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

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| **A.M., Appellant** | ) | |
| **and** | ) | **Docket No. 10-360** |
| | ) | **Issued: September 16, 2010** |
| **U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On November 20, 2009 appellant, through her attorney, filed a timely appeal from an August 14, 2009 merit decision of the Office of Workers' Compensation Programs. 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 a four percent right arm permanent impairment and a three percent left arm impairment.

### *FACTUAL HISTORY*

The case was before the Board on a prior appeal.[1] In a February 2, 2007 decision, the Board set aside a March 3, 2006 Office decision and remanded the case for further development regarding a schedule award for the upper extremities, finding that the medical evidence of record

[1] Docket No. 06-1962 (issued February 2, 2007).

was insufficient to resolve the issue. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.[2]

The Office referred appellant, medical records and a statement of accepted facts to Dr. Kevin Handley, an orthopedic surgeon, for a second opinion examination. In a report dated April 4, 2007, Dr. Handley provided a history and results on examination. He stated that "a reasonable practitioner of orthopedic surgery would be hard pressed to suggest that there is any residual impairment in the upper extremities related to a cervical strain and scalp contusion that occurred February 3, 1986." Dr. Handley noted that appellant had mild shoulder range of motion limitation, but found it was not related to the employment injury. He opined that appellant had no employment-related permanent impairment.

By decision dated May 10, 2007, the Office found appellant was not entitled to an increased schedule award. Appellant requested a hearing before an Office hearing representative. By decision dated August 1, 2007, an Office hearing representative found a conflict in the medical evidence existed. The hearing representative found that Dr. Handley did not provide a thorough report of physical examination and offered "no greater clarity" than the reports of appellant's physician or the Office medical adviser, which the Board had previously found to be of little probative value. According to the hearing representative, this resulted in a conflict in the medical evidence.

Appellant was referred for a referee examination by Dr. Menachem Meller, a Board-certified orthopedic surgeon. In a report dated December 6, 2007, Dr. Meller provided a history and results on examination. He noted subjective complaints of pain with "no verifiable orthopedic findings. He does have numerous signs of inappropriate illness behavior, nonanatomic complaints, nonphysiologic findings." Dr. Meller noted shoulder range of motion limitation, indicating that it was not related to a scalp laceration or soft tissue neck injury. In response to a question as to whether appellant had more than a seven percent permanent impairment to the arms, he stated it was "not likely to within a reasonable degree of medical certainty. Considering the inconsistency, I am likewise unwilling to add any additional impairment as clearly it is not based on objective data."

In a report dated January 23, 2008, an Office medical adviser reiterated his opinion that appellant had a four percent right arm impairment and a three percent left arm impairment. By decision dated February 7, 2008, the Office found appellant was not entitled to an increased schedule award.

Appellant again requested a hearing before an Office hearing representative, which was held on June 24, 2008. By decision dated August 11, 2008, the hearing representative remanded the case for further development. The hearing representative found that Dr. Meller did not identify the actual degree of permanent impairment.

[2] The accepted conditions in this case are a scalp contusion and cervical strain resulting from a February 3, 1986 employment injury. In its February 2, 2007 decision, the Board found the reports from attending osteopath Dr. Nicholas Diamond and the Office medical adviser were of little probative value.

The Office requested a supplemental report from Dr. Meller. In a report dated December 9, 2008, Dr. Meller stated that the original question posed was whether appellant had more than a total seven percent impairment and he had answered no. He further stated, "In my opinion, there were behavioral confounders present which precluded an assignation of any impairment which can be apportioned to the injury described." Dr. Meller noted that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* indicates a physician should consider such factors. He concluded, "Under these circumstances, it is my opinion that he has a zero percent impairment as a result of the accident described, at least as of the date of the evaluation performed. I was unable to attribute any of his current complaints and visible findings to the accident described and as such there is zero percent impairment attributed to his work injury."

By decision dated January 22, 2009, the Office determined that appellant was not entitled to more than the combined seven percent permanent impairment previously awarded. In a decision dated August 14, 2009, an Office hearing representative affirmed the January 22, 2009 decision.

## ***LEGAL PRECEDENT***

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[3] It is well established that the permanent impairment must be causally related to an accepted employment injury.[4] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5]

## ***ANALYSIS***

In this case the Office had declared a conflict in the medical evidence under 5 U.S.C. § 8123(a). It is evident, however, that there was no conflict in the medical evidence requiring a referee examination. The deficiencies in the reports of Dr. Diamond appellant's attending physician and the Office medical adviser were discussed in the Board's prior decision. Neither physician provided a rationalized medical opinion on the issue presented. As to the second opinion report of Dr. Handley, the Office hearing representative noted its deficiencies in the August 1, 2007 Office decision, noting the lack of physical findings or rationalized medical

[3] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[4] *Rosa Whitfield Swain*, 38 ECAB 368 (1987).

[5] *A. George Lampo*, 45 ECAB 441 (1994).

opinion. When medical reports are of diminished probative value, there is no conflict in the medical evidence warranting referral to a referee physician.[6]

The referral to Dr. Meller was as a second opinion physician and his report may constitute the weight of the evidence.[7] In this case the Board finds that it does represent the weight of the medical evidence. Dr. Meller opined that appellant had no employment-related permanent impairment and he explained his opinion. The Board notes that the accepted conditions are of the scalp and cervical spine, a shoulder condition has not been accepted as causally related to the February 3, 2006 employment injury. Dr. Meller noted a shoulder impairment, but indicated it was not causally related to the employment injury. He also noted a lack of other objective findings, as well as inappropriate illness behavior. Dr. Meller provided a rationalized medical opinion on the issue presented, based on an accurate factual and medical background.

On appeal appellant argues that Dr. Meller disregarded his own physical examination findings, such as shoulder range of motion and grip strength. But Dr. Meller explained his examination findings. As noted, he indicated that shoulder limitation was not employment related. With respect to grip strength, he felt appellant was not providing maximum effort and the results were not valid. For the above reasons, the Board finds Dr. Meller did provide a rationalized medical opinion and his report represents the weight of the medical evidence.

## ***CONCLUSION***

The Board finds that appellant has not established more than a four percent right arm and three percent left arm permanent impairment.

[6] *See Mary L. Henninger*, 52 ECAB 408 (2001).

[7] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 14, 2009 is affirmed.

Issued: September 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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