

impairment to her right arm, based on motor and grip strength deficits, as well as loss of range of motion. By report dated July 22, 1998, an Office medical adviser reviewed the medical evidence and opined that appellant had a 33 percent right arm permanent impairment.

The Office found that a conflict in the medical evidence arose under 5 U.S.C. § 8123(a) and appellant was referred to Dr. Lewis Zemsky, a Board-certified orthopedic surgeon, who submitted a September 3, 1998 report finding that appellant had three to five percent right arm impairment. It sought clarification from Dr. Zemsky regarding the method of calculation, but no response was received.

By decision dated December 23, 1999, the Office issued a schedule award for a 33 percent right arm permanent impairment. The period of the award was April 9, 1997 to March 30, 1999. An Office hearing representative set aside the schedule award by decision dated January 10, 2001. The hearing representative noted that the conflict remained unresolved and the case was remanded for further development.

Dr. Robert Dennis, a Board-certified orthopedic surgeon, was selected as a referee physician. In a report dated May 7, 2001, he provided a history and results on examination. Dr. Dennis found that appellant had eight percent right arm impairment, stating he utilized Tables 16-2 through 16-15 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed., hereinafter referred to as the A.M.A., *Guides*).

In a decision dated May 22, 2001, the Office determined that appellant did not have more than 33 percent right arm impairment. This decision was set aside by an Office hearing representative in a February 25, 2002 decision. The hearing representative found that Dr. Dennis did not fully explain how the tables in the A.M.A., *Guides* were used and the Office was directed to secure a supplemental report.

By report dated May 1, 2002, Dr. Dennis reviewed his findings and described the motor deficits he had found. He noted some bicep and tricep weakness, with minimal loss of grip strength. Dr. Dennis identified the affected nerves and further stated, "The unit losses of the radial, musculocutaneous, median and ulnar nerves, are individually very small." He identified Tables 16-15 and Table 16-11, finding that for the median nerve (below midforearm) a two percent impairment based on grip strength and wrist flexion, three percent for the ulnar nerve (above midforearm), one percent for the musculocutaneous nerve for biceps weakness, three percent for the radial nerve (upper arm) based on wrist and triceps weakness and one percent for the anterior interosseous branch of the median nerve based on index flexion. Dr. Dennis concluded that appellant had a 10 percent right arm permanent impairment. He also noted the A.M.A., *Guides* state when motor/sensory impairments result strictly from a peripheral nerve lesion, the range of motion impairments are not applied in addition to the motor/sensory impairments. The referee physician further noted that he did not find any sensory deficit.

In a report dated May 17, 2002, a second Office medical adviser opined that Dr. Dennis provided a good report and that right arm impairment was 10 percent. By decision dated May 20, 2002, the Office found that appellant did not have more than 33 percent right arm impairment.

Appellant requested a hearing before an Office hearing representative, which was held on December 1, 2004. Following the hearing, she submitted a December 13, 2004 report from Dr. David Weiss, an osteopath, who stated that he was confused as to how Dr. Dennis graded the impairment. Dr. Weiss indicated the minimum grade for the identified nerves was 25 percent of the maximum and this would result in 30 percent right arm impairment.

In a decision dated February 2, 2005, the hearing representative found that appellant had not established more than a 33 percent permanent impairment to the right arm. Appellant requested an appeal with the Board, which was docketed as No. 05-1336. By order dated November 7, 2005, the Board remanded the case for proper assemblage of the case record and an appropriate decision.

In a decision dated April 15, 2008, the Office reissued the February 2, 2005 decision finding no more than a 33 percent right arm permanent impairment.

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.¹ 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.²

It is well established that when a case is referred to a referee physician 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.³

ANALYSIS

The Office found a conflict in the evidence regarding the percentage of permanent impairment in the right arm and appellant was referred to Dr. Dennis as a referee physician.⁴ In Dr. Dennis' May 7, 2001 report, he provided results on examination, but he did not clearly explain how he calculated the right arm impairment under the A.M.A., *Guides*.

¹ 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).

² A. *George Lampo*, 45 ECAB 441 (1994).

³ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁴ 5 U.S.C. § 8123(a) provides that if there is a disagreement between a physician making the examination for the United States and the employee's physician, a third physician shall be appointed to make an examination. The Office's regulations state that this is called a referee examination. 20 C.F.R. § 10.321 (2008). The disagreement in this case was between Dr. Potash and the Office medical adviser.

The May 1, 2002 report, however, does identify the tables used and explains the amount of the impairment for each of the identified nerves under Table 16-15. The maximum impairment for motor deficit in median nerve (below midforearm) is 10 percent, for the ulnar nerve (above midforearm) is 46 percent, for the musculocutaneous nerve 25 percent, upper arm radial nerve 42 percent and anterior interosseous branch of the median nerve 15 percent.⁵ Dr. Dennis clearly identified the affected nerves and the corresponding weakness. While he did not provide the specific grade under Table 16-11, the grade can be determined by the final impairment rating for each nerve. Table 16-11 provides for a grade of 1 to 25 percent of the maximum for “complete active range of motion against gravity with some resistance.”⁶ Dr. Weiss argued that a 25 percent grade is the minimum for Table 16-11, but the table clearly provides for a range from 1 to 25. A physician must explain the impairment rating,⁷ and Dr. Dennis discussed his motor deficit findings and the grading of the nerve impairments is consistent with his findings.⁸

The Board finds that Dr. Dennis provided a rationalized medical opinion on the issue presented. Dr. Dennis discussed his findings regarding the permanent impairment and found that under the A.M.A., *Guides* appellant had a 10 percent right arm permanent impairment. As noted above, a rationalized opinion from a referee physician is entitled to special weight. The report of Dr. Dennis represents the weight of the evidence in this case and resolved the conflict in the medical evidence.

CONCLUSION

The evidence does not establish more than a 33 percent right arm impairment.

⁵ A.M.A., *Guides* 492, Table 16-15.

⁶ *Id.* 484, Table 16-11.

⁷ See *Tara L. Hein*, 56 EAB 431 (2005).

⁸ Moreover, Dr. Weiss indicated that a 25 percent grade for each of the identified nerves resulted in a 30 percent arm impairment, which is less than the 33 percent previously awarded.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 15, 2008 is affirmed.

Issued: March 19, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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