

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

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R.G., Appellant )  
and ) Docket No. 09-1005  
DEPARTMENT OF THE NAVY, NORFOLK ) Issued: November 4, 2009  
NAVAL SHIPYARD, Norfolk, VA, Employer )  
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)

*Appearances:* Case Submitted on the Record  
*Appellant, pro se*  
*Office of Solicitor*, for the Director

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 6, 2009 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated March 21, 2008 and February 10, 2009. Under 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 five percent permanent impairment to his right upper extremity and a 34 percent permanent impairment for the left upper extremity.

**FACTUAL HISTORY**

This is the second appeal before the Board. On February 23, 2000 appellant filed a Form CA-2 claim for a left-sided carpal tunnel condition causally related to factors of his employment. The Office accepted the claim for left carpal tunnel syndrome. Appellant received a schedule award for 34 percent impairment of the left upper extremity on May 30, 2003. The Office subsequently accepted a claim for bilateral carpal tunnel syndrome. On June 15, 2005 appellant filed a Form CA-7 claim for a schedule award based on loss of use of his right and left upper

extremities. In an impairment evaluation dated April 27, 2006, an Office medical adviser found that appellant had a four percent impairment of his right upper extremity and a five percent impairment of his left upper extremity under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On June 16, 2006 the Office granted appellant a schedule award for a four percent permanent impairment of the right upper extremity. Appellant requested reconsideration and submitted an August 14, 2006 report from Illeana Rosario, an occupational therapist, who stated that appellant had an 11 percent bilateral upper extremity impairment due to sensory deficit of the median nerve postcarpal tunnel release based on an August 14, 2006 impairment evaluation. The report was cosigned on September 7, 2006 by Dr. Helena Guarda, a specialist in plastic surgery. On October 3, 2006 an Office medical adviser, Dr. Willie E. Thompson, Board-certified in orthopedic surgery, rejected the August 14, 2006 impairment evaluation because he opined it was not submitted by a physician and therefore did not constitute probative medical evidence under the A.M.A., *Guides*. By decision dated December 6, 2006, the Office denied modification of the June 16, 2006 schedule award decision. In a January 24, 2008 decision,<sup>1</sup> the Board set aside the Office's December 6, 2006 decision. The Board noted that Dr. Thompson had rejected the August 14, 2006 report from Ms. Rosario, an occupational therapist, and cosigned by a physician, Dr. Guarda, on the grounds that a report composed by an occupational therapist did not constitute medical evidence under section 8101(2). The Office credited Dr. Thompson's opinion rejecting Ms. Rosario's cosigned report despite the fact that it had previously granted a four percent schedule award for right carpal tunnel syndrome based on Ms. Rosario's April 18, 2005 impairment evaluation, cosigned by Dr. Merrell, the attending physician (and an associate of Dr. Guarda) who performed appellant's carpal tunnel release surgeries. The Board further stated that the report cosigned by Dr. Guarda noted pain symptoms and sensory deficits relating to appellant's wrist indicating that he might have additional permanent impairment related to this area and provided an impairment rating in accordance with specific tables of the A.M.A., *Guides*. It therefore indicated that the Office medical adviser erred by neglecting to evaluate the possibility that appellant had additional impairment of his right upper extremity related to his right-sided carpal tunnel syndrome, as indicated by Ms. Rosario's August 14, 2006 cosigned report. The Board therefore remanded the case to the Office for consideration of the August 14, 2006 report cosigned by Dr. Guarda, to obtain a complete assessment of appellant's right upper extremity impairment in accordance with the standards of the A.M.A., *Guides*. The complete facts of this case are set forth in the Board's January 24, 2008 decision and are herein incorporated by reference.

The Office referred the case back to Dr. Thompson, the Office medical adviser. In a February 11, 2008 report, Dr. Thompson again disregarded the August 14, 2006 report cosigned by Dr. Guarda and merely reiterated the findings and conclusions he stated in his October 3, 2006 report. He noted that he had accorded appellant five percent impairment for the right upper

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<sup>1</sup> Docket No. 07-830 (issued January 24, 2008).

extremity based on a persistent, positive postoperative electromyogram (EMG) and positive nerve conduction studies in his October 3, 2006 report.<sup>2</sup>

By decision dated March 21, 2008, the Office, relying on Dr. Thompson's opinion, found that appellant was entitled to an additional one percent impairment for his right upper extremity.

On October 27, 2008 appellant requested reconsideration. Appellant did not submit any additional medical evidence.

By decision dated February 10, 2009, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>3</sup> 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 loss of use.<sup>4</sup> However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.<sup>5</sup>

### **ANALYSIS**

The Board in its January 28, 2008 decision directed the Office to evaluate Dr. Guarda's cosigned August 14, 2006 report. Dr. Thompson reviewed the report and stated in his October 2006 report that he stood by his previous calculations. The Office, relying on Dr. Thompson as the weight of the evidence, denied an award for additional impairment for the left upper extremity but granted one percent additional impairment for the right upper extremity. The Board finds that, however, as the record now stands, a conflict exists in the medical opinion evidence between Dr. Guarda and Dr. Thompson concerning the degree of appellant's permanent impairment of both the right and left upper extremities. The Board sets aside the March 21, 2008 Office decision and remands for referral of appellant, the case record and a statement of accepted facts to an appropriate independent medical specialist to resolve the conflict as to whether appellant had additional impairment as indicated by Dr. Guarda's August 14, 2006 cosigned

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<sup>2</sup> In its June 26, 2006 decision, the Office awarded a four percent right upper extremity impairment based on Dr. Thompson's April 2006 report. In his October 3, 2006 report, Dr. Thompson rated a five percent impairment based on appellant's continuing positive EMG and nerve conduction studies. The Office, however, did not modify its award of five percent right upper extremity impairment in its December 6, 2006 decision.

<sup>3</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>4</sup> *Id.* at § 8107(c)(19).

<sup>5</sup> 20 C.F.R. § 10.404.

report. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.<sup>6</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 21, 2008 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: November 4, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>6</sup> In light of the Board's decision to set aside and remand the Office's March 21, 2008 decision to reevaluate the proper amount of impairment to appellant's right upper extremity, the Board need not consider the Office's February 10, 2009 nonmerit decision.