United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 09-2207**
	)	**Issued: July 23, 2010**
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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2009 appellant, through her representative, filed a timely appeal of the October 23, 2008 and June 15, 2009 schedule award decisions of the Office of Workers' Compensation Programs. 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 has more than 23 percent impairment to each upper extremity for which she received schedule awards.

On appeal, appellant contends, *inter alia*, that the Office should appoint an impartial medical examiner to resolve the conflict between the schedule award rating made by appellant's physician and the rating made by the impartial medical examiner.

FACTUAL HISTORY

This case has previously been before the Board. In a July 5, 2006 decision, the Board affirmed an August 18, 2004 Office decision finding that appellant failed to establish that she

sustained a recurrence of disability causally related to her bilateral carpal tunnel syndrome. Under Office File No. xxxxxx429, the Board affirmed September 9 and December 15, 2004 Office decisions, finding that she did not establish her claim for disability commencing February 26, 2003 causally related to her accepted condition of proximal radiculitis with bilateral brachial plexitis.[1] In an April 28, 2008 decision, the Board affirmed a March 2, 2007 Office decision finding that appellant did not establish entitlement to disability after September 13, 2004 causally related to her accepted bilateral carpal tunnel syndrome.[2] The facts of the case as set forth in the Board's prior decisions are hereby incorporated by reference. The relevant facts are set forth below.

On June 7, 2002 the Office accepted that appellant, then a 50-year-old clerk, sustained bilateral carpal tunnel syndrome in the performance of duty. Appellant underwent a right carpal tunnel release on July 8, 2002 by Dr. James Raphael, a Board-certified orthopedic surgeon, with a subspecialty in surgery of the hand. On July 13, 2004 she underwent an accepted median neuropathy with brachial plexopathy involving her left upper extremity.

Appellant filed a claim for a schedule award. In a July 24, 2008 report, Dr. David Weiss, an osteopath, rated impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). He conducted a physical examination and measured range of motion, grip strength, lateral pinch key, Semmes-Weinstein and two point discrimination. Dr. Weiss also reviewed appellant's medical tests, including electromyogram and nerve conduction studies. He determined that she had a Grade 2 sensory deficit of the right median nerve, which represented 31 percent impairment pursuant to the A.M.A., *Guides*, 482, Table 16-10 and 492, Table 16-15. Dr. Weiss further determined that appellant had an impairment of 20 percent due to right lateral pinch deficit pursuant to the A.M.A., *Guides*, 509, Tables 16-33 and 16-34. Combining these figures, he found a total 45 percent impairment of her right arm. With regard to appellant's left arm, Dr. Weiss found a similar Grade 2 sensory deficit in her left median nerve which he determined was a 31 percent impairment of the left upper extremity based on Tables 16-10 and 16-15 of the A.M.A., *Guides*. Dr. Weiss indicated that she reached maximum medical improvement on July 24, 2008.

On October 7, 2008 the Office referred the medical evidence to an Office medical adviser for review. The medical adviser noted that Dr. Weiss found numbness in both hands and that appellant complained that activities of daily living were impaired. He noted, however, that Dr. Weiss did not report any thenar or hypothenar atrophy to either the right or the left upper extremity. The medical adviser stated that, pursuant to the A.M.A., *Guides*, 508, section 16-8a, decreased strength cannot be rated in the presence of painful conditions. Although Dr. Weiss advised that two-point discrimination was abnormal he did not note anywhere on examination that there was a loss of protective sensation; therefore, Grade 2 sensory deficit could not be utilized because it was apparent from appellant's activities that he had protective sensibility. The Office medical adviser determined that it was more appropriate to utilize a Grade 3 sensory deficit pursuant to Table 16-10, in classifying appellant's impairment. He noted that under Table 16-15, the maximum extremity impairment due to unilateral sensory or motor deficits for sensory

[1] Docket No. 05-1231 (issued July 5, 2006).

[2] Docket No. 07-2163 (issued April 28, 2008).

deficit or pain in the median nerve below the mid-forearm was 39 percent. The Office medical adviser noted that Grade 3 sensory deficit allowed for maximum 60 percent impairment pursuant to Table 16-10. He multiplied 60 percent by 39 percent to find that appellant had 23 percent impairment of each upper extremity.

On October 23, 2008 the Office issued schedule awards for 23 percent impairment to appellant's left and right upper extremities.

By letter dated October 31, 2008, appellant requested a hearing that was held on March 17, 2009. She testified that she began working as a clerk at the employing establishment in 1980. Appellant filed her claim on February 6, 2002 for complaints of tingling and numbness and that her hands would swell and shoulder and arms ache. She noted that she did not have any off-the-job accidents or diseases to either arm or of her hands, wrists or fingers.

In a June 15, 2009 decision, an Office hearing representative affirmed the determination that appellant had 23 percent impairment to both upper extremities.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

Section 8123(a) 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 shall appoint a third physician who shall make such an examination.[7]

ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome.

Both appellant's physician, Dr. Weiss, and the Office medical adviser properly noted that pursuant to the A.M.A., *Guides,* the maximum amount allowable for an impairment to the

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] *Id.*

[7] 5 U.S.C. § 8123(a).

median nerve below the midforearm for sensory deficit and pain is 39 percent.[8] However, there is a dispute between the Office medical adviser and appellant's physician with regard to the proper grade to assess appellant for determining impairment due to sensory deficit or pain. Table 16-10 of the A.M.A., *Guides* provides a Grade 3 classification for sensory deficit or pain that is characterized by "[d]istorted superficial tactile sensibility (diminished light tough and two-point discrimination) with some abnormal sensations or slight pain, that interferes with some activities."[9] The Office medical adviser found that appellant had a Grade 3 classification to each upper extremity. The maximum percentage of impairment allowed by the A.M.A., *Guides* for a Grade 3 classification is 60 percent. The Office medical adviser multiplied 60 percent by the maximum allowable for impairment to the median nerve below the midforearm of 39 percent, to determine that appellant had 23 percent impairment to each upper extremity.

However, appellant's treating osteopath, Dr. Weiss, opined that appellant had a Grade 2 classification, which the A.M.A., *Guides*, characterizes as "[d]ecreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility) with abnormal sensations or moderate pain that may prevent some activities."[10] The maximum percentage of impairment allowable for Grade 2 is 80 percent. Dr. Weiss multiplied 80 percent by 39 percent to determine appellant's impairment to each upper extremity of 31 percent. Accordingly, there is an unresolved dispute between appellant's treating physician and the Office medical adviser with regard to appellant's grade classification and impairment in both upper extremities.

The Board further notes that Dr. Weiss found that appellant had an additional impairment to his right upper extremity based upon right lateral pinch deficit of 20 percent. Combining this figure with the 31 percent based on sensory deficit of the right median nerve, Dr. Weiss opined that appellant had a 45 percent impairment of the right upper extremity. Dr. Weiss did not identify any pinch strength deficit in the left wrist. The Office medical adviser disputed this rating, explaining that pursuant to the A.M.A., *Guides*, decreased strength could not be rated in the presence of painful conditions. The Board finds that the A.M.A., *Guides* do not encourage the use of grip or pinch strength as an impairment factor because strength measurements are functional tests influenced by subjective factors that are difficult to control. The A.M.A., *Guides* for the most part is based on anatomic impairment. Only in rare cases should pinch deficit be used and only when it represents an impairing factor that has not been otherwise considered adequately. The A.M.A., *Guides* state that, otherwise, the impairment rating based on objective anatomic findings take precedence.[11] Accordingly, the Board finds that Dr. Weiss' rating of 20 percent impairment for right lateral pinch deficit is not adequately explained.

[8] A.M.A., *Guides* 492, Table 16-15.

[9] *Id*. at 492, Table 16-10.

[10] *Id.*

[11] *See* A.M.A., *Guides*, 507-08, 16.8 Strength Evaluation, Principles; *Phillip H. Conte*, 56 ECAB 213 (2004). *See also T.A.*, 59 ECAB ___ (Docket No. 07-1836, issued November 20, 2007) (the Board has found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome is rated on motor and sensory deficits only).

The Board will remand the case for the Office to refer appellant to an impartial medical specialist to resolve the conflict with regard to appellant's upper extremity impairment. After such further development as it deems necessary, the Office shall issue an appropriate schedule award decision.

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant has more than 23 percent impairment to each upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2009 and October 23, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further proceedings consistent with this decision.

Issued: July 23, 2010
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