United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 08-386**
	)	**Issued: July 18, 2008**
DEPARTMENT OF JUSTICE, BUREAU OF PRISIONS, METROPOLITAN CORRECTIONAL CENTER, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 19, 2007 appellant filed a timely appeal of the August 14, 2007 merit decision of the Office of Workers' Compensation Programs, for which he received an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction of the merits of this case.

ISSUE

The issue is whether appellant has more than seven percent impairment of the right upper extremity, for which he received schedule awards.

FACTUAL HISTORY

On August 13, 2001 appellant, then a 41-year-old cook supervisor, filed a traumatic injury claim alleging that on that date he hurt his right elbow at work while breaking up a fight between two inmates. By letter dated August 29, 2001, the Office accepted the claim for right

lateral epicondylitis. On November 5, 2001 it authorized surgery, which was performed on November 14, 2001 by Dr. Kenneth J. Ham, an attending Board-certified orthopedic surgeon.

On May 7, 2002 appellant filed a claim for a schedule award. A November 14, 2002 report of Dr. Ham stated that he sustained two percent impairment of the right upper extremity. He further stated that appellant reached maximum medical improvement on May 6, 2002. On January 13, 2003 Dr. David H. Garelick, an Office medical adviser, reviewed Dr. Ham's findings and agreed that appellant sustained two percent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) 472, Figure 16-34.

By decision dated May 7, 2003, the Office granted appellant a schedule award for two percent impairment of the right upper extremity. In a May 24, 2003 letter, appellant requested an oral hearing before an Office hearing representative.

By decision dated February 9, 2004, an Office hearing representative affirmed the May 7, 2003 decision. He found that Dr. Garelick's opinion constituted the weight of the medical opinion evidence as it was based on the A.M.A., *Guides*.

In a June 12, 2006 letter, the Office expanded appellant's claim to include right cubital tunnel syndrome.

On July 10, 2006 appellant underwent lateral epicondylar and right radial and cubital tunnel releases which were performed by Dr. Nicole F. Einhorn, an attending Board-certified orthopedic surgeon. The surgery was authorized by the Office on July 27, 2006.

On January 22 and April 4, 2007 appellant filed claims for an additional schedule award. He submitted Dr. Einhorn's March 30, 2007 report, which stated that appellant had improved but continued to have recurrent complaints of pain in the medial and lateral aspects of the elbow and right middle and ring fingers. Appellant also experienced numbness in the right middle ring finger. Dr. Einhorn rated appellant's pain as 6 out of 10. She indicated that he was unable to advance his functional capacity to the point where he could perform his regular work duties which required him to lift up to 100 pounds. Dr. Einhorn discharged him on December 7, 2006 and stated that appellant also reached maximum medical improvement on that date. Appellant had permanent lifting and grasping restrictions, reduced grip strength to approximately 30 percent of the contralateral side and no focal deficits on neurologic examination. He had normal range of motion of the elbow. Dr. Einhorn attributed appellant's diminished grip strength to his lateral epicondylitis in the absence of signs and symptoms consistent with specific ulnar nerve dysfunction. She opined that appellant sustained zero percent impairment based on the A.M.A., *Guides* which does not provide an impairment rating for lateral epicondylitis resulting from diminished strength (A.M.A., *Guides* 507, Section 16.7d).

On April 23, 2007 Dr. Garelick reviewed appellant's medical records, including Dr. Einhorn's March 30, 2007 findings. He noted that, since his January 13, 2003 opinion, appellant suffered from persistent pain in the lateral aspect of the right elbow, in the mobile wad and ulnar innervated digits. Appellant's claim was expanded to include right cubital tunnel syndrome and he underwent right elbow surgery on July 10, 2006. Dr. Garelick further noted

that, all of appellant's incisions had healed, there was normal range of motion of the elbow based on physical examination and there were no focal deficits on neurologic examination. He stated that grip strength at the time of a December 2, 2006 functional capacity evaluation averaged 38.1 kilograms which represented a five percent impairment of the right upper extremity (A.M.A., *Guides* 509, Tables 16-31 and 16-34). Dr. Garelick stated that there were no additional pertinent positive physical examination findings. He determined that appellant sustained seven percent impairment of the right upper extremity based on the Combined Values Chart on page 604 of the A.M.A., *Guides*. Dr. Garelick concluded that appellant reached maximum medical improvement on December 7, 2006.

By decision dated August 14, 2007, the Office granted appellant a schedule award for an additional five percent impairment, totaling seven percent impairment of the right upper extremity.

LEGAL PRECEDENT

A claim for an increased schedule award may be based on new exposure.[1] Absent any new exposure to employment factors, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[2]

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[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 regulation 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]

The A.M.A., *Guides* provides that the evaluation of grip strength under Tables 16-31 through 16-34 should only be included in the calculation of an upper extremity impairment if such a deficit has not been considered adequately by other impairment rating methods for the upper extremity. The A.M.A., *Guides* does not encourage the use of grip strength as an impairment rating because strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* for the most part, is based on anatomic impairment. The A.M.A., *Guides* does not assign a large role to such measurements.

[1] *Linda T. Brown*, 51 ECAB 115 (1999).

[2] *Id.*

[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] *See supra* note 4.

Only in rare cases should grip strength be used and only when it represents an impairing factor that has not been otherwise considered adequately.[7] Otherwise, the impairment ratings based on objective anatomic findings take precedence.[8] Office procedures provide that clearly, grip and/or pinch strength should not be used to calculate upper extremity impairment caused by a compression neuropathy such as carpal tunnel syndrome.[9]

ANALYSIS

Appellant previously received a schedule award for two percent impairment of his right upper extremity due to his employment-related right lateral epicondylitis and resultant surgery. In response to his January 22 and April 4, 2007 requests for an increased award, the Office granted him an award for an additional five percent impairment, for a total seven percent impairment of the right upper extremity. On appeal, appellant contends that he is entitled to greater than the seven percent he was awarded.

Appellant submitted the March 30, 2007 report of Dr. Einhorn, an attending physician, who stated that appellant had reduced grip strength to approximately 30 percent of the contralateral side. Dr. Einhorn attributed the diminished grip strength to appellant's employment-related lateral epicondylitis in the absence of signs and symptoms consistent with specific ulnar nerve dysfunction. She opined that appellant sustained zero percent impairment based on the A.M.A., *Guides*, noting that it specifically declined to assign an impairment rating for lateral epicondylitis resulting from diminished strength (A.M.A., *Guides* 507, Section 16.7d). Appellant's own attending physician opined that he did not sustain any additional impairment of the right upper extremity. Therefore, Dr. Einhorn's report is insufficient to establish that appellant has more than seven percent impairment of the right upper extremity. Appellant did not submit any additional medical evidence of a permanent impairment greater than seven percent.

Dr. Garelick, an Office medical adviser, found an additional five percent impairment of the right upper extremity. He determined that appellant's grip strength averaged 38.1 kilograms which constituted a five percent impairment of the right upper extremity (A.M.A., *Guides* 509, Tables 16-31 and 16-34). Dr. Garelick stated that there were no additional pertinent positive physical examination findings. Despite the fact that the A.M.A., *Guides* does not encourage the use of grip strength as an impairment rating because strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* for the most part, is based on anatomic impairment, Dr. Garelick nonetheless determined that an additional five percent was appropriate in these circumstances. The Board finds that the opinion of Dr. Garelick represents the weight of the medical evidence of record and there is no other evidence upon which to base any further impairment.

[7] *Mary L. Henninger*, 52 ECAB 408, 409 (2001). An example of an impairment that would not be adequately considered by other rating methods would be loss of strength caused by a severe muscle tear that healed leaving a palpable muscle defect. A.M.A., *Guides* 508.

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

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, exhibit 4 (June 2003).

CONCLUSION

The Board finds that appellant has failed to establish that he has more than seven percent impairment of the right upper extremity, for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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