

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

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**E.F., Appellant**

**and**

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

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**Docket No. 10-253  
Issued: October 6, 2010**

*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 3, 2009 appellant filed a timely appeal from an August 7, 2009 decision of the Office of Workers' Compensation Programs affirming a schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has more than 15 percent impairment of the left upper extremity and more than 5 percent impairment of the right upper extremity, for which she received a schedule award.

**FACTUAL HISTORY**

On September 23, 1992 appellant, then a 24-year-old letter carrier, filed a claim alleging that her repetitive job duties caused injury to both arms and hands. The Office accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent right wrist release on October 10, 2001 and a left wrist release on October 9, 2002. She returned to a limited-duty position on January 10, 2002.

On September 1, 2003 appellant filed a claim for a schedule award. In a decision dated October 19, 2004, the Office granted schedule awards for five percent impairment to both the left and right upper extremities. By decision dated November 4, 2005, an Office hearing representative vacated the October 19, 2004 decision and remanded the case for further medical development. She found that the Office medical adviser did not adequately explain the difference in ratings between a May 1, 2003 report of Dr. Nicholas Diamond, an attending osteopath, and the March 8, 2004 report of Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and Office referral physician. Dr. Diamond rated 48 percent permanent impairment to the left upper extremity and 22 percent impairment of the right upper extremity. Dr. Hanley found 10 percent impairment to the left upper extremity and no measurable impairment to the right upper extremity.

By decision dated January 24, 2006, the Office granted an additional schedule award for five per cent impairment to the left upper extremity. By decision dated April 3, 2006, an Office hearing representative found a conflict of medical opinion existed between Dr. Diamond and Dr. Hanley and remanded the case for an impartial medical examination.

The Office referred appellant to Dr. John B. Fenning, a Board-certified orthopedic surgeon, for an impartial medical examination. In an October 2, 2006 report, Dr. Fenning noted appellant was seen on May 15 and September 11, 2006. He advised that two examinations were performed because nerve conduction studies and an electromyogram were performed on August 10, 2006. Dr. Fenning noted the history of injury and presented examination findings. He noted her history indicated that she had pain in her right arm, referred from the wrist area, up the volar surface of the arm to the elbow. On examination, there was a sense of weakness in the use of this arm. However, there was no dysesthesia to indicate a continued pressure on the median nerve and she did not have any apparent pathology superior to the elbow that would create persistent hand problems. The fingers of the right hand had full range of motion with a normal thenar eminence. Dynamometer grip strength readings between 18 and 19 were noted along with a negative Tinel's sign, a questionable Phalen's sign, and normal two point discrimination and no sensory disturbance. For the left arm, Dr. Fenning noted complaints of numbness and tingling in the thumb and right ringer, mildly positive Tinel's sign, equivocal Phalen's sign, no restriction on range of motion of the wrists and fingers, dynamometer grip strength readings between 22 and 24 and decreased sensation to light touch pinprick in the median nerve distribution. He noted the nerve condition study results were normal.

Dr. Fenning concluded that appellant had dysesthesias of the left median nerve distribution but right arm symptoms were vague and more of an aching sensation and weakness. Under Table 16-10 the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), he determined that she had a Grade 3 sensory deficit which corresponded to distorted superficial tactile sensibility and some interference with normal activities. Dr. Fenning concluded that appellant had 15 percent left arm impairment. For the right arm, he stated it was more difficult to evaluate as it is primarily one of pain with some muscle weakness. Dr. Fenning stated it was difficult to find a specific table into which the impairment fit, but cited Table 18-7 and assessed a pain-related impairment under the second category to find five percent impairment of the right arm.

On October 27, 2006 an Office medical adviser reviewed Dr. Fenning's report. He noted a Grade 3 sensory deficit of the left arm corresponded to 15 percent impairment rating by using Table 16-15, page 492, in association with Table 16-10, page 482. He further concurred with the right arm rating of five percent finding that, based on findings in Dr. Fenning's report, it complied with scenario two on page 495 of the A.M.A., *Guides*.

By decision dated November 2, 2006, the Office granted schedule awards for an additional 5 percent of the left arm, for a total impairment of 15 percent of the left arm and 5 percent of the right arm.

By decision dated June 4, 2007, an Office hearing representative affirmed the decision. By decision dated August 29, 2007, the Office denied appellant's request for reconsideration without performing a merit review. Appellant appealed to the Board. By order dated November 21, 2008, the Board noted that the Office had not transmitted the record and remanded the case to the Office to reconstruct and properly assemble the case record and to issue a new decision.<sup>1</sup>

By decision dated January 2, 2009, the Office found that appellant had no more than 15 percent impairment of the left arm and 5 percent impairment of the right arm. It further found there was no evidence that the Office improperly bypassed physicians on the Physician Directory System (PDS) registry or otherwise compromised the impartiality of the selection process.

On January 27, 2009 appellant requested an oral hearing that was held on June 22, 2009. During the hearing, appellant's counsel argued the record did not establish that Dr. Fenning was properly selected from the PDS. Counsel further argued that Dr. Fenning failed to provide range of motion measurements of the wrists and fingers and failed to explain his method for calculating a 15 percent left arm impairment due to sensory deficit. Counsel asserted that it was inappropriate for the Office medical adviser to provide rationale for Dr. Fenning's conclusion in this regard.

By decision dated August 7, 2009, an Office hearing representative affirmed the January 22, 2009 decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulations<sup>3</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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.<sup>4</sup> For consistent results and to ensure equal justice under the law

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<sup>1</sup> Docket No. 08-243 (issued November 21, 2008).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>5</sup>

Section 8123(a) of the Act provides in pertinent part: 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 to make an examination.<sup>6</sup> When there are 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 on a proper factual background, must be given special weight.<sup>7</sup>

It is well established that Office procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.<sup>8</sup> The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.<sup>9</sup> These procedures contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and the Office.<sup>10</sup> Moreover, the reasons for the selection made must be documented in the case record.<sup>11</sup>

### ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized appellant's surgical releases for both wrists. Appellant requested a schedule award. Due to a conflict between Dr. Diamond an attending physician who found 48 percent impairment of the left arm and 22 percent of the right arm, and Dr. Hanley, an Office referral physician, who found 10 percent impairment of the left arm and no impairment of the right arm, the Office referred appellant to Dr. Fenning for an impartial examination. In an October 2, 2006 report, Dr. Fenning found that appellant had 15 percent impairment to the left arm and 5 percent impairment to the

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<sup>5</sup> *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>8</sup> *See LaDonna M. Andrews*, 55 ECAB 301 (2004).

<sup>9</sup> *See Raymond J. Brown*, 52 ECAB 192 (2001).

<sup>10</sup> *Id.* *See also Miguel A. Muniz*, 54 ECAB 217 (2002).

<sup>11</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). A claimant may ask to participate in the selection of the impartial medical specialist under certain conditions; however, no request was made in this case.

right arm. Following review by an Office medical adviser, the Office awarded appellant an impairment rating of 15 percent left arm and 5 percent right arm.

On appeal, and before the Office, appellant's counsel contends that the Office did not properly select Dr. Fenning as the impartial medical specialist. Under its procedures, the Office claims examiner is to assure that the impartial medical specialist is selected in conformance with the PDS from those Board-certified specialists who are qualified and available to conduct the examination. The procedure manual provides that the case file is to be supplemented with documentation of those instances in which a physician was contacted and declined the referral or examination is not otherwise feasible. The Office is to document in the case record how the rotational procedures were followed.<sup>12</sup>

The evidence of record provides sufficient documentation pertaining to the selection of Dr. Fenning as the impartial medical specialist. The evidence of record includes a log of 14 physicians the Office contacted from PDS on April 14, 2006 prior to selecting Dr. Fenning on April 17, 2006. The log noted that six physicians no longer did impartial examinations, one physician was no longer in practice, wrong numbers were listed for several physicians, one physician's office was closed for Easter holiday; another physician's office required prepayment; two physician's offices were skipped because only voice mail was received, and no contact information was available for one physician. With regard to the physicians who were passed over, the reasons why they were bypassed were properly annotated. There is no evidence to establish that the Office failed to follow proper procedures in selecting Dr. Fenning.<sup>13</sup> While appellant contends that bypassing a physician because only voice mail was received is not a proper reason, the Office claims scheduler reasonably exercised discretion in passing over one physician on the directory to the next. The evidence does not establish that the Office improperly bypassed physicians in the selection process without sufficient justification.

On appeal and before the Office, appellant's attorney contends that Dr. Fenning's report is insufficient to carry the weight of the medical evidence. In finding that appellant had 15 percent impairment of the left arm, Dr. Fenning determined that under Table 16-10 of the A.M.A., *Guides*, appellant had a Grade 3 condition which corresponded to distorted superficial tactile sensibility and some interference with normal activities. For the right arm, Dr. Fenning found that appellant had pain and muscle weakness for which five percent impairment was warranted. He indicated that this was consistent with a pain-related impairment under the second category of Table 18-7 of the A.M.A., *Guides*. An Office medical adviser reviewed Dr. Fenning's findings and found his left arm impairment calculation of 15 percent was consistent with a grade 3 sensory deficit per Table 16-10 based on the affected nerve per Table 16-15.<sup>14</sup> While Dr. Fenning did not specifically reference Table 16-15, the Office medical adviser was able to utilize his findings and apply them to the appropriate A.M.A., *Guides* tables. Appellant's attorney argues that Dr. Fenning did not assess appellant's thumb weakness and

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<sup>12</sup> See *id.* at Chapter 3.500.4(b)(7).

<sup>13</sup> Regarding the physician who required prepayment, the Board notes that Office procedures contemplate that payment is made after completion of a referral. See *id.* at Chapter 3.500.5.

<sup>14</sup> See A.M.A., *Guides* 482, 492.

failed to give range of motion figures. However, Dr. Fenning's examination reflects that he noted the fingers of the right hand had full range of motion and he saw no restriction in range of motion of the wrists or fingers. Furthermore, the Board has found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome be rated on motor and sensory deficits only.<sup>15</sup> The Office medical adviser also found that Dr. Fenning's finding of five percent right arm impairment was consistent with scenario two for rating carpal tunnel syndrome at page 495 of the A.M.A., *Guides*.<sup>16</sup> The Board finds that Dr. Fenning provided sufficient findings from examination and sufficient detail in accordance with the A.M.A., *Guides*.<sup>17</sup>

The Board finds that Dr. Fenning's report is sufficiently well rationalized and based upon a proper factual background such that it represents the weight of the medical opinion evidence and establishes that appellant has no greater than 15 percent left upper extremity impairment and no greater than 5 percent right upper extremity impairment.

### CONCLUSION

The Board finds that appellant has no more than 15 percent permanent impairment to the left upper extremity and 5 percent permanent impairment to the right upper extremity for which she has received a schedule award.

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<sup>15</sup> See *T.A.*, 59 ECAB \_\_\_ (Docket No. 07-1836, issued November 20, 2007).

<sup>16</sup> This provision allows for up to five percent impairment for normal sensibility and opposition strength with abnormal sensory and/or motor latencies. A.M.A., *Guides*, at 495.

<sup>17</sup> See *I.H.*, 60 ECAB \_\_\_ (Docket No. 08-1352, issued December 24, 2008) (in schedule award cases, an Office medical adviser may review an impartial specialist's report to verify the correct application of the A.M.A., *Guides* and confirm the percentage of permanent impairment).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 7, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 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