United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 09-550**
	)	**Issued: November 23, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, Employer	)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 19, 2008 appellant, through his representative, filed a timely appeal from an August 18, 2008 merit 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 merits of the case.

ISSUE

The issue is whether appellant sustained greater than six percent impairment to his upper extremity, for which he received a schedule award.

On appeal, contends that the 44 percent impairment rating of Dr. Nicolas Diamond, an osteopath, conforms to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In the alternative, he argues that there is a conflict in the medical evidence regarding whether his strength deficit should be included in the calculation for permanent impairment.

FACTUAL HISTORY

On April 10, 2006 appellant, then a 33-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on April 5, 2006, while in the platform dock area in the collection breakdown, he reached inside an all-purpose container and heard a popping noise in his right forearm. On May 10, 2006 the Office accepted the claim for nontraumatic rupture of right biceps tendon and authorized surgery. Appellant underwent a right distal biceps tendon repair on May 18, 2006.

On January 16, 2008 appellant filed a claim for a schedule award (Form CA-7).

In an October 18, 2007 medical report, Dr. Diamond reviewed appellant's occupational and medical history. He reported appellant's complaints of intermittent, but daily, right elbow pain and stiffness and numbness and tingling radiating into the right hand. Dr. Diamond reported a Quick Dash Disability score of 55 percent and supplied a Quick Dash worksheet. Physical examination revealed a three centimeter (cm) scar over the radial head area of the right elbow and a four and a half cm scar over the antecubital area. Dr. Diamond noted an effusion, olecranon tenderness and lateral epicondyle tenderness. Range of motion testing showed flexion-extension of 135/145 degrees, pronation of 50/80 degrees and supination of 80/80 degrees. Dr. Diamond noted pain with flexion-extension and pronation. Manual muscle strength testing revealed a grade of 4+/5 strength in the triceps, a grade of 4/5 strength in the biceps and a grade of 4/5 strength in the pronation of the right elbow. Dr. Diamond stated that appellant had normal muscle tonus, however, there was an abnormal muscle bulk with a decreased right upper arm circumference despite appellant's right hand dominance.

Grip strength testing showed 11.75 kilogram (kg) of force strength on the right versus 34.25 kg of force strength on the left. Pinch key testing revealed 2.25 kg in the right versus 7.5 kg in the left hand. Appellant's lower arm circumference was 27.5 cm on the right versus 27 cm on the left. Further, the upper arm circumference was 29.5 cm on the right versus 30.5 cm on the left. Appellant's deep tendon reflexes were +2 and symmetrical. Sensory examination did not reveal any perceived dermatomal abnormalities. Dr. Diamond diagnosed post-traumatic right distal biceps tendon rupture and status post right distal biceps tendon repair. He opined that the April 5, 2006 work injury was the competent producing factor for appellant's subject and objective findings on examination. Dr. Diamond stated that, in accordance with the A.M.A., *Guides*,[1] appellant sustained 10 percent impairment for 4/5 motor strength deficit of the right triceps, 6 percent impairment for 4/5 motor strength deficit of the right biceps, 30 percent impairment for right grip strength deficit and 3 percent impairment for pain. Adding these figures, he calculated a total of 44 percent permanent impairment to appellant's right upper extremity and noted a maximum medical improvement date of October 18, 2007.

On January 18, 2008 the Office referred the case record to an Office medical adviser for a review of the extent of appellant's permanent impairment.

In a January 27, 2008 medical report, the Office medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, reviewed appellant's history and Dr. Diamond's

[1] A.M.A., *Guides* (5th ed. 2001).

October 18, 2007 medical report. Dr. Berman concluded that appellant sustained six percent impairment to the right upper extremity. He stated that Dr. Diamond's recommendation for triceps deficit could not be accepted because there was no documentation of any triceps abnormality and, further, the accepted conditions did not include triceps abnormality. Dr. Berman also cited to section 16.8a, on page 508, of the A.M.A., *Guides*, which states that decreased strength cannot be rated in the presence of painful conditions or decreased range of motion. Thus, he opined that, because appellant had both decreased range of motion and painful conditions, a strength evaluation was not appropriate. Using Figure 16-34, on page 472, of the A.M.A., *Guides*, Dr. Berman equated the 130 degrees of flexion to one percent impairment. Further, based on Figure 16-37, on page 474, he calculated two percent impairment for full supination but 50 out of 80 degrees of pronation. Dr. Berman added three percent impairment for a pain award, in accordance with page 574, concluding that appellant sustained a total six percent permanent impairment. He noted a maximum medical improvement date of October 18, 2007.

By decision dated February 26, 2008, the Office awarded appellant a schedule award for a six percent permanent impairment of the right upper extremity. It also noted October 18, 2007, as the date of maximum medical improvement.

On March 4, 2008 appellant, through his representative, filed a request for an oral hearing before an Office hearing representative, which took place on June 19, 2008.

By decision dated August 18, 2008, an Office hearing representative affirmed the February 26, 2008 decision of the Office, finding that appellant sustained six percent permanent impairment, on the grounds that the weight of the medical evidence rested with Dr. Berman.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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. However, the Act 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 uniform standards applicable to all claimants.[4] The A.M.A., *Guides* has been adopted by the Office as the appropriate standard for evaluating schedule losses.[5]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[5] *Supra* note 3.

ANALYSIS

The Office accepted appellant's claim for a nontraumatic rupture of right biceps tendon and authorized a right distal biceps tendon repair. It granted a schedule award for six percent permanent impairment to his upper right extremity. The issue is whether appellant established that he sustained a greater impairment to his right upper extremity entitling him to additional schedule awards.

On October 18, 2008 Dr. Diamond performed a full physical examination and opined that appellant sustained 44 percent permanent impairment to the right upper extremity. He calculated 10 percent impairment for motor strength deficit of the right triceps, 6 percent impairment for motor strength deficit of the right biceps, 30 percent impairment for right grip strength deficit and 3 percent impairment for pain. Dr. Diamond noted a maximum medical improvement date of October 18, 2007.

The Board finds Dr. Diamond did not properly apply the A.M.A., *Guides* in calculating appellant's permanent impairment. The A.M.A., *Guides* do not assign a large role to strength measurements because they are function tests influenced by subjective factors that are difficult to control. Further, the A.M.A., *Guides* is based, for the most part, on anatomic impairment.[6] Accordingly, loss of strength may be rated separately only in rare cases where the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the A.M.A., *Guides*. Even then, impairment due to loss of strength could be combined with other impairments only if it is based on unrelated etiologic or pathomechanical causes. Otherwise, impairment ratings based on objective anatomic findings take precedence. Moreover, decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated.[7]

Dr. Diamond did not justify his inclusion of decreased strength in the impairment rating. He did not explain how appellant's impairment was the rare case, how his loss of strength was based on etiologic or pathomechanical causes unrelated to other impairments or how he could effectively measure decreased strength despite appellant's loss of range of motion and painful conditions. Because Dr. Diamond did not address why, under the circumstances of this case, an impairment rating for strength deficit was appropriate, the Board finds that he did not provide a properly rationalized impairment rating in accordance with the A.M.A., *Guides*.[8]

The Office referred appellant's case record to Dr. Berman, an Office medical adviser, for an opinion on permanent impairment. In a January 27, 2008 report, Dr. Berman calculated a six percent permanent impairment to the right upper extremity. He declined to include any impairment rating for triceps deficit because there was no documentation of an abnormality of the triceps nor did the Office accept any conditions regarding the triceps. Further, Dr. Berman

[6] A.M.A., *Guides* 507.

[7] *Id.* at 508.

[8] *See K.W.*, 59 ECAB ___ (Docket No. 07-1547, issued December 19, 2007).

did not include decreased strength in the impairment rating finding that a strength evaluation was not appropriate due to appellant's decreased range of motion and painful conditions. He cited to section 16.8a, on page 508, of the A.M.A., *Guides*, which states that decreased strength cannot be rated in the presence of painful conditions or decreased range of motion. Using Figure 16-34, on page 472, of the A.M.A., *Guides*, Dr. Berman found one percent impairment based on 130 degrees of flexion. He also added two percent impairment for 50 out of 80 degrees of pronation in accordance with Figure 16-37, on page 474. Finally, Dr. Berman found three percent permanent impairment for pain, citing to page 574. He concluded that appellant sustained a total six percent permanent impairment to the right upper extremity and noted a maximum medical improvement date of October 18, 2007.

The Board finds that Dr. Berman correctly calculated appellant's permanent impairment at six percent in accordance with the A.M.A., *Guides*. He properly referred to Figures 16-34[9] and 16-37[10] to calculate a total of three percent permanent impairment for loss of range of flexion and pronation. Dr. Berman added three percent permanent impairment for pain in accordance with Chapter 18[11] for a total of six percent permanent impairment to the right upper extremity. Further, the Board finds that Dr. Berman's declination to include Dr. Diamond's finding of loss of strength in his impairment calculation was in accordance with section 16.8a.[12]

The Board has held that, if an examining physician does not correctly use the A.M.A., *Guides* to calculate the degree of permanent impairment, it is proper for an Office medical adviser to review the record and apply the A.M.A., *Guides* to the examination findings reported by the examining physician.[13] Dr. Berman properly applied Dr. Diamond's findings on examination to the A.M.A., *Guides* and calculated a six percent permanent impairment to appellant's upper right extremity. Therefore, the Board finds that the weight of the medical evidence rests with Dr. Berman.[14]

On appeal, appellant's representative contends that Dr. Diamond calculated 44 percent permanent impairment in accordance with the A.M.A., *Guides*. In the alternative, he argued that a conflict of medical opinion existed between Drs. Diamond and Berman, requiring a resolution by an impartial medical examiner. As previously addressed by the Board, Dr. Diamond's medical opinion does not conform to the A.M.A., *Guides* and is of diminished probative value. Because Dr. Berman properly applied appellant's physical findings to the A.M.A., *Guides*, his

[9] A.M.A., *Guides* 472, Figure 16-34.

[10] *Id*. at 474, Figure 16-37.

[11] *Id.* at 574, Figure 18-1.

[12] *See id.* at 508. *See also K.W., supra* note 8.

[13] *Lena P. Huntley*, 46 ECAB 643 (1995).

[14] *See Linda Beale*, 57 ECAB 429 (2006).

medical opinion is of greater probative value than that of Dr. Diamond.[15] Thus, no conflict of medical opinion exists.[16]

CONCLUSION

The Board finds that appellant did not sustain greater than six percent impairment to his upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 23, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *See id.*

[16] A conflict of medical evidence exists when there are opposing medical reports of virtually equal weight and rationale. *Darlene R. Kennedy*, 57 ECAB 414 (2006).