

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

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**K.T., Appellant**

**and**

**U.S. POSTAL SERVICE, PHILADELPHIA  
LOGISTICS & DISTRIBUTION CENTER,  
Swedesboro, NJ, Employer**

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**Docket No. 12-1195  
Issued: October 17, 2012**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On May 8, 2012 appellant, through his attorney, filed a timely appeal of the January 18, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed a schedule award for right upper extremity impairment. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) 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 greater than three percent impairment of the right upper extremity.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

Appellant, a 54-year-old mail handler, has an accepted claim for right carpal tunnel syndrome which arose on or about January 1, 2006. He underwent a right carpal tunnel release on May 2, 2007. On April 8, 2008 appellant filed a claim for a schedule award (Form CA-7).

In a report dated November 28, 2007, Dr. Nicholas P. Diamond, a pain management specialist, found 52 percent impairment of the right upper extremity under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides* (5<sup>th</sup> ed. 2001). The overall rating represented a combination of impairments for right lateral pinch deficit (30 percent) and a grade 2 sensory deficit involving the right median nerve (31 percent).

The district medical adviser (DMA) reviewed the case on November 4, 2008 and found 10 percent impairment of the right upper extremity under the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>2</sup> The DMA disagreed with Dr. Diamond's grade 2 assessment and instead found a grade 4 sensory deficit, thus reducing the rating to 10 percent rather than 31 percent as noted by Dr. Diamond. The DMA also explained that Dr. Diamond improperly relied on loss of lateral pinch strength. According to the DMA, appellant had normal clinical strength and there was no median nerve motor loss and thus, no impairment for median nerve motor deficit.

Based on Dr. Diamond's and the DMA's differing impairment ratings, OWCP declared a conflict in medical opinions and, therefore, referred appellant to an impartial medical examiner (IME). OWCP also referred the DMA's November 4, 2008 report to Dr. Diamond for review and comment. In an April 22, 2009 report, Dr. Diamond reaffirmed his "[g]rade 2" assessment as well as his reliance on pinch strength rather than manual muscle strength testing. He reiterated that appellant had 52 percent impairment of the right upper extremity.

Dr. George P. Glenn Jr., a Board-certified orthopedic surgeon and IME, examined appellant on May 5, 2009. He applied the latest edition of the A.M.A., *Guides* as instructed by OWCP and found one percent right upper extremity impairment pursuant to Table 15-23, Entrapment/Compression Neuropathy Impairment, A.M.A., *Guides* 449 (6<sup>th</sup> ed. 2008).

On June 4, 2009 another DMA who was not involved in creating the conflict reviewed Dr. Glenn's findings and disagreed with his one percent right upper extremity impairment rating. The DMA believed that appellant had at least two percent impairment and possibly three percent.

OWCP referred the DMA's June 4, 2009 findings to Dr. Glenn but the July 7, 2009 correspondence was returned as undeliverable.

By decision dated April 22, 2010, OWCP granted a schedule award for three percent impairment of the right upper extremity. The award covered a period of 9.36 weeks from May 5 to July 9, 2009.

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<sup>2</sup> At the time, Dr. Morley Slutsky, Board-certified in occupational medicine, served as DMA.

In a report dated June 4, 2010, Dr. Diamond applied the latest edition of the A.M.A., *Guides* to his November 28, 2007 examination results and found appellant had five percent right upper extremity impairment under Table 15-23, A.M.A., *Guides* 449 (6<sup>th</sup> ed. 2008).

In a decision dated June 30, 2010, the Branch of Hearings and Review set aside the April 22, 2010 schedule award. The hearing representative found that the current DMA could not resolve the conflict between Dr. Diamond and Dr. Slustky, the previous DMA. He explained that it was Dr. Glenn's responsibility to resolve the conflict. The hearing representative identified Dr. Glenn's current address and advised OWCP to forward the DMA's June 4, 2009 findings to him for review.

In a supplemental report dated August 24, 2010, Dr. Glenn agreed that he had misinterpreted the A.M.A., *Guides* when he adjusted the rating downward based on appellant's functional score of one. He indicated that the default rating of two percent was appropriate. Dr. Glenn specifically disagreed with the DMA's finding that an even higher adjustment to three percent was required under Table 15-23, A.M.A., *Guides* 449 (6<sup>th</sup> ed. 2008).

In a report dated October 4, 2010, the DMA noted that he accepted the IME's two percent rating.

In an October 29, 2010 decision, OWCP found that appellant had not established that he had a greater right upper extremity impairment than the previous award for three percent.

Appellant requested a hearing which was held on March 11, 2011. In a decision dated June 7, 2011, the hearing representative remanded the case because the DMA had not reviewed Dr. Diamond's June 4, 2010 impairment rating. The hearing representative also found that the previous conflict between Dr. Diamond and the DMA regarding impairment under the fifth edition of the A.M.A., *Guides* (2001) was rendered moot once OWCP adopted the sixth edition effective May 1, 2009. As such, the hearing representative found that Dr. Glenn's May 5, 2009 examination and impairment rating under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008) was a second opinion examination rather than a referee examination.

In a report dated June 27, 2011, the DMA explained that the difference between Dr. Glenn's two percent rating and Dr. Diamond's supplemental five percent rating was that when Dr. Diamond saw appellant on November 28, 2007 his physical examination revealed a decrease in grip strength. However, when Dr. Glenn examined appellant one and a half years later his physical examination results were normal. The DMA concluded that appellant's condition had improved over one and a half years and he believed Dr. Glenn's more recent examination findings should be accepted. Accordingly, the DMA recommended no increase over the prior schedule award.

By decision dated July 22, 2011, OWCP again denied an increase over the prior award.

Appellant requested another hearing which was held on November 16, 2011.

In a decision dated January 18, 2012, the hearing representative affirmed OWCP's July 22, 2011 opinion based on Dr. Glenn's August 24, 2010 supplemental report.

## LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>3</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>4</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).<sup>5</sup>

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>6</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>7</sup> Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.<sup>8</sup>

## ANALYSIS

OWCP initially determined that a conflict arose between its DMA and Dr. Diamond regarding the extent of appellant's right upper extremity impairment under the A.M.A., *Guides* (5<sup>th</sup> ed. 2001). It referred appellant to Dr. Glenn to resolve the conflict. However, at the time Dr. Glenn examined appellant on May 5, 2009, OWCP no longer utilized the fifth edition of the A.M.A., *Guides*. Therefore, he rated appellant's right upper extremity impairment pursuant to the A.M.A., *Guides* (6<sup>th</sup> ed. 2008). Dr. Glenn initially found one percent right upper extremity impairment under Table 15-23, A.M.A., *Guides* 449 (6<sup>th</sup> ed. 2008), but later revised his rating to two percent impairment.

On April 22, 2010 OWCP granted a schedule award for three percent right upper extremity impairment based on the DMA's June 4, 2009 report. It has since issued five other

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<sup>3</sup> For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

<sup>6</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

<sup>7</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>8</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

decisions regarding appellant's entitlement to a schedule award. In the interim, Dr. Glenn has been relegated from IME to a second opinion physician.

The Board finds that Dr. Glenn's May 5, 2009 examination findings and his August 24, 2010 supplemental report represents the weight of the medical evidence regarding appellant's right upper extremity impairment. As noted, he ultimately found that appellant had two percent impairment of the right upper extremity under Table 15-23, A.M.A., *Guides* 449 (6<sup>th</sup> ed. 2008), which represents the default value for a grade modifier 1 impairment.

In contrast, Dr. Diamond found five percent impairment of the right upper extremity. He also applied Table 15-23; however, he indicated there was grade modifier 2 impairment. Dr. Diamond based his June 4, 2010 impairment rating on examination findings that were more than two and a half years old. As the DMA explained, the primary difference between Dr. Glenn's rating and Dr. Diamond's rating is that Dr. Glenn's more recent physical examination revealed that appellant's condition had improved over the one-and-a-half-year period that separated the two examinations.

On appeal, counsel argues that there is an unresolved conflict in medical opinion and, therefore, the case should be remanded for referral to an IME. The Board rejects this argument for two reasons. First, for a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>9</sup> Dr. Diamond's report is not equally weighted when compared to Dr. Glenn's more recent report. Dr. Glenn's May 5, 2009 evaluation is a more accurate representation of appellant's current condition. As noted, the DMA believed the difference between the two reports demonstrated an improvement in appellant's overall condition. He agreed with Dr. Glenn's rating. The Board finds no fault with OWCP's reliance on the more recent of the two examinations.

The Board finds that his August 24, 2010 supplemental report conforms to the A.M.A., *Guides* (6<sup>th</sup> ed. 2008), and thus, represents the weight of the medical evidence regarding the extent of appellant's right upper extremity impairment.<sup>10</sup> Appellant has not submitted any probative medical evidence demonstrating he has greater than three percent impairment of the right upper extremity.

Lastly, counsel argued that the April 22, 2010 three percent schedule award should have been paid at the 3/4 rate rather than the 2/3 compensation rate. He previously submitted a copy of appellant's marriage certificate in support of his claim for an increased compensation rate. Because OWCP has not yet addressed the question of whether appellant had eligible dependents during the period May 5 to July 9, 2009, the issue is not presently before the Board.

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<sup>9</sup> *Darlene R. Kennedy, supra* note 7.

<sup>10</sup> On appeal, counsel raised several arguments regarding Dr. Glenn's designation as IME. Given that OWCP has relegated Dr. Glenn to second opinion status; counsel's arguments regarding proper selection of an IME are moot.

**CONCLUSION**

Appellant has not established that he has greater than three percent impairment of the right upper extremity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.<sup>11</sup>

Issued: October 17, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>11</sup> Appellant may request a schedule award or increased schedule award based on evidence of new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.