United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 10-1163**
	)	**Issued: January 4, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Union, NJ, Employer	)	

Appearances:
James Muirhead, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 24, 2010 appellant filed a timely appeal from a February 3, 2010 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 12 percent left arm and an 8 percent right arm permanent impairment, for which she received schedule awards.

FACTUAL HISTORY

The Office accepted that appellant sustained bilateral carpal tunnel syndrome, bilateral lateral epicondylitis and a left shoulder condition causally related to her federal employment.[1] Dr. F. Kennedy Gordon, an attending internist, provided treatment reports regarding her

[1] The Office described the accepted left shoulder condition as "other affections of shoulder region, not elsewhere classified."

condition.[2] In a report dated October 10, 2007, he diagnosed bilateral carpal tunnel syndrome and indicated surgical intervention was not required at that time.

In a report dated July 21, 2008, Dr. Arthur Becan, an orthopedic surgeon, opined that appellant had a 48 percent right arm impairment and a 40 percent left arm impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th edition). The Office referred the case to an Office medical adviser for a review of the extent of permanent impairment to the left arm. In a February 4, 2009 report, the Office medical adviser noted that Dr. Becan's findings were in marked contrast to Dr. Gordon, who provided a complete evaluation in July 2007 where the neurological examination was normal. He suggested a referee examination to resolve the conflict.

By letter dated July 13, 2009, the Office advised appellant that there was a conflict between Dr. David Weiss and the Office medical adviser.[3] Appellant was referred to Dr. Richard Lebovicz, a Board-certified orthopedic surgeon, as a referee examiner. In a report dated November 18, 2009, Dr. Lebovicz provided a history and results on examination. With respect to permanent impairment, he identified Table 15-23 of the sixth edition of the A.M.A., *Guides*. Dr. Lebovicz identified grade modifier 1 for test findings and grade modifier 2 for history and physical findings, resulting in an overall grade modifier 2. The default value is a five percent arm impairment. Dr. Lebovicz found a six percent arm impairment for carpal tunnel syndrome based on a functional scale (*Quick*DASH) of 74.25. As to lateral epicondylitis, he referred to Table 15-4, which provides a range from zero to two percent for a Class of Diagnosis (CDX) 1 impairment. The grade modifier for functional history (GMFH) was two, for physical examination (GMPE) also two and for clinical studies (GMCS) a zero. Applying the adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), the net adjustment was one, for a two percent impairment. Dr. Lebovicz also provided calculations for left shoulder impingement under Table 15-5, with a default value of a three percent impairment. With the same method noted for Table 15-4, he found a net adjustment of one resulting in a four percent left arm impairment. Dr. Lebovicz, therefore, concluded that combining the values of 6 and 2 for the right arm was an 8 percent impairment and 6, 2 and 4 for the left arm resulted in a 12 percent left arm impairment. He advised that the date of maximum medical improvement was July 21, 2008.

In a January 10, 2010 report, an Office medical adviser reviewed the medical evidence and found that Dr. Lebovicz properly applied the A.M.A., *Guides*. The date of maximum medical improvement was July 21, 2008.

By decision dated February 3, 2010, the Office issued schedule awards for a 12 percent left arm permanent impairment and an 8 percent right arm permanent impairment. The period of the awards was 62.40 weeks from July 21, 2008.

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[2] Under the Office File No. xxxxxx094, an April 22, 2003 occupational claim accepted for right lateral epicondylitis, which is designated as a master file. There is a July 14, 2007 report from Dr. Gordon with a diagnosis of bilateral carpal tunnel syndrome, bilateral elbow epicondylitis and mild right de Quervain's tenosynovitis. Dr. Gordon reported positive Tinel's and Phalen's signs, with the "rest of the neurovascular system intact."

[3] The Board notes that this was a typographical error as Dr. Becan reported on appellant's impairment.

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.[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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[6]

ANALYSIS

The schedule award in this case was based on the November 18, 2009 report from Dr. Lebovicz. The Board notes that the Office found a conflict in the medical opinion as to the extent of permanent impairment under 5 U.S.C. § 8123(a) and the referral was made as a referee examiner.[7] As to the degree of employment-related permanent impairment, there was no conflict in the record. Dr. Becan provided an opinion on the issue, but the Office medical adviser did not provide any contrary opinion. The Office medical adviser was asked only to review the extent of permanent impairment to the left arm and the calculations he provided appeared to find the same 40 percent impairment as found by Dr. Becan. According to the medical adviser, there was a conflict between Dr. Becan and Dr. Gordon as to the physical findings, but a conflict under 5 U.S.C. § 8123(a) cannot be based on two attending physicians.[8]

The Board finds, therefore, that the referral to Dr. Lebovicz was as a second opinion physician. Even though the report of Dr. Lebovicz is not entitled to the special weight afforded to the opinion of referee specialist resolving a conflict of medical opinion, his report can still be considered for its own intrinsic value and can still constitute the weight of the medical evidence.[9] In this case, Dr. Lebovicz provided a rationalized medical opinion as to permanent impairment under the A.M.A., *Guides.* For carpal tunnel syndrome, he identified Table 15-23, which provides impairments for entrapment and compression neuropathy. The table requires identifying grade modifiers for test findings, history, and physical findings and then averaging

[4] 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).

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

[6] FECA Bulletin No. 09-03 (March 15, 2009).

[7] 5 U.S.C. § 8123(a). This section provides if there is a disagreement between a physician making the examination for the United States and a physician of the employee, a third physician shall be appointed to make an examination.

[8] *See C.M.*, 61 ECAB ___ (Docket No. 09-1268, issued January 22, 2010); *Roger W. Griffith*, 57 ECAB 491 (2000); *Noah Oaten*, 50 ECAB 283 (1999).

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

the results for a final rating category.[10] Dr. Lebovicz used the relevant findings to establish a grade modifier 2 rating, which has a default of a five percent arm impairment. The default may be modified up or down by one based on the functional scale and Dr. Lebovicz found the proper impairment was six percent for each arm based on carpal tunnel.[11] For elbow epicondylitis, Dr. Lebovicz referred to Table 15-4, which specifically addresses lateral epicondylitis and provides a default arm impairment of one percent for Class (CDX) 1.[12] This may be adjusted using the established formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] In this case, Dr. Lebovicz identified grade modifiers of 2 (moderate problems) for functional history and physical examination, and 0 for clinical studies. Applying the formula resulted in 1 + 1 + (-1), or a net adjustment of + 1, or a 2 percent arm impairment. For the left shoulder, Table 15-5 provides a default of three percent for impingement syndrome with "residual loss, functional with normal motion."[14] The net adjustment uses the same formula as noted for epicondylitis and Dr. Lebovicz added one for a four percent impairment.

Dr. Lebovicz provided a rationalized opinion that appellant had a 12 percent left arm impairment (6 for carpal tunnel, 2 for lateral epicondylitis and 4 for left shoulder impingement) and an 8 percent right arm impairment (6 for carpal tunnel and 2 for lateral epicondylitis) under the A.M.A., *Guides.* The Office medical adviser concurred in his January 10, 2010 report and no contrary evidence was submitted. The Board finds that Dr. Lebovicz represented the weight of the medical evidence.

On appeal, appellant argues that, since the date of maximum medical improvement was July 21, 2008, the Office should have used the fifth edition of the A.M.A., *Guides*. The proper edition of the A.M.A., *Guides* to be applied is the date of the Office decision, not the date of maximum medical improvement. For any Office decision issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used.[15] The decision in this case was dated November 18, 2009 and was properly based on the sixth edition of the A.M.A., *Guides*. The date of maximum medical improvement is the date the period covered by a schedule award commences.[16] The period of the award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the arm, the maximum number of weeks of compensation is 312 weeks. Since appellant's bilateral arm impairment totaled 20 percent, she is entitled to 20 percent of 312 or 62.40 weeks of compensation commencing July 21, 2008.

[10] A.M.A., *Guides* 449, Table 15-23.

[11] *Id.*

[12] *Id.* at 398, Table 15-4.

[13] *Id.* at 411.

[14] *Id.* at 402, Table 15-5.

[15] *See W.D.*, 61 ECAB ___ (Docket No. 10-274, issued September 3, 2010).

[16] *Albert Valverde*, 36 ECAB 233, 237 (1984).

CONCLUSION

The Board finds the evidence does not establish that appellant has more than a 12 percent left arm permanent impairment and an 8 percent right arm permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 3, 2010 is affirmed.

Issued: January 4, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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