United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 10-254**
	)	**Issued: October 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Brick, NJ, 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 November 3, 2009 appellant, through her attorney, filed a timely appeal of an August 6, 2009 Office of Workers' Compensation Programs' merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has more than 24 percent impairment of her right upper extremity for which she has received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.[1] On October 7, 2002 appellant, then a 41-year-old letter carrier, twisted her left ankle and fell injuring her right wrist and elbow when exiting from her employing establishment vehicle. The Office accepted her claim for left ankle and right wrist sprains and right lateral epicondylitis. On October 27, 2003 appellant's attending

[1] Docket No. 06-1587 (issued November 20, 2006).

physician, Dr. Arthur Vasen, a surgeon, performed a right lateral epicondylar debridement and reattachment with synovectomy of the radiocapitellar joint. In a separate claim, the Office accepted that appellant sustained a work-related aggravation of her epicondylitis on April 1, 2004. On July 13, 2004 Dr. Vasen found that appellant had reached maximum medical improvement.

In a report dated September 23, 2004, Dr. David Weiss, an osteopath, addressed her permanent impairment for schedule award purposes. Dr. Weiss found that appellant exhibited a left lower extremity limp, tenderness of the lateral epicondyle in the right elbow, right elbow flexion of 145 degrees, right elbow pronation of 60 degrees and right elbow supination of 90 degrees. He noted that grip strength testing on the right was 10 kilograms and 18 kilograms on the left. Dr. Weiss found that muscle strength testing of the right elbow revealed strength of four out of five in the pronators and supinators. On manual muscle testing right wrist dorsiflexion and extension were four out of five. Dr. Weiss noted appellant's right upper arm circumference was 24 centimeters while her left upper arm circumference was 25.5 centimeters. Appellant's right lower arm circumference was 21 centimeters and 22 centimeters on the left. Regarding appellant's right wrist, Dr. Weiss found appellant exhibited full range of motion with tenderness. He examined appellant's left ankle and found anterior talofibular ligament tenderness as well as tenderness over the lateral malleolus. Manual muscle testing revealed four out of five strength in the ankle invertus.

Dr. Weiss rated 10 percent impairment of the right upper extremity due to resection arthroplasty, 1 percent impairment due to loss of elbow supination, 20 percent impairment due to loss of grip strength and 3 percent impairment due to pain. He found a total 32 percent impairment of the right arm. In regard to appellant's left lower extremity, Dr. Weiss found that appellant had five percent impairment due to loss of muscle strength and three percent impairment due to pain. He rated a total left leg impairment rating of eight percent.

The Office medical adviser reviewed appellant's claim on January 13, 2005 and agreed with Dr. Weiss' left lower extremity impairment rating. However, he found that appellant was not entitled to 10 percent impairment due to resection arthroplasty or excision of the radial head as this was not the surgery performed by Dr. Vasen. He noted that debridement of the extensor tendon right elbow involved soft tissue only and was not an impairment under the American Medical Association, *Guides to the Evaluation of the Permanent Impairment*. The Office medical adviser concurred with the 1 percent impairment due to loss of elbow pronation, 20 percent impairment due to loss of grip strength, and 3 percent due to pain, for a right upper extremity impairment rating of 24 percent.[2]

By decision dated December 27, 2006, the Office found that appellant had 8 percent impairment of her left leg and 24 percent impairment of her right arm.

Appellant appealed this decision to the Board. In a July 9, 2007 decision, the Board found that appellant was not entitled to 10 percent impairment due to resection arthroplasty as

[2] This document was not included in the record at the time of the Board's November 20, 2003 order, setting aside the hearing representative's February 14, 2006 decision and remanding for a *de novo* decision. Docket No. 06-1587 (issued November 20, 2003).

Dr. Vasen did not perform this surgery. The Board found that neither Dr. Weiss nor the Office medical adviser provided an explanation for the usage of grip strength or for the inclusion of pain-related impairment under Chapter 18 of the A.M.A., *Guides* in their respective impairment ratings and that further development of the medical evidence was required to establish the degree of appellant's right arm impairment.[3] The Board noted that neither physician explained the appropriateness of manual muscle testing in evaluating appellant's left lower extremity by describing other observable pathologic signs and medical evidence.[4] Regarding the application of the pain section of Chapter 18 of the A.M.A., *Guides*, again neither physician explained why appellant's pain-related impairment could not be adequately addressed by applying Chapter 17 of the A.M.A., *Guides* which addresses lower extremity impairment and therefore did not justify the application of Chapter 18 of the A.M.A., *Guides* to appellant's left lower extremity. The facts of the case as set out in the Board's prior decision are incorporated herein by reference.[5]

The Office referred appellant for a second opinion evaluation with Dr. David Rubinfeld, a Board-certified orthopedic surgeon, on January 25, 2008. In a February 7, 2008 report, Dr. Rubinfeld noted appellant's history of injury and reported normal range of motion of the right shoulder, elbow and wrist as well as the left lower extremity. He found normal motor strength in all extremities. Dr. Rubinfeld found that appellant had decreased sensation in the right middle finger. He opined that appellant's right elbow discomfort was related to her employment injury. Dr. Rubinfeld rated two percent impairment of the right upper extremity due to pain based on section 15.5 of the A.M.A., *Guides,*[6] and found no impairment of the left ankle.

The district medical adviser, Dr. Andrew A. Merola, a Board-certified orthopedic surgeon, reviewed Dr. Rubinfeld's report on March 12, 2008. He agreed that appellant had no loss of range of motion of the right upper extremity or the left lower extremity. Dr. Merola noted that Dr. Rubinfeld awarded appellant two percent impairment due to pain, but found that he did not cite to the correct provision of the A.M.A., *Guides*, noting that this was likely a typographical error. He concluded that she should be rated under Chapter 18, page 574 at three percent.

By decision dated March 26, 2008, the Office denied appellant's claim for additional schedule awards based on Dr. Rubinfeld's report.

Appellant, through her attorney, requested an oral hearing. He appeared at the oral hearing on July 16, 2008 and noted that the left leg impairment was no longer contested. Counsel asserted that Dr. Rubinfeld failed to provide specific grip strength measurements or cite to the appropriate provisions of the A.M.A., *Guides*. Appellant added her comments to Dr. Rubinfeld's report and alleged that he failed to assess range of motion and that the entire examination took less than five minutes.

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[3] *See Frantz Ghassan*, 57 ECAB 349 (2006).

[4] A.M.A., *Guides* 531, 17.2e.

[5] Docket No. 07-765 (issued July 9, 2007).

[6] A.M.A., *Guides* 388, Chapter 15.5, Diagnosis-Related Estimates of the Thoracic Spine.

By decision dated October 6, 2008, the hearing representative set aside the March 17, 2008 decision and remanded the case for clarification of Dr. Rubinfeld's report regarding strength testing. In a letter dated November 17, 2008, the Office requested that Dr. Rubinfeld confirm whether grip or pinch strength testing was done with dynamometer and to provide specific results. Dr. Rubinfeld reexamined appellant on January 2, 2009 and again reported normal range of motion figures for all extremities. He provided grip and pinch strength measurements on the right hand. Dr. Rubinfeld stated, "Specifically, with regard to the right elbow, the percentage of impairment is two percent of the right upper extremity due to pain (section 16.5).[7] Based on section 16.8 which states that 'decreased strength cannot be rated in the presence of … painful conditions…,' there is no change in this rating due to the findings on grip and pinch strength measurements."

Dr. Merola reviewed this report on February 1, 2009 and stated:

> "A new examination documented by Dr. Rubinfeld is essentially consistent and concordant with the prior examination except for the fact that his pain rating is one percent less than the pain rating that Chapter 18 would give the claimant. In order to give this claimant the most appropriate schedule loss of use secondary to chronic pain, I would indicated that Chapter 18, [F]igure 18-1, page 574 be utilized and therefore a three percent total schedule loss of use secondary to chronic pain is appropriate."

By decision dated March 3, 2009, the Office denied appellant's claim for an additional schedule award based on Dr. Rubinfeld's reports.

Appellant, through her attorney, requested an oral hearing. At the oral hearing on June 10, 2009 he argued that Dr. Rubinfeld's report was not valid as he did not adequately evaluate loss of strength. Appellant submitted a statement that she utilized maximum effort in grip and pinch strength testing despite her pain.

On July 3, 2009 Dr. Weiss reviewed the grip and pinch strength measurements found by Dr. Rubinfeld and stated that appellant could effectively apply maximal force in utilizing the grip and pinch tests. He noted that Dr. Rubinfeld's measurements correlated to 42 percent deficit of grip strength on the right, 20 percent impairment under the A.M.A., *Guides*. Dr. Weiss opined that appellant had 32 percent impairment due to resection arthroplasty, loss of supination, right grip strength deficit and pain-related impairment.

By decision dated August 6, 2009, the Branch of Hearings and Review affirmed the March 3, 2009 decision, finding that Dr. Rubinfeld's report represented the weight of the medical opinion evidence.

[7] *Id.* at 480, 16.5 Impairment of the Upper Extremities Due to Peripheral Nerve Disorders.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulations[9] 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, 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.[10]

The Board notes that, while impairment due to peripheral nerve injury may not be combined with impairment for loss of muscle strength,[11] a claimant may be entitled to a schedule award for one or the other.[12] It is the responsibility of the evaluating physician to explain in writing why a particular method to assign the impairment rating was chosen. When uncertain about which method to chose, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating.[13]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[14]

The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners 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*.[15]

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[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] A.M.A., *Guides*, 5th ed. (2001).

[11] *Id.* at 526, Table 17-2.

[12] *Tara L. Hein*, 56 ECAB 431 (2005).

[13] *Id.*; A.M.A., *Guides* 526.

[14] *Tommy R. Martin*, 56 ECAB 273 (2005).

[15] Federal Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

ANALYSIS

Appellant received a schedule award for 24 percent impairment of her right upper extremity. In the prior appeal, the Board found that neither Dr. Weiss nor the district medical adviser properly correlated appellant's physical findings with the A.M.A., *Guides*.

On remand, the Office referred appellant to Dr. Rubinfeld, a Board-certified orthopedic surgeon, who examined appellant and made very limited positive physical findings including numbness in the middle finger of the right hand and pain in the right elbow. Dr. Rubinfeld consistently opined that appellant had no loss of range of motion of the right upper extremity. He concluded that appellant was not entitled to an impairment rating due to loss of strength as she also had pain based on his understanding of the A.M.A., *Guides*. Dr. Rubinfeld rated appellant's pain based on a peripheral nerve disorder as he cited to Chapter 16.5 of the A.M.A., *Guides*, but did not provide the specific nerve, the grade of impairment of the nerve or did not otherwise explain how he reached his impairment for pain of two percent.

The district medical adviser, Dr. Merola, a Board-certified orthopedic surgeon, relied on Chapter 18 of the A.M.A., *Guides*. As noted, this chapter and the maximum value of three percent for pain chronic pain should generally not be used 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*. The Board finds that instead of awarding three percent impairment due to pain in accordance with Chapter 18, the Office should have requested clarifying information from Dr. Merola regarding the specific peripheral nerve involved, the grade of the involvement and thus calculate appellant's pain impairment in accordance with the A.M.A., *Guides*.

On July 3, 2009 Dr. Weiss again opined that appellant had 32 percent impairment due to resection arthroplasty, loss of supination, right grip strength deficit and pain-related impairment. As noted in the Board's prior decision, appellant did not undergo a resection arthroplasty. Furthermore, loss of range of motion and loss of strength cannot be combined unless based on unrelated etiologic or pathomechanical causes,[16] therefore grip strength deficit should not be combined with loss of supination. Finally, the A.M.A., *Guides* state, "Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities or the absence of parts … that prevent effective application of maximal force in the region being evaluated."[17] (Emphasis in the original.) Dr. Weiss did not explain his rating in light of these provisions of the A.M.A., *Guides*; therefore his rating departs with the A.M.A., *Guides* and is of diminished probative value.

On appeal, appellant's attorney alleged that there was an unresolved conflict of medical opinion evidence between Drs. Rubinfeld, Weiss and the district medical adviser. As none of the physicians have provided a detailed, well-rationalized report which comports with the A.M.A., *Guides*, there is no conflict of medical opinion. The Board finds that the case is not in posture

[16] A.M.A., *Guides* 508.16.8a Principles.

[17] *Id.*

for decision and will be remanded for a new second opinion referral. After such other development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that there is no medical opinion evidence accurately correlating appellant's impairments with the A.M.A., *Guides* and offering a detailed explanation for the impairment method selected whether pain or loss of strength. The case requires further development consistent with this decision.[18]

ORDER

IT IS HEREBY ORDERED THAT August 6, 2009 decision of Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: October 8, 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

[18] The Board notes that the recalculation of appellant's schedule award will be based on the sixth edition of the A.M.A., *Guides*. FECA Bulletin No. 09-03 (issued March 15, 2009).