United States Department of Labor
Employees' Compensation Appeals Board

W.L., Appellant	)	
and	)	**Docket No. 07-758**
	)	**Issued: July 11, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Bellmawr, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2007 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated July 31, 2006 and an Office decision dated January 31, 2006 finding that he had receive an appropriate schedule award. 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 seven percent total impairment of his upper extremities due to carpal tunnel syndrome.

FACTUAL HISTORY

On July 18, 2000 appellant, then a 48-year-old manual distribution clerk, filed an occupational disease claim attributing his bilateral carpal tunnel syndrome to his past

employment as a letter sorter machine clerk and his current duties of sorting mail by hand. The Office accepted appellant's claim for carpal tunnel syndrome on August 1, 2000.

Dr. George A. Knod, Board-certified in physical medicine and rehabilitation, performed an electromyelogram (EMG) on April 3, 2000 and found mild left carpal tunnel syndrome and mild to moderate right carpal tunnel syndrome. Appellant requested schedule awards on June 25, 2001. He submitted a report dated May 23, 2001 from Dr. Nicholas Diamond, an osteopath, reporting the history of injury and finding that appellant had positive Tinel's signs bilaterally. Dr. Diamond found that appellant had full range of motion of his wrists. He noted that appellant demonstrated loss of grip strength and motor strength in both hands and concluded that he had 27 percent impairment of each of his wrists. In a supplemental report dated April 29, 2002, Dr. Diamond stated that appellant had reached maximum medical improvement by May 17, 2001. Appellant stated that he did not intend to undergo surgery for his diagnosed conditions.

The Office referred appellant for a second opinion evaluation on April 1, 2002 with Dr. Gregory Maslow, a Board-certified orthopedic surgeon. In his May 6, 2002 report, Dr. Maslow found that appellant had full range of motion of both wrists, full stability with no evidence of synovitis or tendinitis, normal strength, negative compression tests and negative Tinel's signs. He reviewed the EMGs and found mild carpal tunnel syndrome bilaterally. Dr. Maslow stated that he could not duplicate Dr. Diamond's findings of loss of strength. He concluded that appellant had no impairment for schedule award purposes.

On March 20, 2003 the Office referred appellant to Dr. Howard Zeidman, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence regarding the extent of appellant's permanent impairment due to his accepted bilateral carpal tunnel syndrome. In a report dated March 24, 2003, Dr. Zeidman found positive Tinel's sign bilaterally. He reported good sensation, strength and motion with no evidence of thenar atrophy. Dr. Zeidman awarded appellant one percent impairment bilaterally due to residual EMG findings and the absence of other observable functional disability.[1]

The Office medical adviser reviewed the record on July 23, 2003 and found that, as appellant's right EMG demonstrated mild to moderate carpal tunnel syndrome, he had five percent impairment on the right. He further found that appellant's left EMG demonstrated only mild carpal tunnel syndrome and he was, therefore, entitled to only two percent impairment on the left. The Office medical adviser stated, "It is not clear how Dr. Zeidman arrived at one percent for each upper extremity. The maximum is five percent but one percent seems low for the right side." Dr. Zeidman found that appellant reached maximum medical improvement on March 24, 2003.

[1] In evaluating carpal tunnel syndrome, the A.M.A., *Guides* 495, provide that, if after an optimal recovery time following surgical decompression, an individual continues to complain of pain, paraesthesias or difficulties in performing certain activities three possible scenarios can be present. Dr. Zeidman attempted to rate appellant's impairment based on the second scenario: "Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS [carpal tunnel syndrome] is still present and an impairment rating not to exceed 5 percent of the upper extremity may be justified." A.M.A., *Guides* 495. However, as appellant has not undergone surgical decompression this rating method is not appropriate.

By decision dated August 14, 2003, the Office granted appellant's schedule award for two percent impairment of the left upper extremity and five percent impairment of the right upper extremity. Appellant requested an oral hearing. By decision dated November 2, 2004, the hearing representative found that Dr. Zeidman's report was not sufficiently detailed to constitute the weight of the medical opinion evidence. He remanded the claim for the Office to request a supplemental report from Dr. Zeidman.

The Office requested a supplemental report from Dr. Zeidman on December 3, 2004. Dr. Zeidman responded and stated that appellant was entitled to no more than five percent impairment due to residual EMG impairments and that he had no objective functional disabilities. He stated that appellant's impairment warranted one percent rating based on the limited impairment present with EMG findings rather than functional loss identified.

By decision dated March 3, 2005, the Office found that appellant had no more than seven percent bilateral upper extremity impairment for which he had received a schedule award. Appellant requested an oral hearing on March 8, 2005. By decision dated October 26, 2005, the hearing representative set aside the Office's March 3, 2005 decision finding that Dr. Zeidman's report was not sufficiently rationalized. He remanded the case to the Office for additional development.

On November 18, 2005 the Office referred appellant for a second impartial medical evaluation with Dr. David Bundens, a Board-certified orthopedic surgeon, who completed a report on December 13, 2005 and noted appellant's history of injury. Dr. Bundens found positive Tinel's and Phalen's signs bilaterally and diagnosed bilateral carpal tunnel syndrome. He found that appellant had 35 percent loss of grip strength bilaterally. Dr. Bundens then proceeded to calculate appellant's permanent impairment by multiplying the finding of 35 percent loss of grip strength by the maximum motor deficit of the median nerve of 10 percent to reach an impairment rating of 3.5 percent of each upper extremity.

The Office medical adviser reviewed Dr. Bundens, report on January 12, 2006 and disagreed with his reasoning. He stated that the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] did not allow impairments for decreased grip strength. The Office medical adviser questioned the appropriateness of utilizing loss of grip strength to determine impairment of the median nerve.

By decision dated January 31, 2006, the Office found that Dr. Bundens had established that appellant had no more than seven percent total bilateral impairment for which appellant had received schedule awards. Appellant requested an oral hearing. He testified at the oral hearing on June 19, 2006. By decision dated July 31, 2006, the hearing representative affirmed the Office's January 31, 2006 decision finding that Dr. Bundens' report was sufficiently rationalized to be accorded special weight.

[2] A.M.A., *Guides* (5th ed. 2000).

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates 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 implementing regulation as the appropriate standard for evaluating schedule losses.[5] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[6]

The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[7] The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[8]

The A.M.A., *Guides* provide that only individuals with objectively verifiable diagnosis should qualify for a permanent impairment rating due to entrapment neuropathies such as carpal tunnel syndrome.[9] In a situation when the individual has not undergone surgical decompression, such as appellant, the impairment due to residual carpal tunnel syndrome is evaluated by multiplying the grade of severity of the sensory or motor deficit by the respective maximum upper extremity impairment value resulting from sensory or motor deficits of each nerve structure involved. When both sensory and motor functions are involved the impairment values derived for each are combined.[10] The A.M.A., *Guides* provide, "In compression neuropathies, additional impairment values are not given for decreased grip strength."[11]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id.*

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

[7] 5 U.S.C. §§ 8101-8193, 8123.

[8] 20 C.F.R. § 10.321.

[9] A.M.A., *Guides* 493.

[10] *Id*. at 494, 481.

[11] *Id*. at 494.

ANALYSIS

The Office properly found that there was a conflict of medical opinion regarding the extent of appellant's permanent impairment due to his accepted condition of carpal tunnel syndrome between appellant's attending physician, Dr. Diamond, an osteopath, who found 27 percent impairment of each upper extremity and Dr. Maslow, a Board-certified orthopedic surgeon, who found that appellant had no ratable impairment. The Office referred appellant to Dr. Bundens, a Board-certified orthopedic surgeon, to resolve this conflict. However, Dr. Bundens did not evaluate appellant's permanent impairment in accordance with the appropriate provisions of the A.M.A., *Guides*.[12] While Dr. Bundens identified the nerve involved, the median nerve,[13] he did not follow the proper procedure to classify the muscle functions such that a percentage of motor deficit could be reached.[14] Instead, Dr. Bundens calculated appellant's grip strength impairment which the A.M.A., *Guides* explicitly discourages when the diagnosed condition is a compression neuropathy and used this impairment to determine the impairment in muscle function. In order to properly resolve the conflict, the impartial medical specialist should provide a reasoned opinion as to the permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*.[15] Although Dr. Bundens attempted to apply the A.M.A., *Guides*, he did not follow the appropriate procedure. Accordingly, the case will be remanded to the Office to properly resolve the conflict by obtaining a supplemental report from Dr. Bundens which comports with the perimeters of the A.M.A., *Guides*.[16]

CONCLUSION

The Board finds that the case contains an unresolved conflict of medical opinion. On remand the Office should secure a supplemental report from Dr. Bundens following the precepts of the A.M.A., *Guides*. After this and such other development as the Office deems necessary, it should issue a *de novo* decision.

[12] *Id*. at 481, Table 16.5b.

[13] *Id*. at 492, Table 16-15.

[14] *Id*. at 484, Table 16-11.

[15] *Thomas J. Fragale*, 55 ECAB 619, 622 (2004).

[16] *L.R. (E.R.)*, 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).

ORDER

IT IS HEREBY ORDERED THAT the July 31 and January 31, 2006 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further development consistent with this decision of the Board.

Issued: July 11, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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