

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

VICKIE L. HARDIE, Appellant

and

**U.S. POSTAL SERVICE, AUSTIN GENERAL
MAIL FACILITY, Austin, TX, Employer**

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**Docket No. 04-2144
Issued: April 15, 2005**

Appearances:
Vickie L. Hardie, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 30, 2004 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated March 30 and July 9, 2004, denying her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award decision.

ISSUE

The issue is whether appellant has established that she sustained a permanent impairment of the upper extremities pursuant to accepted bilateral carpal tunnel syndrome and right ulnar nerve entrapment. On appeal, she asserts that the opinion of Dr. Anthony Hicks, an attending physician specializing in occupational medicine, was sufficient to establish that she sustained a ratable impairment of both upper extremities caused by the accepted conditions.

FACTUAL HISTORY

The Office accepted that on or before December 17, 2000, appellant, then a 49-year-old clerk, sustained bilateral carpal tunnel syndrome and right ulnar nerve entrapment caused by

keyboarding and repetitive wrist motions in the performance of duty. She performed restricted duty with no keyboarding from January through August 2001.¹

Dr. Umeschandra G. Gadaria, an attending Board-certified plastic surgeon, performed a right median nerve release on October 2, 2001 and a left median nerve release on December 21, 2001. Appellant was also treated by Dr. Brent L. Davis, an attending physician specializing in occupational medicine, who submitted periodic notes beginning in January 2002 describing her post-surgical progress. After a course of physical therapy Dr. Gadaria discharged appellant from his care on April 8, 2002. He referred her back to Dr. Davis for an evaluation of any permanent impairment.

Dr. Davis submitted periodic reports from April 24 to July 9, 2002 noting appellant's continuing bilateral wrist symptoms, upper extremity pain and headaches. He limited her to light duty with no keyboarding, as indicated by a June 17, 2002 functional capacity evaluation.

On July 22, 2002 appellant claimed a schedule award.

In an August 6, 2002 report, Dr. Davis opined that appellant was "at steady state" and would require permanent light-duty restrictions. The record indicates that she returned to restricted duty on August 6, 2002.

In an August 13, 2002 letter, the Office requested that Dr. Davis submit a schedule award evaluation of both upper extremities according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a September 3, 2002 report, Dr. Davis opined that the results of an August 29, 2002 examination established that appellant had a zero percent impairment of the upper extremities according to the fourth edition of the A.M.A., *Guides*. He noted that flexion, extension, radial and ulnar deviation of both wrists were within normal limits.² Grip strength and two-point discrimination were also normal in both hands and wrists. Dr. Davis opined that, while appellant still complained of pain and paresthesias in both wrists and hands, she had no discomfort at rest.³

In an October 10, 2002 questionnaire, appellant indicated that her pain severity was 7.25 out of 20, that her activity limitation due to pain was 5.125 out of 16 and that the effect of pain on her mood was a mean of 10.

¹ September 12, 2001 electromyography (EMG) and nerve conduction velocity (NCV) studies performed by Dr. Sara G. Austin, a Board-certified neurologist, showed moderately severe bilateral median mononeuropathies, worse on the right.

² Regarding range of motion of the right wrist, Dr. Davis observed 63 degrees flexion, 60 degrees extension, 30 degrees ulnar deviation and 20 degrees radial deviation. For the left wrist, Dr. Davis noted 68 degrees flexion, 60 degrees extension, 40 degrees ulnar deviation and 20 degrees radial deviation.

³ On September 27, 2002 the Office approved appellant's request to change physicians from Dr. Davis to Dr. Anthony M. Hicks, a physician specializing in occupational medicine.

On December 12, 2002 the Office referred Dr. Davis' September 3, 2002 schedule award evaluation to an Office medical adviser for review. In a January 5, 2003 report, the Office medical adviser concurred that appellant had no impairment of the upper extremities as she had no motor or sensory abnormalities on examination. The Office medical adviser noted that Dr. Davis relied on the fourth edition of the A.M.A., *Guides* whereas he should have used the fifth edition in effect as of February 1, 2001. However, the Office medical adviser noted that the use of the fourth edition of the A.M.A., *Guides* did not alter the outcome of the schedule award evaluation as appellant had no measurable impairment of the upper extremities. Thus, she would be rated at a zero percent impairment under the fifth edition of the A.M.A., *Guides*.

By decision dated February 12, 2003, the Office denied appellant's schedule award claim on the grounds that the medical evidence demonstrated that she had no permanent impairment of the upper extremities related to the accepted conditions. The Office found that the weight of the medical evidence rested with the Office medical adviser, who correctly applied the A.M.A., *Guides* to Dr. Davis' clinical findings.

Appellant requested an oral hearing, held December 11, 2003. At the hearing, she asserted that Dr. Davis incorrectly used the fourth edition of the A.M.A., *Guides*. Appellant contended that the Office should accord Dr. Hicks the weight of the medical evidence in the case.

In an October 10, 2002 report, Dr. Hicks provided a history of injury and treatment. He related appellant's complaints of persistent pain in all joints of the upper extremities which she related to her job duties. Dr. Hicks listed diagnoses of carpal tunnel syndrome with paresthesias, pain and upper extremity dysfunction. He stated that appellant was "at maximum medical improvement as of the date of the evaluation." Dr. Hicks also noted that "[b]ased upon probable medical diagnoses involved, prior medical intervention(s) completed to date, [appellant's] response to same and ongoing symptom complexes described by [her], additional medical/surgical interventions MIGHT BE reasonable in the foreseeable future." (Emphasis in the original.) Additionally, he commented that his opinion might be changed upon review of medical records he had requested but not yet received. Referring to Figure 16-48 and Table 16-12b of the fifth edition of the A.M.A., *Guides*, Dr. Hicks noted involvement of the median nerve in the C6-8 dermatome, "T1 and palmar digitals." He rated this involvement at 25 percent based on clinical findings, corresponding to Grade 4 of Table 16-10a. Dr. Hicks noted that according to Table 16-15, maximum upper extremity impairment for sensory deficit in the median nerve and palmar digital nerves was 39 percent. He then multiplied the 25 percent grade for pain by the 39 percent value for the median and palmar digital nerves to equal 0.975 percent, which he rounded up to equal 1 percent. Dr. Hicks also provided an impairment rating for "moderate" pain according to Table 18.5, section 18.8 at page 586 of the A.M.A., *Guides*. He noted that according to section 18.3d, he increased appellant's impairment rating to 3 percent of each upper extremity.

In a June 9, 2003 note, Dr. Hicks stated that appellant had reached maximum medical improvement as of October 10, 2002. He submitted progress notes from November 12, 2003 to February 10, 2004, diagnosing neck and shoulder pain and strains, possible herniated cervical discs, cervical dysfunction, headaches, dystonia, carpal tunnel syndrome with paresthesias and

upper extremity pain and dysfunction. Dr. Hicks opined that appellant required continuing treatment directly related to the accepted bilateral carpal tunnel syndrome and right ulnar neuropathy.

By decision dated March 30, 2004, the Office hearing representative denied appellant's schedule award claim on the grounds that she submitted insufficient medical evidence to establish that she sustained a ratable impairment of the upper extremities. He found that the weight of the medical evidence rested with the January 5, 2003 report of the Office medical adviser, who concurred with Dr. Davis that appellant had no permanent impairment of the upper extremities. The Office hearing representative found that Dr. Hicks' October 10, 2002 schedule award evaluation was of diminished probative value as he was speculative and equivocal regarding the correct diagnosis and whether appellant had reached maximum medical improvement.

Appellant requested reconsideration by letter dated June 13, 2004. She submitted an April 15, 2004 report from Dr. Hicks noting a restricted range of left shoulder motion in all planes and "dysesthesias" in the left upper extremity in the C7-8 dermatome. Appellant also submitted a June 4, 2004 report from Dr. Hicks, asserting that the Office misinterpreted his opinion as to whether appellant had reached maximum medical improvement. He stated that "given the *entirety* of the medical record compiled to date, [appellant's] condition *HAS stabilized* (despite the possibility & optimistic hope of an eventual <positive> change in the degree of the functional impairment in the member)." (Emphasis in the original.) Dr. Hicks opined that appellant had a permanent impairment as set forth in his October 10, 2002 report. He commented that the Office's interpretation of his October 10, 2002 opinion contradicted "the spirit and letter" of the A.M.A., *Guides*.

By decision dated July 9, 2004, the Office denied modification of the March 30, 2004 decision. The Office found that Dr. Hicks' June 4, 2004 report did not contain any additional impairment rating or resolve his prior equivocal opinion regarding whether appellant had sustained maximum medical improvement. The Office noted that the weight of the medical evidence continued to rest with the Office medical adviser's January 5, 2003 report.⁴

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁵ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for

⁴ Following issuance of the Office's July 9, 2003 decision, appellant submitted additional evidence. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time is issued the final decision in the case. 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. §§ 8101-8193.

evaluation of schedule losses and the Board has concurred in such adoption.⁶ As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.⁷

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.⁸ Once it is determined that maximum medical improvement has been reached, the evidence is then examined to determine the precise degree of permanent impairment according to the appropriate edition of the A.M.A., *Guides*.⁹

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and right ulnar nerve entrapment in the performance of duty on or about December 17, 2000, requiring bilateral median nerve releases. She claimed a schedule award on July 22, 2002. The Office denied the schedule award claim on the grounds that the weight of the medical evidence demonstrated that she sustained no permanent impairment of the upper extremities related to the accepted conditions.

The Office accorded the weight of the medical evidence in this case to the January 5, 2003 report of an Office medical adviser, interpreting the August 29, 2002 clinical findings of Dr. Davis, an attending physician specializing in occupational medicine. In a September 3, 2002 report, he noted the results of a detailed clinical examination, informed by his knowledge of appellant's condition as her attending physician. He found a normal range of motion of both wrists, with normal grip strength bilaterally, no loss of sensation and no pain at rest. Dr. Davis opined that appellant had a zero percent impairment of the upper extremities according to the fourth edition of the A.M.A., *Guides*, as she evinced no impairment of either arm. In a January 5, 2003 report, the Office medical adviser concurred with Dr. Davis' determination of a zero percent impairment as appellant's examination was within normal limits.

Appellant asserted that the Office erred in relying on the Office medical adviser's report as it was based on Dr. Davis' opinion using the fourth edition of the A.M.A., *Guides*. The Board

⁶ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ See FECA Bulletin 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

⁸ *Mark A. Holloway*, 55 ECAB ____ (Docket No. 03-2144, issued February 13, 2004).

⁹ *Michael Vining (Kevin M. Vining)*, 52 ECAB 354 (2001).

has held that a medical opinion not based on the appropriate edition of the A.M.A., *Guides* has diminished probative value in determining the extent of a claimant's impairment.¹⁰ This principle recognizes that different editions of the A.M.A., *Guides* may accord different percentages of impairment to identical deficits. However, in this case, Dr. Davis' reliance on the fourth edition of the A.M.A., *Guides* does not produce any such a disparity. In a January 5, 2003 report, the Office medical adviser explained that appellant is rated at a zero percent impairment under both the fourth and fifth editions of the A.M.A., *Guides* as she has no deficits of either upper extremity. Under the facts of this case, the Board finds that Dr. Davis' reference to the fourth edition of the A.M.A., *Guides* constituted harmless error.¹¹ Therefore, the Office properly accorded the Office medical adviser's January 5, 2003 report the weight of the medical evidence.

On appeal, appellant asserts that the weight of the medical evidence should have been accorded to Dr. Hicks, an attending physician specializing in occupational medicine. He submitted an October 10, 2002 schedule award evaluation finding a three percent impairment of each upper extremity. However, the Board finds that his opinion is equivocal regarding the threshold issue of whether appellant reached maximum medical improvement. As set forth above, prior to calculating a schedule award, it must first be determined that a claimant's condition has stabilized such that any remaining impairment could be deemed permanent.¹² In an October 10, 2002 report, Dr. Hicks stated both that appellant had reached maximum medical improvement as of that day and that she might require further medical interventions or surgery. He also noted that he might change his mind about appellant's status after reviewing additional medical reports as he did not then have access to the complete record. The Office properly found that Dr. Hicks' opinion is of diminished probative value due to its speculative, equivocal nature.

Dr. Hicks submitted a June 4, 2004 report noting that the complete medical record indicated both that appellant's condition had stabilized and that there was a "possibility ... of an eventual" improvement in functioning. The equivocal nature of this opinion substantially diminishes its probative value.¹³ Thus, the Office properly found in its July 9, 2004 decision, that the Office medical adviser's January 5, 2003 report represented the weight of the medical evidence.

¹⁰ *Carolyn E. Sellers*, 50 ECAB 393, 394 (1999). *Cf. Robert V. Disalvatore*, 54 ECAB ____ (Docket No. 02-2256, issued January 17, 2003) (the Board noted in particular that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome be rated on motor and sensory impairments only. There is no equivalent in the fifth edition to the fourth edition's Table 16.) The present case may be distinguished from *Disalvatore* as the issue in that case involved the interpretation of various findings of permanent impairment. In this case, appellant showed no evidence of permanent impairment and thus would have been rated at a zero percent permanent impairment under either edition of the A.M.A., *Guides*.

¹¹ *Cf. Roland C. Radoff*, Docket No. 02-1020 (issued October 1, 2002) (the Office developed the claim prior to February 21, 2001, the effective date of the fifth edition of the A.M.A., *Guides*, but issued the schedule award afterward. The Board noted that there was no difference between the provisions of both editions of the A.M.A., *Guides* in rating the impairment at issue). The present case is distinguished from *Radoff* as the issue involves a new schedule award and not calculation of an augmented schedule award.

¹² *Mark A. Holloway*, *supra* note 8.

¹³ *Kathy A. Kelley*, 55 ECAB ____ (Docket No. 03-1660, issued January 5, 2004).

CONCLUSION

The Board finds that appellant has not established that she sustained a ratable permanent impairment of the upper extremities.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 9 and March 30, 2004 are affirmed.

Issued: April 15, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member