

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

C.R., Appellant	)	
	)	
and	)	<b>Docket No. 10-357</b>
	)	<b>Issued: November 17, 2010</b>
<b>DEPARTMENT OF HEALTH &amp; HUMAN</b>	)	
<b>SERVICES, SOCIAL SECURITY</b>	)	
<b>ADMINISTRATION, Philadelphia, PA,</b>	)	
<b>Employer</b>	)	
	)	

*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 November 20, 2009 appellant, through counsel, filed a timely appeal from an August 18, 2009 decision of the Office of Workers' Compensation Programs which affirmed schedule awards for impairment to the right upper extremity. Pursuant to 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 two percent impairment of the right upper extremity, for which she received a schedule award.

On appeal appellant's counsel contends that there is a conflict in the medical opinion evidence.

**FACTUAL HISTORY**

On December 2, 2003 appellant, then a 53-year-old benefit authorization administrative assistant, filed a traumatic injury claim alleging that on December 1, 2003 she dislocated her

right thumb and strained her body when she slipped and fell at work. The Office accepted the claim for dislocated right thumb and cervical and thoracic strains. Appellant was placed on the periodic rolls for temporary total disability by letter dated July 21, 2004. She returned to work on October 31, 2005 and retired in 2008.

Appellant filed a claim for a schedule award and submitted a September 29, 2008 report from Dr. David Weiss, an examining osteopath, in support of her request. Dr. Weiss noted the history of injury and appellant's continued complaints of neck and back pain and right thumb pain and stiffness. He stated that appellant's activities of daily living were restricted with difficulties in household chores, in grasping with her right hand and can no longer dance, exercise or bicycle ride. Dr. Weiss advised that her pain level was 4-7/10 in her right thumb. Examination of the right thumb demonstrated normal fist presentation. Range of motion for the right thumb was 0/55/55 for metacarpal phalangeal extension/flexion, 0-40/65 degrees interphalangeal extension/flexion and opponents strength testing of the thumb and index was 4/5. Grip strength testing was read as 10 kilograms (kg) of force strength on the right as compared to 16 kg on the left and pinch at 2 kg on the right. Dr. Weiss diagnosed post-traumatic cervical and dorsal sprain and strain, C3-4 herniated nucleus pulposus, aggravation of preexisting cervical spine osteoarthritis, status post right thumb interphalangeal joint fracture dislocation and status post interventional pain management with spinal accessory nerve block. He opined that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>1</sup> under Tables 16-33 and 16-34 appellant had 20 percent right upper extremity impairment due to right lateral pinch deficit and, under Table 18-1, 3 percent pain-related impairment, for a total 23 percent right upper extremity impairment. Dr. Weiss noted the maximum medical improvement date of September 28, 2008.

On November 24, 2008 the Office referred the medical record to an Office medical adviser for review. In a December 1, 2008 report, Dr. Arnold T. Berman, the Office medical adviser, opined that, according to page 508 of the A.M.A., *Guides*, decreased motion and painful conditions cannot be rated in the presence of decreased strength. Therefore, the rating by Dr. Weiss based on pinch strength was not acceptable. Dr. Berman also noted that the pain impairment rating did not comport with section 18.3a of the A.M.A., *Guides* and was not recommended. The Office medical adviser noted the only abnormal finding was the interphalangeal joint range of motion for flexion and extension as her Oppenens weakness and Jaymar strength testing was normal. Appellant's 40 degrees of flexion resulted in a three percent impairment and 0 degrees of extension resulted in a one percent impairment, which totaled four percent right thumb impairment using Figure 16-12, page 456 Figure 16-12, page 456 of the A.M.A., *Guides*. Dr. Berman converted the loss of range of motion to the digit under Table 16-1, page 438, to rate two percent loss of the hand. Using Table 16-2, page 439 two percent impairment of the hand represented two percent impairment to the right upper extremity.

By decision dated February 9, 2009, the Office granted appellant a schedule award for 6.24 weeks of compensation from September 29 to November 11, 2008 based on two percent impairment of the right upper extremity.<sup>2</sup>

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

<sup>2</sup> The Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of an arm. 5 U.S.C. § 8107(c)(2). Multiplying 312 weeks by 2 equals 6.24 weeks.

Appellant's counsel requested an oral hearing before an Office hearing representative, which was held on June 23, 2009. By decision dated August 18, 2009, the hearing representative affirmed the February 9, 2009 decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>3</sup> and its implementing regulations<sup>4</sup> 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 should be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.<sup>5</sup> Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.<sup>6</sup> Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.<sup>7</sup>

### **ANALYSIS**

The Office accepted appellant's claim for dislocated right thumb, cervical strain and thoracic strain, right finger dislocation, neck sprain, thoracic sprain and middle proximal phalanx or phalanges fracture. Appellant received a schedule award for two percent impairment of the right upper extremity. The issue is whether she has established that she is entitled to a greater than two percent schedule award for her right upper extremity.

In a September 28, 2008 report, Dr. Weiss performed a full physical examination and opined that appellant sustained 23 percent permanent impairment to the right upper extremity. He calculated appellant's 20 percent impairment for right lateral pinch deficit using Tables 16-33 and 16-34 and 3 percent impairment for pain using on Figure 18-1 at page 574. Dr. Weiss noted a maximum medical improvement date of September 28, 2008.

The Board finds that Dr. Weiss did not properly use the A.M.A., *Guides* in calculating appellant's permanent impairment. The A.M.A., *Guides* do not encourage the use of grip strength in an impairment rating 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. The A.M.A., *Guides* do not assign a large role to such measurements. Only in rare cases should grip strength be used, and only when it represents an impairing factor that has not been otherwise considered adequately.<sup>8</sup> It is the responsibility of the evaluating

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *Id.* at § 10.404(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). See *S.K.*, 60 ECAB \_\_\_\_ (Docket No. 08-848, issued January 26, 2009).

<sup>7</sup> A.M.A., *Guides* 433-521.

<sup>8</sup> *Id.* at 507; *Cerita J. Slusher*, 56 ECAB 532 (2005).

physician to explain in writing why a particular method in determining impairment was chosen.<sup>9</sup> Dr. Weiss also found that appellant had three percent impairment due to pain using Chapter 18. Examiners, however, should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.<sup>10</sup> Dr. Weiss did not explain why appellant's condition could not be adequately rated under other chapters. As his report does not conform to the A.M.A., *Guides*, his impairment rating is of diminished probative value.<sup>11</sup>

The Office referred the case record to Dr. Berman, an Office medical adviser, for an opinion on permanent impairment. In a December 1, 2008 report, Dr. Berman rated two percent permanent impairment to the right upper extremity. He declined to include any impairment for grip strength finding that a strength evaluation was not appropriate due to appellant's decreased range of motion. Dr. Berman 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. He based his impairment determination on appellant's loss of range of motion in the digit. Using Figure 16-12, page 456, Dr. Berman found three percent impairment for 40 degrees of flexion and one percent impairment for 0 degrees of extension, resulting in a total right thumb impairment of four percent. He next used Tables 16-1, page 438 and 16-2, page 439 to calculate a two percent impairment to the right upper extremity.

The Board finds that Dr. Berman properly rated appellant's permanent impairment at two percent in accordance with the A.M.A., *Guides*. He referred to Figure 16-12<sup>12</sup> and Tables 16-1<sup>13</sup> and 16-2<sup>14</sup> to calculate a total of two percent permanent impairment for loss of range of flexion and extension.

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.<sup>15</sup> Dr. Berman properly applied Dr. Weiss' findings on examination to the A.M.A., *Guides* and calculated a two percent permanent impairment to appellant's upper right extremity. Therefore, the Board finds that the weight of the medical evidence rests with Dr. Berman.<sup>16</sup>

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<sup>9</sup> *Tara L. Hein*, 56 ECAB 431 (2005).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* 571, 18.3(b); *P.C.*, 58 ECAB 539 (2007); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>11</sup> See generally *Derrick C. Miller*, 54 ECAB 266 (2002).

<sup>12</sup> A.M.A., *Guides* 458.

<sup>13</sup> *Id.* at 438.

<sup>14</sup> *Id.* at 439.

<sup>15</sup> *Lena P. Huntley*, 46 ECAB 643 (1995).

<sup>16</sup> See *Linda Beale*, 57 ECAB 429 (2006).

On appeal, appellant's representative contends that there is a conflict of medical opinion between Drs. Weiss and Berman, requiring a resolution by an impartial medical examiner. As noted, the rating from Dr. Weiss 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 medical opinion is of greater probative value than that of Dr. Weiss.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant did not sustain greater than two percent impairment to her upper extremity, for which she received a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 18, 2009 is affirmed.

Issued: November 17, 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

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<sup>17</sup> A conflict of medical evidence exists when there are opposing medical reports of virtually equal weight and rationale. *J.J.*, 60 ECAB \_\_\_ (Docket No. 09-27, issued February 10, 2009); *Darlene R. Kennedy*, 57 ECAB 414 (2006).