

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

G.E., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Monmouth, NJ, Employer**

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**Docket No. 10-81
Issued: September 17, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 13, 2009 appellant filed a timely appeal from July 24, 2009 merit decision of the Office of Workers' Compensation Programs. Under 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 an 11 percent permanent impairment to her right upper extremity.

FACTUAL HISTORY

Appellant, a 53-year-old supervisory contract specialist, sustained a fall on her right side on August 12, 2003. She filed a claim for benefits on August 14, 2003, which the Office accepted for fracture of the radial head in the right arm, right wrist sprain, traumatic arthropathy of the right hand, right trigger finger and right hip and thigh sprain. Arthroscopic surgery was authorized.

In a report dated May 14, 2007, Dr. David O. Weiss, an osteopath, found that appellant had a 38 percent right upper extremity impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). He stated on examination that she had tenderness over the carpometacarpal joint, with resisted thumb extension graded at a four plus out of five. Dr. Weiss found that grip strength testing performed via Jamar hand dynamometer at level 3 revealed 32 kilograms (kg) on the right versus 12 kg on the left, which equated to a 62.5 percent strength deficit to the right hand. He further found that pinch key unit testing measured 8 kg on the right versus 5 kg on the left; three-point pinch measured 7 kg on the right versus 10 kg on the left. Dr. Weiss stated that appellant had a perceived sensory deficit to cotton whisk sensation over the radial nerve distribution of the right wrist and hand. He measured wrist joint circumference of 19 centimeters (cm) on the right versus 18.5 cm on the left; a lower arm circumference of 26.5 cm on the right versus 27.5 cm on the left.

Dr. Weiss calculated his 38 percent right upper extremity rating based on the following factors: a 4 percent impairment for loss of right wrist dorsiflexion and a 4 percent impairment for loss of right wrist palmar flexion under Figure 16-28 at page 467 of the A.M.A., *Guides*; a 2 percent impairment for right wrist ulnar deviation at Figure 16-31, page 469 of the A.M.A., *Guides*, for a total 10 percent range of motion impairment of the right wrist; a 1 percent impairment for Grade 4 sensory deficit of the right radial nerve at Table 16-10, page 482 and Table 16-15, page 492 of the A.M.A., *Guides* and a 30 percent impairment for loss of right grip strength at Table 16-34, page 509 of the A.M.A., *Guides*. Using the Combined Values Chart at page 604, he rated a total 38 percent right upper extremity impairment. Dr. Weiss found that appellant reached maximum medical improvement on May 14, 2007.

In a December 28, 2007 report, Dr. Arnold T. Berman, Board-certified in orthopedic surgery and an Office medical adviser, reviewed Dr. Weiss' report and found that appellant had an 11 percent permanent impairment rating for the right upper extremity. He concurred with Dr. Weiss' findings and conclusions with regard to the 10 percent range of motion impairment of the right wrist and the 1 percent impairment for Grade 4 sensory deficit of the right radial nerve. However, Dr. Berman rejected Dr. Weiss' 30 percent impairment for grip strength based on section 16.8a of the A.M.A., *Guides*,¹ which states that decreased strength cannot be rated in the presence of painful conditions because such conditions prevent the effective application of maximum force in the region being evaluated.

The Office found that there was a conflict in the medical evidence regarding the percentage of impairment in appellant's right upper extremity used under the fifth edition A.M.A., *Guides*. It scheduled her for an impartial medical examination with Dr. Elliott C. Semet, Board-certified in orthopedic surgery. In an April 22, 2008 report, Dr. Semet found that appellant had an 11 percent permanent impairment of the right upper extremity under the A.M.A., *Guides*. He measured limitations of dorsi and palmar flexion of approximately 35 to 40 degrees with pain generated beyond 35 degrees for a final measurement of a total arc motion of 75 degrees. Dr. Semet calculated radial deviation of approximately 18 degrees and ulnar deviation of 20 degrees. He advised that appellant displayed no pain at the extremes of motion

¹ A.M.A., *Guides* 508.

with the exception of dorsi and palmar flexion; he noted no pain with ulnar deviation, pressure over the triangular fibrocartilage or any other provocative stress testing of the triangular fibrocartilage.

Dr. Semet had appellant undergo grip strength testing with a hand dynamometer at level 3. He stated that testing was inconsistent on repetitive tries with maximal medical grip strength significantly less than rapid exchange testing; with rapid exchange, he noted that she was able to produce an extra 25 pounds of grip strength. Dr. Semet related that his examination of three-point pinching and key pinching was unreliable as appellant was clearly watching the amount of pressure she put forth. He stated that, while her sensory examination showed a perceived sensory deficit in the small area of radial sensory isolated to the index finger, she had equal sensation to the blue monofilament bilaterally. Dr. Semet noted that the difference in her wrist circumference measured one-quarter of an inch; her maximum grip strength improved from 25 to 40 pounds with a maximum grip strength obtained at 65 pounds on the left side.

Dr. Semet concluded based on his examination, the lack of consistency appellant showed and section 16.8a of the A.M.A., *Guides*, that she had no ratable impairment based on decreased strength. He concurred with Drs. Weiss and Berman that she was entitled to a 10 percent range of motion impairment of the right wrist, based on 8 percent for dorsi and palmar flexion deficit and 2 percent for loss of ulnar deviation and a 1 percent impairment for Grade 4 sensory deficit of the right radial nerve based on the applicable figures at pages 467-69² of the A.M.A., *Guides*.

In an August 25, 2008 report, an Office medical adviser agreed with Dr. Semet's opinion that appellant had an 11 percent impairment of her right upper extremity. He stated that loss of motion of 35 to 40 degrees, flexion and palmar flexion combined, at Figure 16-28, page 467, of the A.M.A., *Guides* yielded a total eight percent right wrist range of motion impairment. The Office medical adviser also stated that pursuant to Figure 16-28, page 467 of the A.M.A., *Guides* an ulnar deviation of 20 degrees equated to a two percent impairment. Lastly, he noted a small area of sensory deficit on the ulnar side of the index finger, which yielded a 1 percent sensory deficit impairment at Table 16-10, page 492 of the A.M.A., *Guides*, for a total 11 percent right upper extremity impairment.

By decision dated November 21, 2008, the Office granted appellant a schedule award for an 11 percent permanent impairment of the right upper extremity for the period April 22 to December 18, 2008 for a total of 34.32 weeks of compensation. It found that Dr. Semet's referee medical opinion represented the weight of the medical evidence.

By letter dated December 5, 2008, appellant's attorney requested an oral hearing, which was held on April 30, 2009.

By decision dated July 24, 2009, an Office hearing representative affirmed the November 21, 2008 Office decision.

² This constitutes either a misstatement or typographical error on the part of Dr. Semet; the figures he relied on are located at pages 467-69 of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ 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 loss of use.⁴ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* fifth edition as the standard to be used for evaluating schedule losses.⁵ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.

In situations where there are opposing medical reports 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.⁶

ANALYSIS

In this case, the Office referred appellant to Dr. Semet, the impartial examiner, who determined that she had an 11 percent permanent impairment of the right upper extremity under the A.M.A., *Guides*.⁷ Dr. Semet concurred with Drs. Weiss and Berman that appellant was entitled to a 10 percent range of motion impairment of the right wrist (based on 8 percent for dorsi and palmar flexion deficit and 2 percent for loss of ulnar deviation) and a 1 percent impairment for Grade 4 sensory deficit of the right radial nerve based on the applicable figures at pages 467-69 of the A.M.A., *Guides*.

In an August 25, 2008 report, an Office medical adviser agreed with Dr. Semet's opinion that appellant had an 11 percent impairment of her right upper extremity. He stated that loss of motion of 35 to 40 degrees, flexion and palmar flexion combined, at Figure 16-28, page 467, of the A.M.A., *Guides* yielded a total eight percent right wrist range of motion impairment. The Office medical adviser also stated that pursuant to Figure 16-28, page 467 of the A.M.A., *Guides* an ulnar deviation of 20 degrees equated to a two percent impairment. Lastly, he noted that the small area of sensory deficit on the ulnar side of the index finger equated to a 1 percent sensory deficit impairment at Table 16-10, page 492 of the A.M.A., *Guides*, for a total 11 percent right upper extremity impairment.

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

⁴ *Id.* at § 8107(c)(19).

⁵ 20 C.F.R. § 10.404.

⁶ *See Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁷ It is well established that the opinion of an impartial medical specialist is to be given special weight. *See Anna M. Delaney*, 53 ECAB 384 (2002).

However, Dr. Semet and the Office medical adviser in his August 25, 2008 report rejected Dr. Weiss' 30 percent impairment rating for grip strength deficit based on section 16.8a of the A.M.A., *Guides*,⁸ which states:

“In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the A.M.A., *Guides*, the loss of strength may be rated separately.... If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise the impairment ratings based on objective anatomic findings take precedence. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region to be evaluated.”⁹

The Board notes that Dr. Semet, the impartial medical examiner, performed grip strength testing with a hand dynamometer, which was inconsistent and unreliable with repetitive tries attempted. He opined that appellant was modulating the amount of pressure she exerted. Dr. Semet concluded that, based on his examination, the lack of consistency she showed and section 16.8a of the A.M.A., *Guides*, she had no ratable impairment based on decreased strength. The Board finds that Dr. Semet's opinion was sufficiently thorough, well rationalized and factually supported to merit the special weight of an impartial medical examiner. The Office medical adviser reviewed Dr. Semet's report and found that appellant was not entitled to more than an 11 percent award for his right upper extremity impairment. Based on the reports from Dr. Semet and the Office medical adviser, which were rendered in conformance with the applicable figures and tables of the A.M.A., *Guides*, the Office properly found in its November 21, 2008 decision that appellant had an 11 percent permanent impairment of the right upper extremity.

Counsel contends on appeal that Dr. Semet's report is not rationalized and that he failed to use appropriate methods to measure appellant's range of motion impairment. He further contends that the physician cited page numbers but did not provide specific cites to the applicable tables of the A.M.A., *Guides* on which he relied. As discussed, however, Dr. Semet's report is thorough, well rationalized and based on an accurate factual and medical history; consequently, his report represents the weight of the medical evidence. He indicated a 10 percent impairment for loss of range of motion, the same rating provided by every physician of record in this case. As noted above, Dr. Semet's rating was supported by his examination and appropriate testing procedures. While he did not indicate the precise tables or figures of the A.M.A., *Guides* on which he relied, the Office medical adviser reviewed his report, utilized his findings and conclusions and properly applied them to Figure 16-28 at page 467 and Table 16-10 at page 492 of the A.M.A., *Guides* in rendering his 11 percent right upper extremity impairment rating.

⁸ A.M.A., *Guides* 508.

⁹ *Id.*

Counsel also contends on appeal that Dr. Semet was not properly selected from the Physician's Directory System (PDS) and was not chosen in accordance with proper procedures.¹⁰ He argues that the Office intended to select Dr. Semet as the impartial medical specialist and therefore two physicians were bypassed for no telephone number or incorrect telephone number. Counsel notes on appeal that he was able to confirm the bypassed physicians' telephone numbers. His ability to "confirm" the bypassed physicians telephone numbers does not establish abuse of discretion malfeasance on the part of the Office during the actual scheduling process.¹¹

There is no other probative medical evidence establishing that appellant sustained any additional permanent impairment. The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to rate her right upper extremity impairment based on Dr. Semet's opinion, which constitutes the weight of medical opinion. The Board affirms the July 24, 2009 decision, which affirmed the November 21, 2008 schedule award decision.

CONCLUSION

The Board finds that appellant has no more than an 11 percent impairment of her right upper extremity.

¹⁰ To ensure the complete independence of physicians that are selected as impartial medical specialists, the Office developed specific procedures to safeguard against any possible appearance that the selected physician's opinion is biased or prejudiced. Impartial medical specialists are selected from among Board-certified specialists in the appropriate geographical area on a strict rotating basis to negate the appearance that any preferential treatment exists between a particular physician and the Office. The Federal (FECA) Procedure Manual provides that the selection of an impartial medical specialists is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). *See also Willie M. Miller*, 53 ECAB 697 (2002).

¹¹ *R.B.*, 61 ECAB ___ (Docket No. 09-1786, issued July 1, 2010).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board