United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant **and** **DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Bensalem, PA, Employer**	)	**Docket No. 09-1427** **Issued: March 5, 2010**

Appearances:
Jeffrey P. Zeelander, 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 18, 2009 appellant, through counsel, filed a timely appeal from an April 29, 2009 schedule award of the Office of Workers' Compensation Programs for a 21 percent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than 21 percent impairment of the right upper extremity, for which she received schedule awards.

On appeal, appellant's counsel requested that the Board modify the award to reflect the impairment determination found by the impartial medical examiner.

FACTUAL HISTORY

This is the third appeal before the Board. On March 7, 2006 the Board found the Office's refusal to authorize appellant's request for a change of physician constituted an abuse of

discretion.[1] In a June 13, 2008 decision, the Board set aside an October 16, 2007 Office decision which granted appellant a schedule award for a three percent impairment of the right upper extremity.[2] The Board found that Dr. Roy T. Lefkoe, a Board-certified orthopedic surgeon selected as the impartial medical examiner, did not adequately explain how he rated impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[3] The facts and the history of the case as set forth in the prior decision are hereby incorporated by reference.[4]

On January 29, 2009 Dr. Lefkoe reported that he reviewed his prior report and the report by Dr. Berman. He found no impairment to appellant's elbow. Using Tables 16-14, 16-11 and 16-10, Dr. Lefkoe determined that appellant had a Grade 4 motor impairment, which represented a 25 percent impairment and a Grade 3 sensory impairment which represented a 60 percent impairment. Using the Combined Values Chart, he found a total 70 percent right upper extremity impairment. Dr. Lefkoe noted that appellant had 90 degrees flexion resulting in a 7 percent impairment, 20 degrees extension resulting in a 2 percent impairment, 10 degrees adduction resulting in a 1 percent impairment, 80 degrees abduction resulting in a 5 percent impairment, 30 degrees internal rotation resulting in a 4 percent impairment and a 0 percent impairment for 60 degrees external rotation, which resulted in a total 19 percent right upper extremity impairment. He stated that this impairment was not added to the 70 percent sensory and motor impairment as it is not permitted.[5]

On April 19, 2009 Dr. Berman reviewed Dr. Lefkoe's supplemental report and noted that he incorrectly used Tables 16-10 and 16-11. He found a three percent impairment based on a five percent maximum sensory deficit using Table 16-15. Dr. Berman noted that Table 16-15 requires that a physician multiply the grade and percent deficits found using Tables 16-10 and 16-11. He noted that instead of multiplying the grade and percent deficits found that Dr. Lefkoe incorrectly combined them. Therefore, his rating was erroneous. Dr. Berman reviewed Dr. Lefkoe's range of motion deficits and concurred with his finding that appellant had a 19 percent right upper extremity impairment. The Office medical adviser then combined the 19 percent for loss of range of motion with the 3 percent impairment for sensory loss, to total 21 percent right upper extremity impairment.

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[1] Docket No. 05-1562 (issued March 7, 2006).

[2] Docket No. 08-162 (issued June 13, 2008).

[3] The conflict in medical opinion arose between appellant's attending Board-certified physiatrist, Dr. George L. Rodriguez and a second opinion physician, Dr. Kevin P. Hanley, a Board-certified orthopedic surgeon, regarding the extent of impairment to his right arm.

[4] On March 3, 1989 appellant, then a 29-year-old data transcriber, filed a traumatic injury claim alleging that on that date she injured her right elbow, upper arm and right shoulder when she fell over boxes. The Office accepted the claim for a cervical strain, contusion to the elbow, shoulder and neck, brachial plexopathy and thoracic outlet syndrome. By letter dated October 19, 1989 appellant was placed on the periodic rolls for temporary total disability.

[5] A.M.A., *Guides* 499.

By decision dated April 29, 2009, the Office granted appellant a schedule award for a 21 percent impairment of the right arm. As she had previously received a schedule award for a 3 percent impairment, she received an additional 18 percent.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] 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 of loss of use.[8] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[9]

Office procedures[10] provide that upper extremity impairment secondary to carpal tunnel syndrome and other entrapment neuropathies should be calculated using section 16.5d and Tables 16-10, 16-11 and 16-15.[11]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[12]

ANALYSIS

Following the prior appeal, the Office secured a supplemental report from Dr. Lefkoe. On January 29, 2009 Dr. Lefkoe reiterated that appellant sustained a 70 percent impairment to the right arm due to her brachial plexus condition. Using Table 16-11 at page 484 and Table 16-14 at page 490, he concluded that appellant had a Grade 4 motor deficit (25 percent motor sensory impairment) of the right upper extremity and a 60 percent sensory impairment based upon a Grade 3 sensory impairment using Table 16-10 at page 482 and Table 16-14 at page 490. Dr. Lefkoe then used the Combined Values Chart at pages 604-06 to determine a total 70 percent right upper extremity impairment.

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[6] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[7] 20 C.F.R. § 10.404.

[8] 5 U.S.C. § 8107(c)(19).

[9] 20 C.F.R. § 10.404.

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, exhibit 4 (June 2003). *See also Cristeen Falls*, 55 ECAB 420 (2004).

[11] A.M.A., *Guides* 491, 482, 484, 492, respectively; *see Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[12] *Phillip H. Conte*, 56 ECAB 213 (2004).

On April 19, 2009 Dr. Berman, an Office medical adviser, noted that Dr. Lefkoe had incorrectly applied the A.M.A., *Guides* when rating appellant's motor and sensory deficits under Tables 16-10, 16-11 and 16-14. Dr. Berman stated that Dr. Lefkoe should have multiplied the deficit grades found at Tables 16-10 and 16-11 by the maximum impairment values found at Table 16-15. The Board notes that Dr. Lefkoe should have used Table 16-15 instead of Table 16-14 in determining the impairment rating. As noted above Office procedures provide that upper extremity impairment secondary to other entrapment neuropathies should be calculated using section 16.5d and Tables 16-10, 16-11 and 16-15.[13] The Board has held that, where a medical conflict exists, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An Office medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[14] The Office did not advise Dr. Lefkoe that Table 16-15 should be used in conjunction with Tables 16-10 and 16-11 instead of Table 16-14. The Board finds that the conflict in the medical opinion evidence remains unresolved.

The case will be remanded for the Office to secure a supplemental report from Dr. Lefkoe regarding the extent of appellant's permanent impairment of the right upper extremity. If he is unable to clarify or elaborate on his opinion or if the opinion is not forthcoming, the Office should refer the case to another impartial medical examiner.[15] After such further development as it deems necessary, the Office should issue a *de novo* decision on the extent of any employment-related impairment.

CONCLUSION

The Board finds that the conflict in the medical evidence was not properly resolved and the case requires further development.

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[13] A.M.A., *Guides* 491, 482, 484, 492, respectively; *see Joseph Lawrence, Jr.*, *supra* note 11. *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, exhibit 4 (June 2003); *Cristeen Falls*, *supra* note 8.

[14] *See I.H.*, 60 ECAB ___ (Docket No. 08-1352, issued December 24, 2008); *Richard R. LeMay*, 56 ECAB 341 (2005); *Thomas J. Fragal*e, 55 ECAB 619 (2004).

[15] *See T.C.*, 60 ECAB ___ (Docket No. 08-2112, issued June 12, 2009); *Nancy Keenan*, 56 ECAB 687 (2005); *see also Leonard W. Waggoner*, 35 ECAB 461 (1983).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2009 is set aside the case is remanded for further action consistent with this decision.

Issued: March 5, 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