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

| | | |
|---|---|---|
| **D.M., Appellant** | ) | |
| **and** | ) | |
| **U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, Employer** | ) | **Docket No. 07-1890**<br>**Issued: April 9, 2008** |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On July 10, 2007 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated August 7, 2006 and February 23, 2007, finding that she had no more than a 33 percent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

### ***ISSUE***

The issue is whether appellant has more than a 33 percent impairment of the right upper extremity, for which she received a schedule award. On appeal, counsel contends that the Office improperly relied on the report of an Office medical adviser to resolve a conflict in the medical evidence.

### ***FACTUAL HISTORY***

On April 10, 1995 appellant, then a 45-year-old inspection operations support technician, filed a traumatic injury claim assigned file number 02-729575. She alleged 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 appellant filed a claim for an occupational disease assigned file number 02-0696840 because her request for surgery for a condition she sustained on April 4, 1995 was denied by the Office on February 10, 1997. The Office accepted the claims for right carpal tunnel syndrome, right shoulder impingement syndrome, calcific tendinitis and right shoulder and cervical sprains.[1] It authorized arthroscopy and subacromial decompression of the right shoulder which was performed by Dr. Gregory S. Gallick, an attending Board-certified orthopedic surgeon, on April 18, 1996 and right carpal tunnel release which was also performed by Dr. Gallick on July 9, 1998.

On September 22, 1999 appellant filed a claim for a schedule award dated July 27, 1999. In a June 15, 1999 medical report, Dr. David Weiss, an osteopath, Board-certified in orthopedic surgery, opined that she sustained a 53 percent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (4th ed. 1995). On July 26, 1999 Dr. Daniel Kalash, an Office medical adviser, reviewed Dr. Weiss' June 15, 1999 report and agreed with his finding that appellant sustained a 53 percent impairment of the right upper extremity.

Subsequently, appellant filed another claim for a schedule award. She submitted Dr. Weiss' April 14, 2000 report which found that appellant sustained a 60 percent impairment of the right upper extremity based on the fourth edition of the A.M.A., *Guides*. On August 7, 2000 Dr. Henry Magliati, an Office medical adviser, reviewed Dr. Weiss' April 14, 2000 findings and determined that appellant sustained a 37 percent impairment of the right upper extremity.

By decision dated October 3, 2000, the Office granted appellant a schedule award for a 37 percent impairment of the right upper extremity based on Dr. Magliati's August 7, 2000 opinion. In a letter dated October 6, 2000, appellant, through counsel, requested an oral hearing before an Office hearing representative.

In a September 12, 2001 decision, an Office hearing representative set aside the October 3, 2000 decision and remanded the case to the Office. The hearing representative found a conflict in the medical opinion evidence between Dr. Weiss and Dr. Magliati as to the extent of permanent impairment to appellant's right upper extremity. On remand the hearing representative instructed the Office to refer appellant together with the case record and a statement of accepted facts to an appropriate impartial medical specialist to resolve the conflict.

By letter dated October 18, 2001, the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination. In a November 26, 2001 report, Dr. Dennis opined that appellant sustained a 31 percent impairment of the right upper extremity based on the fifth edition of the A.M.A., *Guides*. On December 20, 2001 Dr. Magliati reviewed Dr. Dennis' October 18, 2001 report. He determined that appellant sustained a 24 percent impairment of the right upper extremity based on the A.M.A., *Guides*.

[1] The Office doubled the cases assigned file numbers 02-072957 and 02-0696840 into a master case file assigned file number 02-069840.

By decision dated January 2, 2002, the Office granted appellant a schedule award for a 24 percent impairment of the right upper extremity based on Dr. Magliati's December 20, 2001 opinion. In a January 8, 2002 letter, appellant, through counsel, requested an oral hearing before an Office hearing representative.

By decision dated April 23, 2002, an Office hearing representative set aside the January 2, 2002 decision and remanded the case to the Office. He found that the Office erred in having Dr. Magliati review the October 18, 2001 report of Dr. Dennis as he was part of the conflict in medical opinion.

On May 13, 2002 Dr. Merola, an Office medical adviser, reviewed Dr. Dennis' November 26, 2001 report. He found that appellant sustained a 31 percent impairment of the right upper extremity based on the A.M.A., *Guides*.

In a July 29, 2002 decision, the Office granted appellant a schedule award for a 31 percent impairment of the right upper extremity.

Appellant requested an oral hearing before a hearing representative. By decision dated July 2, 2003, a hearing representative set aside the July 29, 2002 decision and remanded the case to the Office. He found that the report of Dr. Dennis was not entitled to special weight as he failed to provide the necessary measurements and calculations to support his impairment rating based on the A.M.A., *Guides*.

By letter dated September 30, 2003, the Office referred appellant to Dr. Norman M. Heyman, a Board-certified orthopedic surgeon, for an impartial medical examination. In an October 21, 2003 report, Dr. Heyman reviewed a history of the April 4, 1995 employment injury and appellant's medical records. He reported his essentially normal findings on physical examination. Dr. Heyman also reported his range of motion findings regarding appellant's right upper extremity. He stated that 90 degrees of flexion constituted a six percent impairment and 30 degrees of extension constituted one percent impairment (A.M.A., *Guides* 476, Figure 16-40). Dr. Heyman further stated that 80 degrees of abduction constituted a five percent impairment and 30 degrees of adduction constituted one percent impairment (A.M.A., *Guides* 477, Figure 16-43). He found that 30 degrees of external rotation represented a one percent impairment and 60 degrees of internal rotation represented a two percent impairment (A.M.A., *Guides* 479, Figure 16-46). Dr. Heyman also found that appellant's distal clavicle resection and acromioplasty constituted 10 percent impairment (A.M.A., *Guides* 506, Table 16-27). He determined that his impairment ratings for loss of range of motion constituted a 39 percent impairment of the right shoulder (A.M.A., *Guides* 510, Table 16-35). In addition, Dr. Heyman determined that appellant sustained five percent impairment for carpal tunnel syndrome based on no atrophy or sensory change and good muscle function and opposition. He added his impairment rating for loss of range of motion and impairment rating for carpal tunnel syndrome to calculate a 44 percent impairment of the right upper extremity. On October 21, 2003 Dr. Heyman completed a work capacity evaluation, stating that appellant could not perform her regular work duties but she could work eight hours per day with restrictions.

On November 21, 2003 Dr. Gregory L. Cohen, an Office medical adviser, reviewed Dr. Heyman's October 21, 2003 report. He determined that 90 degrees of flexion constituted six

percent impairment and 30 degrees of extension constituted one percent impairment (A.M.A., *Guides* 476, Figure 16-40). Dr. Cohen also determined that 80 degrees of abduction constituted five percent impairment and 30 degrees of adduction constituted one percent impairment (A.M.A., *Guides* 477, Figure 16-43). He found that 30 degrees of external rotation represented one percent impairment and 60 degrees of internal rotation represented two percent impairment (A.M.A., *Guides* 479, Figure 16-46). Dr. Cohen added his loss of range of motion impairment ratings to calculate a 16 percent impairment of the right upper extremity. He stated that the maximum impairment rating due to appellant's shoulder pain was five percent (A.M.A., *Guides* 492, Table 16-15). Dr. Cohen multiplied this deficit by 60 percent Grade 3 deficit (A.M.A., *Guides* 482, Table 16-10), which yielded a 3 percent impairment for pain. He combined the impairment ratings for loss of range of motion and pain to calculate a 19 percent impairment of the right upper extremity (A.M.A., *Guides* 604, Combined Values Chart). Dr. Cohen stated that there was no impairment due to upper extremity weakness based on section 16.8a on page 508 of the A.M.A., *Guides*. He determined that maximum upper extremity impairment for sensory deficit or pain when the median nerve was involved at the wrist (carpal tunnel syndrome) was 39 percent (A.MA., *Guides* 492, Table 16-15). Dr. Cohen stated that this was more advantageous for appellant than using very mild pinch weakness. He multiplied this deficit by 25 percent for minimal abnormal sensations (A.M.A., *Guides* 482, Table 16-10), which yielded a 10 percent impairment for carpal tunnel syndrome. Dr. Cohen combined the 19 percent impairment for loss of range of motion and 10 percent impairment for carpal tunnel syndrome to calculate a 27 percent impairment of the right upper extremity (A.M.A., *Guides* 604, Combined Values Chart). He concluded that appellant reached maximum medical improvement in November 2001 based on Dr. Dennis' report.

By decision dated December 23, 2003, the Office granted appellant a schedule award for 27 percent impairment based on Dr. Cohen's November 21, 2003 opinion. The Office also found that appellant received an overpayment in the amount of $7,363.21 as she received a schedule award for a 31 percent impairment of the right upper extremity when she should have received an award for 27 percent impairment.

In a letter dated December 29, 2003, appellant, through counsel, requested an oral hearing before a hearing representative. In a decision dated November 8, 2004, a hearing representative set aside the December 23, 2003 decision and remanded the case to the Office. He found that, although Dr. Cohen provided a rationalized medical opinion in support of his finding that appellant sustained a 27 percent impairment of the right upper extremity, he did not address whether she had any impairment due to her distal clavicle resection. On remand the hearing representative instructed the Office to obtain a supplemental report from Dr. Cohen which explained why appellant did not have any impairment for her right shoulder surgery based on the A.M.A., *Guides*.

In a July 11, 2006 report, Dr. Cohen opined that appellant sustained a 10 percent impairment of the right upper extremity for her distal clavicle resection (A.M.A., *Guides* 506, Table 16-27). He combined this impairment rating with his previous finding of 16 percent impairment for loss of range of motion, 3 percent impairment for pain and 10 percent impairment for carpal tunnel syndrome to determine that appellant sustained a 33 percent impairment of the right upper extremity (A.M.A., *Guides* 604, Combined Values Chart). Dr. Cohen stated that, as

previously noted, there was no additional impairment for weakness based on section 16.8a of the A.M.A., *Guides*.

By decision dated August 7, 2006, the Office granted appellant a schedule award for a 33 percent impairment of the right upper extremity based on Dr. Cohen's July 11, 2006 opinion.[2] On August 14, 2007 appellant, through counsel, requested an oral hearing.

In a decision dated February 23, 2007, a hearing representative affirmed the August 7, 2006 decision. She found that appellant had no more than a 33 percent impairment of the right upper extremity based on Dr. Cohen's July 11, 2006 opinion. The hearing representative found that Dr. Cohen properly applied the A.M.A., *Guides* and provided rationale for his opinion.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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.[5] 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.[6]

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, the Office is required by statute and regulation to make findings of fact.[7] Office procedure further specifies that a final decision of the Office must include findings of fact and provide clear reasoning which allows the claimant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.[8] These requirements are supported by Board precedent.[9]

---

[2] In an August 7, 2006 letter, the Office advised appellant that an overpayment of compensation no longer existed in her claim as she was entitled to a schedule award for 31 percent impairment of the right upper extremity and she previously received a schedule award for 27 percent impairment.

[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.404.

[5] 5 U.S.C. § 8107(c)(19).

[6] 20 C.F.R. § 10.404.

[7] 5 U.S.C. § 8124(a) provides: The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office shall contain findings of fact and a statement of reasons.

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

[9] *See James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[11] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[12]

## ***ANALYSIS***

The Office determined that a conflict in the medical opinion evidence arose between Dr. Weiss, an attending physician, and Dr. Magiliati, an Office referral physician, as to the extent of permanent impairment of appellant's right upper extremity due to her employment-related right carpal tunnel syndrome, right shoulder impingement syndrome, calcific tendinitis and right shoulder and cervical sprains. Dr. Weiss found that appellant sustained a 60 percent impairment of the right upper extremity based on the A.M.A., *Guides*. Dr. Magliati opined that appellant sustained a 37 percent impairment of the right upper extremity based on the A.M.A., *Guides*.

The Office initially referred appellant to Dr. Dennis, selected as the impartial medical specialist. However, his report was found insufficient to resolve the conflict in the medical opinion evidence. The case was remanded to the Office for referral of appellant to another impartial medical specialist. On remand, the Office properly referred appellant to Dr. Heyman for an impartial medical examination.

In an October 21, 2003 report, Dr. Heyman stated that appellant sustained a 44 percent impairment of the right upper extremity based on the A.M.A., *Guides*. He stated that 90 degrees of flexion constituted six percent impairment and 30 degrees of extension constituted one percent impairment (A.M.A., *Guides* 476, Figure 16-40). Dr. Heyman further stated that 80 degrees of abduction constituted five percent impairment and 30 degrees of adduction constituted one percent impairment (A.M.A., *Guides* 477, Figure 16-43). He found that 30 degrees of external rotation represented one percent impairment and 60 degrees of internal rotation represented two percent impairment (A.M.A., *Guides* 479, Figure 16-46). Dr. Heyman also found that appellant's distal clavicle resection and acromioplasty constituted 10 percent impairment (A.M.A., *Guides* 506, Table 16-27). He determined that his impairment ratings for loss of range

[10] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[11] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

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

of motion constituted a 39 percent impairment of the right shoulder (A.M.A., *Guides* 510, Table 16-35). In addition, Dr. Heyman determined that appellant sustained five percent impairment for carpal tunnel syndrome based on no atrophy or sensory change and good muscle function and opposition. He added his impairment rating for loss of range of motion and impairment rating for carpal tunnel syndrome to calculate a 44 percent impairment of the right upper extremity.

On November 21, 2003 Dr. Cohen, an Office medical adviser, reviewed Dr. Heyman's findings and applied the A.M.A., *Guides*. He determined that appellant sustained a 27 percent impairment of the right upper extremity. In a supplemental report dated July 11, 2006, Dr. Cohen further determined that appellant sustained a 10 percent impairment of the right upper extremity for her accepted employment-related distal clavicle resection based on the A.M.A., *Guides*. He combined this impairment rating with his previous impairment ratings to determine that appellant sustained a 33 percent impairment of the right upper extremity (A.M.A., *Guides* 604, Combined Values Chart).

On August 7, 2006 the Office issued a decision granting appellant a schedule award for 33 percent impairment of the right upper extremity based on Dr. Cohen's opinion. This decision was affirmed by an Office hearing representative on February 23, 2007. The Board finds that the Office medical adviser did not explain why Dr. Heyman's opinion was not entitled to special weight accorded an impartial medical specialist. If the Office medical adviser believed that Dr. Heyman's opinion needed clarification or elaboration, the Office has a responsibility to secure a supplemental report from him that corrects the defect in the original opinion.[13] For these reasons, the case should be remanded to the Office for a proper evaluation of appellant's claim for a schedule award in accordance with the above-described standards. The Office should request a supplemental opinion from Dr. Heyman. If Dr. Heyman is unwilling or unavailable to render such, the Office should select another impartial medical specialist for an evaluation of appellant and an opinion as to the extent and degree of any employment-related impairment. After such development it deems necessary, the Office should issue an appropriate decision.[14]

## ***CONCLUSION***

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

[13] *See* cases cited in *supra* note 12.

[14] *Id.*

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 23, 2007 and August 7, 2006 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: April 9, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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