly evaluate appellant's degree of permanent impairment to a scheduled member and therefore his report requires further clarification.

CONCLUSION

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is warranted.

[13] *See* A.M.A., *Guides* 571, section 18.3b.

[14] *Thomas J. Fragale*, 55 ECAB 619 (2004); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Award*, Chapter 3.700.3 (June 2003).

[15] *Raymond A. Fondots*, 53 ECAB 637 (2002); *April Ann Erickson*, 28 ECAB 336 (1977).

[16] *Harold Travis*, 30 ECAB 1071 (1979).

ORDER

IT IS HEREBY ORDERED THAT the December 7 and May 2, 2007 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: July 27, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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