

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

D.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer

)
)
)
)
)
)
)
)

**Docket No. 10-2267
Issued: August 24, 2011**

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, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 8, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated June 2, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 ten percent permanent impairment to her right upper extremity.

FACTUAL HISTORY

Appellant, a 35-year-old letter carrier, injured her right wrist and left ankle when she stumbled while descending a flight of stairs on November 27, 2006. She filed a claim for

¹ 5 U.S.C. § 8101 *et seq.*

benefits on November 28, 2006, which OWCP accepted for left ankle sprain and right wrist sprain.

On May 21, 2007 Dr. James S. Raphael, a Board-certified orthopedic surgeon, performed arthroscopic surgery with debridement of the triangular fibrocartilage on appellant's right wrist.

On March 10, 2008 Dr. Raphael performed a right wrist arthroscopy with debridement of the triangular fibrocartilage compartment and ulnar shortening osteotomy.

An x-ray report dated April 30, 2008, noted that appellant had no hardware complication, no callus, and no change in the appearance of the osteotomy site of the mid ulna of her right arm. There was no interval change in the appearance of the right wrist, with multiple screws transfixing an osteotomy site of the mid ulna and osteotomy fragments remaining in near anatomic alignment. Appellant's bones and intercarpal joints in the right upper arm were normal in appearance, with mild negative ulnar variance.

Appellant underwent x-ray testing on May 28, 2008 which showed posteroanterior (PA) and lateral views of the right wrist. In a comparison with the April 30, 2008 x-rays, it was noted that there was an unchanged appearance of the cortical sideplate and multiple side screws traversing an osteotomy of the distal right ulna, with no hardware complications and unchanged, mild negative ulnar variance. The x-ray results also showed a small amount of new periosteal reaction presumably representing external callus formation.

In a February 27, 2009 report, Dr. Arthur Becan, Board-certified in orthopedic surgery, stated that appellant had a 12 percent right upper extremity impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (the A.M.A., *Guides*). He stated that appellant underwent grip strength testing with a Jamar Hand Dynamometer at Level III which revealed 5 kilograms of force strength in the right hand versus 25 kilograms of force strength in the left hand. A pinch key unit test showed four kilograms of force in the right hand versus six kilograms in the left hand.

Dr. Becan stated that the evaluation of impairment due to ulnar resection arthroplasty was outlined at section 15.2, *Diagnosis-Based Impairment* (DBI) at page 387 of the A.M.A., *Guides*, and section 15.2c, *Wrist* at page 390 of the A.M.A., *Guides*, which refers the examiner to section 15.3. He stated:

“In Table 15-3, Wrist Regional Grid section on Ligament/Bone/Joint (page 396), for the Diagnosis ‘Ulnar head isolated, proximal row carpectomy, or carpal bone (isolated) arthroplasty’ there is a Class 1 rating for ‘normal motion.’ This yields a default rating of 10 percent upper extremity impairment;

“Per Section 15.3a, *Adjustment Grid: Functional History* (page 406) and Table 15-7, *Functional History Adjustment: Upper Extremity* (page 406) the patient is assigned Grade Modifier 3;

“Per Section 15.3b *Adjustment Grid: Physical Examination* (page 407) and Table 15-8, *Physical Examination Adjustment: Upper Extremities* (page 708) the patient is assigned Grade Modifier 1;

“In Section 15.3c, *Adjustment Grid: Clinical Studies* (page 407) and Table 15-9, *Clinical Studies Adjustment: Upper Extremities* (page 410-411) the patient is assigned Grade Modifier 1;

“Using the adjustments above the net adjustment compared to Diagnosis Class 1 is +2 which increased the default rating to Grade E, which translates to 12 percent upper extremity impairment.

“Based on the nature of the diagnosis, impairment was also evaluated using the range of motion method as discussed in Section 15.7e, *Wrist Motion* (page 459) and in accordance with Table 15-32, *Wrist Range of Motion* (page 473) Based on the motion measurements reported there is 5 percent upper extremity impairment. However, this can not be combined with the DBI per the A.M.A. *Guides*. Therefore, because the diagnosis based rating is higher it is used to rate impairment for the right wrist. In summary, there is 12 percent upper extremity impairment for the right wrist.”

On May 12, 2009 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her right wrist.

In a report dated December 4, 2009, Dr. Morley Slutsky, a specialist in occupational medicine and OWCP’s medical adviser, found that appellant had a 10 percent impairment of her right upper extremity pursuant to the sixth edition of the A.M.A., *Guides*. He agreed with Dr. Becan’s choice for ratable diagnosis, class of impairment and grade modifier assignments for physical examination and clinical studies. Dr. Slutsky found, however, that the final net adjustment for functional history was “zero” as opposed to “+2.” He calculated a final grade of C as opposed to Dr. Becan’s grade E, and rated a right upper extremity impairment of 10 percent, as opposed to Dr. Becan’s 12 percent upper extremity impairment rating.

Dr. Slutsky explained that Dr. Becan incorrectly assessed the clinical studies modifier at two rather than one. He stated that appellant’s most recent diagnostic test, a wrist x-ray administered on May 28, 2008, showed no change in appearance of the osteotomy site of mid ulna, no callus and no hardware complication. Dr. Slutsky also found that the reported functional history differed from physical examination by two grades and that as a result functional history should not be used in the rating process. He therefore rated a one for diagnosis class, no adjustment for functional history, and one each for physical examination and clinical studies, for a net adjustment of zero; this yielded a final grade of C and a 10 percent rating for the right upper extremity.

OWCP found that Dr. Slutsky noted that the grade modifiers for functional history were two steps greater than physical examination and thus under the A.M.A., *Guides* the physical examination modifier was not to be included in the impairment rating.² It further found that the A.M.A., *Guides* provide that as to clinical studies wrist stability is based on radiographic (*i.e.*, x-ray) findings.³ OWCP stated that Dr. Slutsky reviewed x-ray studies conducted postsurgery,

² A.M.A., *Guides* 411.

³ *Id.* at 407.

while Dr. Becan did not comment on these x-ray findings; Dr. Slutsky noted that such x-ray studies showed no postoperative changes or complications.⁴

On January 27, 2010 OWCP granted appellant a schedule award for a 10 percent permanent impairment of the right upper extremity for the period February 27 to October 3, 2009, for a total of 31.2 days of compensation.

On January 11, 2011 appellant, through her attorney, requested an oral hearing, which was held on April 19, 2011.

By decision dated June 2, 2010, OWCP's hearing representative affirmed the January 27, 2010 decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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, FECA 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.⁷ 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.⁸

ANALYSIS

On appeal, appellant's attorney argues that a conflict in medical opinion exists between Dr. Becan and Dr. Slutsky concerning the nature and the extent of permanent impairment caused by the accepted right wrist sprain. Dr. Becan rated 12 percent impairment to the right upper extremity pursuant to the sixth edition of the A.M.A., *Guides* based on a grade E default rating, which yielded a 12 percent upper extremity impairment. Dr. Slutsky, OWCP's medical adviser, found that appellant had a 10 percent impairment of her right upper extremity pursuant to the

⁴ Dr. Slutsky further stated that Dr. Becan did not document that he performed valid range of motion measurements as required by section 15.7a, page 459 of the A.M.A., *Guides*, which sets forth the method for calculating range of motion impairment. He noted that the section at page 464 requires that the rating physician perform three measurements per joint motion, that the measurements are averaged and that each of the three measurements shown to be are within 10 degrees of the calculated average; he indicated that the maximum observed measurement is then used to determine the range of motion impairment.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁷ *Id.*

⁸ *Veronica Williams*, 56 ECAB 367, 370 (2005).

sixth edition of the A.M.A., *Guides*. He agreed with Dr. Becan's choice for ratable diagnosis, class of impairment and grade modifier assignments for physical examination and clinical studies. Dr. Slutsky opined, however, that the adjustment for functional history should be zero as opposed to plus 2. He further found that the clinical studies modifier should be two, not one. Dr. Slutsky based this finding on the most recent radiographic evidence for postsurgery wrist stability, the May 28, 2008 wrist x-ray, which showed no change in appearance of the osteotomy site of mid ulna, no callus and no hardware complication. This produced a default rating of grade C, yielding 10 percent right upper extremity impairment.

The Board notes that Dr. Becan explained his method for calculating an impairment of the right upper extremity, which was in conformance with the applicable protocols of the A.M.A., *Guides*. Dr. Becan examined appellant and he provided his calculations in accordance with section 15.2, *Diagnosis-Based Impairment (DBI)* at page 387 of the A.M.A., *Guides*, and section 15.2c, *Wrist* at page 390 of the A.M.A., *Guides*, and section 15.3. The opinions of record are in conflict, however, as to the modifier degree to be applied to the impairment values. The Board finds a conflict in medical opinion as to the extent of impairment to appellant's right arm caused by appellant's accepted injury.

The Board will set aside the June 2, 2010 OWCP's decision and remand the case for referral of appellant, the case record and a statement of accepted facts, to an appropriate impartial medical specialist to determine the permanent impairment to appellant's right upper extremity. After such further development of the record as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision as to the extent of permanent impairment to appellant's right arm.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2010 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: August 24, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board