

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

N.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Bellmawr, NJ, Employer)

**Docket No. 09-1540
Issued: February 4, 2010**

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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 29, 2009 appellant, through her representative, filed a timely appeal from the July 23, 2008 and February 25, 2009 merit decisions of the Office of Workers' Compensation Programs, which found that she had a nine percent impairment of her right upper extremity and no impairment of her left arm. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant's July 20, 2002 employment injury has caused more than a nine percent impairment of her right upper extremity or any impairment of her left arm.

FACTUAL HISTORY

On July 20, 2002 appellant, then a 33-year-old clerk, sustained an injury in the performance of duty from constant reaching overhead, bending, pushing and lifting. The Office accepted her claim for cervical radiculopathy. Appellant filed a claim for a schedule award.

A conflict in medical opinion arose on the extent of any impairment due to the accepted medical condition. The Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Samuel E. Epstein, a Board-certified osteopathic physician specializing in orthopedic surgery, for an impartial medical evaluation.

Dr. Epstein examined appellant on May 12, 2008. He related the history of injury, her medical care and her current complaints. Dr. Epstein reviewed appellant's medical record, including the conflicting evaluations of her impairment. He described his findings on physical examination and diagnosed right C6 radiculopathy secondary to a herniated C6-7 disc. Dr. Epstein found that appellant most likely reached maximum medical improvement in 2004 after she had a series of epidural steroid injections and thoracic blocks.

To evaluate impairment due to pain or sensory deficit resulting from a peripheral nerve disorder, Dr. Epstein used Table 13-23, page 346 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). For the right upper extremity, he graded appellant's pain or sensory deficit as Class 6 or "Decreased sensation with severe pain or major causalgia that prevents activity." From a range of 81 to 95 percent sensory impairment, Dr. Epstein chose 90 percent because of the severity of the pain, lack of sensation to pinprick and the prevention of many activities of daily living.

For the left upper extremity, Dr. Epstein graded appellant's pain or sensory deficit as Class 3 or "Normal sensation except for pain or decreased sensation with or without pain, present during activity." From a range of 11 to 25 percent sensory impairment, he chose 15 percent because he felt that she was slightly less than mid-range in her pain or sensory impairment on the left.

To evaluate impairment due to loss of motor power and motor function resulting from a peripheral nerve disorder, Dr. Epstein used Table 13-24, page 348. For the right upper extremity, he graded appellant's motor deficit as Class 2 or "Active movement against gravity with some resistance." From a range of 1 to 25 percent motor deficit Dr. Epstein chose 5 percent because she had only mild weakness to resistance on right wrist extension.

For the left upper extremity, Dr. Epstein graded appellant's motor deficit as Class 1 or "Active movement against gravity with full resistance." This represented no motor deficit and as he explained, she had no weakness to full resistance on the left.

Dr. Epstein then multiplied these percentage deficits by the maximum impairment values of the C6 spinal nerve. Table 16-13, page 489 shows an 8 percent maximum impairment of the upper extremity due to pain or sensory deficit and a 30 percent maximum impairment due to motor deficit. Dr. Epstein thereby determined that appellant had a 7.2 percent sensory and a 1.7 percent motor impairment of the right upper extremity, which he rounded and combined for a total impairment of nine percent.

Although Dr. Epstein graded the sensory deficit in appellant's left upper extremity at 15 percent, he concluded that she had no sensory impairment. "[Appellant] has no objective physical evidence during examination nor on [electromyogram] and nerve conduction studies of

the left C6 radiculopathy. In addition, prior medical evaluations from the medical records, have not demonstrated a left C6 radiculopathy of the upper extremity.”

On July 23, 2008 the Office issued a schedule award for a nine percent permanent impairment of the right upper extremity.

At an oral hearing before an Office hearing representative on December 3, 2008, appellant questioned the Office’s selection of Dr. Epstein, his evaluation of appellant and his application of the A.M.A., *Guides*.

In a decision dated February 25, 2009, the Office hearing representative affirmed the July 23, 2008 schedule award. Appellant found that the Office properly selected Dr. Epstein and that his report was sufficiently well reasoned to be accorded special weight.

On appeal, appellant’s representative again questioned the Office’s selection of Dr. Epstein, his evaluation and use of the A.M.A., *Guides*.

LEGAL PRECEDENT

Section 8107 of the Federal Employees’ Compensation Act¹ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.²

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.³ 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.⁴

ANALYSIS

The Office accepted that appellant’s July 20, 2002 employment injury caused cervical radiculopathy. Dr. Epstein, the osteopathic physician and impartial medical specialist, diagnosed a right C6 radiculopathy secondary to a herniated C6-7 disc. He evaluated the impairment caused by this radiculopathy according to the standards set forth in the A.M.A., *Guides*.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ 5 U.S.C. § 8123(a).

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Epstein graded appellant's sensory and motor deficits under Table 13-23, page 346 and Table 13-24, page 348. He provided rationale for selecting a specific percentage within each of the applicable ranges. Dr. Epstein then properly followed procedure by multiplying the percentage deficits by the maximum impairment values of the C6 spinal nerve, as shown in Table 16-13, page 489 (also in Table 15-17, page 424). The result was a 7.2 percent sensory and 1.7 percent motor impairment of the right upper extremity, which rounded and combined for a total impairment of 9 percent.

Dr. Epstein found no motor deficit in the left upper extremity. Although he did report a 15 percent sensory deficit, representing a 1 percent impairment of the left upper extremity, he explained that appellant had no objective physical evidence of a left C6 radiculopathy during examination or on electrodiagnostic testing. Further, prior medical evaluations failed to demonstrate a C6 radiculopathy in the left upper extremity. This is consistent with Dr. Epstein's diagnosis of a right C6 radiculopathy secondary to a herniated C6-7 disc and rationally supports his opinion that appellant had no ratable sensory impairment of the left upper extremity.

Only individuals with an objectively verifiable diagnosis of entrapment or compression neuropathy should qualify for a permanent impairment rating. The diagnosis is made not only on believable symptoms but, more important, on the presence of positive clinical findings and loss of function. The diagnosis should also be documented by electromyography as well as sensory and motor nerve conduction studies.⁵

The Office provided Dr. Epstein with the medical record and a statement of accepted facts so he could base his opinion on a proper factual and medical history. His review of the record and his examination of appellant was thorough. The Board finds that Dr. Epstein's opinion is well rationalized and is entitled to special weight in resolving the conflict on the extent of appellant's permanent impairment. The Board will therefore affirm the Office's July 23, 2008 and February 25, 2009 decisions.

On appeal, appellant's representative challenges the Office's selection of Dr. Epstein as an impartial medical specialist. He raised this issue for the first time at the December 3, 2008 oral hearing before the Office hearing representative. The Board finds his challenge untimely.⁶ By letter dated April 23, 2008, the Office notified counsel of Dr. Epstein's selection as the impartial medical specialist. This followed the December 19, 2007 hearing before the Branch of Hearings and Review at which time it was argued that the reports obtained from Dr. Roland L. Gerson a Board-certified orthopedic surgeon, selected as the impartial specialist, were not sufficient to resolve the conflict as to the extent of permanent impairment. The case was remanded for selection of the new impartial referee.

Appellant's representative also questions Dr. Epstein's application of the A.M.A., *Guides*. To evaluate the upper extremity impairment resulting from the accepted cervical

⁵ A.M.A., *Guides* 493 (5th ed. 2001) (see page 382, radiculopathy and electrodiagnostic verification).

⁶ *M.A.*, 59 ECAB ___ (Docket No. 07-1344, issued February 19, 2008) (claimant raised a timely objection to the selection of the impartial medical specialist prior to the scheduled examination and provided sufficient reason to require the Office to demonstrate that it properly followed its selection procedures).

radiculopathy, Dr. Epstein followed the grading scheme and procedure set forth in Chapter 13.9 of the A.M.A., *Guides*. This grading scheme and procedure is basically the same grading scheme and procedure found in Chapter 15.12 and Chapter 16.5. That he cited Table 13-23 and Table 13-24 instead of Table 16-10 and Table 16-11 is no grounds for setting aside the Office decisions for clarification from the impartial medical specialist. The results are the same.

Appellant's representative notes that it did not appear that Dr. Epstein performed any grip strength testing, but the representative offered no argument that such testing was necessary. Strength measurements are recognized functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* is largely based on anatomic impairment. The A.M.A., *Guides* does not assign a large role to such measurements and cautions against their use.⁷

Appellant's representative states that Dr. Epstein did not explain how he arrived at a nine percent impairment of the right upper extremity. As noted he did explain the basis for the impairment rating. Dr. Epstein gave no rating for the left upper extremity, as appellant had a zero percent motor deficit and no objective sensory deficit in the C6 nerve distribution to the left upper extremity. Finally, the Board notes that Dr. Epstein's commentary on the evaluation by appellant's physician is immaterial.

CONCLUSION

The Board finds that appellant has no more than a nine percent impairment of her right upper extremity and no impairment of her left.

⁷ A.M.A., *Guides* 507-08.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2009 and July 23, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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