United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	**Docket No. 10-285**
and	)	**Issued: January 24, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Edison, 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:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 9, 2009 appellant, through counsel, filed a timely appeal of the August 5, 2009 schedule award 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 33 percent impairment of the right upper extremity, for which she received a schedule award.

On appeal, counsel contends that the medical report of the impartial medical specialist establishes 44 percent impairment of the right arm.

FACTUAL HISTORY

This case has previously been before the Board. In an April 9, 2008 decision,[1] the Board set aside the Office's August 7, 2006 and February 23, 2007 decisions denying an increased

[1] Docket No. 07-1890 (issued April 9, 2008).

schedule award.[2] Dr. Gregory L. Cohen, an Office medical adviser, found that appellant had 33 percent impairment of the right upper extremity after Dr. Norman M. Heyman, a Board-certified orthopedic surgeon and impartial medical specialist, found that appellant had 44 percent impairment.[3] In an October 21, 2003 report, Dr. Heyman utilized the fifth edition of the A.M.A., *Guides* to determine appellant's right upper extremity impairment. The Board remanded the case to the Office to obtain a supplemental report from Dr. Heyman clarifying the right upper extremity impairment rating. The facts and history of the case as set forth in the prior decision are hereby incorporated.

On July 2, 2008 the Office requested that Dr. Heyman review the Office medical adviser's report and provide an opinion regarding whether he agreed with Dr. Cohen's impairment rating. In a September 11, 2008 report, Dr. Heyman stated that Dr. Cohen's impairment calculations were accurate, although he did not know how he calculated 10 percent impairment for appellant's employment-related right carpal tunnel syndrome and a 5 percent impairment rating for the accepted condition. He reported that this impairment was minimally based on the absence of any sensory or motor loss due to appellant's prior authorized surgery. Dr. Heyman stated that his report listed the correct tables and referred to appropriate pages with the exception of Table 16-27 which he listed as being on page 406 rather than on page 506 of the A.M.A., *Guides*. He disagreed with Dr. Cohen's opinion that no additional impairment for weakness was allowed based on section 16.8a on page 508 of the A.M.A., *Guides*. Dr. Heyman opined that appellant had minimum pain and section 16.8a provided that loss of strength could be combined with other impairments if an examiner believed that an individual's loss of strength represented an impairing factor that had not been considered adequately by other methods and if it was based on unrelated etiologic or pathomechanical classes. He stated that appellant's decreased strength was not related to the resection of her distal clavicle or due to impingement or swelling of the muscle or decreased excursion in the coracoacromioclavicular space. Appellant's weakness was related to decreased use and attention to muscle function and strengthening. He concluded that the 44 percent impairment rating was satisfactory as the employment-related carpal tunnel syndrome condition had been treated surgically and appellant had no current symptoms. But, if the Office included an additional 5 percent impairment with his 44 percent impairment rating based on Dr. Cohen's 10 percent impairment rating for the accepted carpal

[2] On April 10, 1995 appellant, then a 45-year-old inspection operations support technician, filed a traumatic injury claim assigned file number xxxxxx575 alleging that on April 4, 1995 she experienced pain in her neck, shoulder and arm when she caught a computer terminal as it fell from a counter at work. On March 11, 1997 she filed an occupational disease claim assigned file number xxxxxx840 as her request for surgery for the condition she sustained on April 4, 1995 was denied by the Office on February 10, 1997. The Office accepted both claims for right carpal tunnel syndrome, right shoulder impingement syndrome, calcific tendinitis and right shoulder and cervical sprains. It authorized arthroscopy and subacromial decompression of the right shoulder which was performed on April 18, 1996 and right carpal tunnel release which was performed on July 9, 1998. Subsequently, the Office doubled file numbers xxxxxx957 and xxxxxx840 under file number. xxxxxx840.

[3] In a July 11, 2006 medical report, Dr. Cohen combined appellant's 10 percent impairment for distal clavicle resection, 16 percent impairment for loss of range of motion of the right shoulder, 3 percent impairment for pain and 10 percent impairment for employment-related carpal tunnel syndrome to determine that she had 33 percent impairment of the right upper extremity based on the Combined Values Chart on page 604 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides,* 5th ed. 2001). He stated that there was no additional impairment for weakness based on section 16.8a of the fifth edition of the A.M.A., *Guides*.

tunnel syndrome condition, then appellant had 49 percent impairment of the right upper extremity.

On October 14, 2008 Dr. Henry J. Magliato, an Office medical adviser, reviewed the case record. He disagreed that appellant had 11 percent impairment due to shoulder weakness as it could not be rated along with loss of range of motion. Dr. Magliato also disagreed with Dr. Heyman's five percent impairment rating for the employment-related right carpal tunnel syndrome as motor and sensory findings and the results of a January 1, 2000 electromyogram (EMG) were normal, resulting in zero percent impairment (A.M.A., *Guides* 495). He disallowed the 11 percent impairment rating for weakness and 5 percent impairment for the accepted carpal tunnel syndrome condition, finding 28 percent impairment of the right arm. Dr. Magliato concluded that appellant did not have more than the 33 percent impairment previously granted.

In a November 5, 2008 decision, the Office denied an additional schedule award. It found that Dr. Magliato's opinion established that appellant did not have more than a 33 percent impairment of the right upper extremity, for which she received a schedule award.

On November 11, 2008 appellant, through her attorney, requested an oral hearing before an Office hearing representative.

In an August 5, 2009 decision, an Office hearing representative affirmed the November 5, 2008 decision. The hearing representative found that the weight of the medical evidence rested with Dr. Magliato, who properly applied the A.M.A., *Guides* to the clinical findings.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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 of loss of use.[6] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[7]

[4] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8107(c)(19).

[7] 20 C.F.R. § 10.404.

With regard to rating loss of strength, section 16.8 of the A.M.A., *Guides* note that such measurements are functional tests influenced by subjective factors that are difficult to control. Therefore, the A.M.A., *Guides* do not assign a large role to such measurements. Section 16.8a 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."[8]

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming, or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[9] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[10]

ANALYSIS

The Board previously found the case not in posture for decision as to whether appellant had more than 33 percent impairment of the right arm. The Board found that Dr. Cohen, an Office medical adviser, failed to adequately explain why the rating of Dr. Heyman, the impartial medical specialist, of 44 percent impairment was not entitled to special weight. The Board remanded the case to obtain a supplemental report from Dr. Heyman clarifying his opinion.

In a September 11, 2008 report, Dr. Heyman reiterated the 44 percent impairment rating based on the fifth edition of the A.M.A., *Guides*. He could not fully explain how he reached his five percent impairment rating for appellant's employment-related right carpal tunnel syndrome, noting that this rating was minimally based on the absence of any sensory or motor loss symptoms due to surgical treatment of the accepted condition. Dr. Heyman did know how

---

[8] A.M.A., *Guides* 508.

[9] *Nancy Keenan*, 56 SCAB 687 (2005); *Roger W. Griffith*. 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[10] *Harold Travis*, 30 ECAB 1071 (1979).

Dr. Cohen reached a 10 percent impairment rating for the employment-related carpal tunnel syndrome condition. Yet, he recommended that an additional 5 percent impairment rating for carpal tunnel syndrome be added to his 44 percent impairment rating based on Dr. Cohen's 10 percent impairment rating, or 49 percent impairment of appellant's right upper extremity. Dr. Heyman did not address the section of the A.M.A., *Guides* pertaining to compression neuropathies or to the specific provision on page 495 addressing the three scenarios by which carpal tunnel may be rated.[11] He stated that appellant had minimum pain and section 16.8a provided that loss of strength could be combined with other impairments if an examiner believed that an individual's loss of strength represented an impairing factor that had not been considered adequately by other methods and if it was based on unrelated etiologic or pathomechanical classes. Dr. Heyman stated that her decreased strength was not related to the resection of her distal clavicle, impingement or swelling of the muscle, or decreased excursion in the coracoacromoclavicular space. He found that appellant's weakness was related to decreased use and attention to muscle function and strengthening. Dr. Heyman did not adequately explain why strength impairment should be rated separately from the range of motion impairment. He did not state that a palpable muscle defect was present after healing.[12] Additionally, Dr. Heyman did not explain why he changed his October 21, 2003 opinion that appellant had good muscle function, nor did he address how he could effectively measure decreased strength despite appellant's loss of range of motion and painful condition.

Dr. Magliato, the Office medical adviser, rated impairment under the A.M.A., *Guides* as 28 percent. The Office relied on the medical adviser's opinion to deny an additional award but the Board finds that the Office medical adviser exceeded his role. This is not a situation in which Dr. Magliato may simply take the objective clinical findings of an examining physician to compare them with the impairment criteria listed in the A.M.A., *Guides*.[13] The Office medical adviser substituted his judgment for Dr. Heyman, the impartial medical specialist. An Office medical adviser may review a report to verify the correct application of the A.M.A., *Guides* and confirm the percentage of permanent impairment,[14] but it is the impartial medical specialist who must resolve a conflict in medical opinion.[15] It is well established that, when a referee

[11] The A.M.A., *Guides* provide that sensory deficits (pain) and/or motor deficits (weakness) are to be evaluated according to the method described in section 16.b. Moreover, in compression neuropathies, additional impairment values are not given for decreased strength. A.M.A., *Guides* 494.

[12] *Id.* at section 16.8a at 508.

[13] *I.H.,* 60 ECAB ___ (Docket No. 08-1352, issued December 24, 2008) (where the Office medical adviser assigned a percentage of impairment for pain to an impartial medical specialist's finding of such without referring the case back to the impartial medical specialist for a proper evaluation under the A.M.A., *Guides* (5th ed., 2001). The impartial medical specialist assessed pain impairment under the Maryland Codes instead. The Board found that the Office medical adviser had substituted his judgment for that of the impartial medical specialist's, thereby attempting to clarify or expand the impartial medical specialist's opinion). If the clinical findings are fully described, any knowledgeable observer may check the findings with the A.M.A., *Guides* criteria. A.M.A., *Guides* 17.

[14] *See I.H., supra,* note 13; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(c) (April 1993).

[15] *I.H., supra,* note 13; *Richard R. LeMay*, 56 ECAB 341, 348 (2005).

examination is arranged to resolve a conflict in medical opinion, the medical adviser is not to attempt clarification or expansion of the impartial medical specialist's opinion.[16]

As Dr. Heyman did not resolve the conflict in medical opinion, the Board will set aside the Office's August 5, 2009 decision. The case is remanded for referral of appellant, the case record and a statement of accepted facts, to a second impartial medical specialist to determine the extent and degree of any employment-related impairment.[17] After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the conflict in medical opinion was not properly resolved and the case requires further development.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: January 24, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[16] Federal (FECA) Procedural Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

[17] *See* cases cited *supra* note 9.