United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 11-717**
	)	**Issued: November 18, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, 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, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 26, 2011 appellant, through his representative, filed a timely appeal from the October 29, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning his entitlement to schedule award compensation. Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 met his burden of proof to establish that he has more than a four percent permanent impairment of his left arm, for which he received a schedule award.

[1] 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

In September 2006 OWCP accepted that appellant, then a 55-year-old letter carrier, sustained left carpal tunnel syndrome due to the repetitive duties of his job. On February 1, 2007 appellant underwent a left carpal tunnel release that was authorized by OWCP.

On March 6, 2008 appellant filed a claim for compensation requesting a schedule award for permanent impairment. In a November 8, 2007 report, Dr. David Weiss, an attending osteopath, determined that he had a 39 percent permanent impairment of his left arm under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

On February 28, 2008 appellant was referred for a second opinion examination to Dr. Zohar Stark, a Board-certified orthopedic surgeon. After a review of the statement of accepted facts and the medical evidence of record, he opined that appellant had a five percent permanent impairment under the standards of the fifth edition of the A.M.A., *Guides*. Dr. Stark noted that appellant reached maximum medical improvement on June 1, 2007. OWCP referred Dr. Stark's medical report to an OWCP medical adviser who reviewed the report and produced an April 4, 2008 report in which he concurred with Dr. Stark's impairment rating. However, OWCP's medical adviser found that the date of maximum medical improvement was February 28, 2008.

OWCP determined that there was a conflict of medical opinion between Dr. Stark and Dr. Weiss and referred appellant to Dr. George Glenn, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of his left arm impairment. As a result of an August 26, 2008 examination and report and an addendum dated September 25, 2008, Dr. Glenn determined that appellant had a 20 percent permanent impairment of his left arm due to sensory deficits and diminished sensory response. OWCP referred Dr. Glenn's medical reports to Dr. Andrew Merola, a Board-certified orthopedic surgeon who served as an OWCP medical adviser. On October 19, 2008 Dr. Merola agreed with Dr. Glenn's impairment rating and noted that the date of maximum medical improvement was August 26, 2008.

On October 7, 2009 Dr. Weiss provided a revised calculation, using his earlier findings, under the standards of the sixth edition of the A.M.A., *Guides*. He concluded that appellant had a 13 percent permanent impairment of his left arm due to entrapment neuropathy and degenerative joint disease. OWCP referred Dr. Weiss' medical report to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, who opined on December 21, 2009 that appellant's left arm impairment was four percent because the left wrist degenerative disease was never accepted as work related.

In a March 16, 2010 decision, OWCP granted appellant a schedule award for a four percent permanent impairment of his left arm. The award ran for 12.48 weeks from November 8, 2007 to February 3, 2008.

Appellant disagreed with the March 16, 2010 decision and, through his counsel, requested an oral hearing before an OWCP hearing representative. In a decision issued on September 20, 2010, the hearing representative set aside the March 16, 2010 decision and

remanded the case for further development. OWCP was directed to forward the medical reports of Dr. Glenn to a new OWCP medical adviser, not previously associated with this case, for review and opinion on appellant's left arm impairment stemming from the accepted work-related condition, the subsequent corrective surgery and, if appropriate, the degenerative joint disease in his left wrist. Upon receipt of OWCP's medical adviser's report and, following any other developmental actions deemed necessary, OWCP was directed to issue a *de novo* decision on appellant's entitlement to any additional schedule award for permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP prepared an updated statement of accepted facts and questions to OWCP's medical adviser. This material, along with the relevant medical evidence, were forwarded to OWCP's medical adviser. The relevant medical evidence included the reports from Dr. Glenn dated August 26 and September 25, 2008.

After a review of the statement of the accepted facts and the medical evidence, Dr. Robert Pick, a Board-certified orthopedic surgeon serving as OWCP's medical adviser, provided a report dated October 24, 2010. Dr. Pick provided a brief history and indicated that he reviewed the file and specifically Dr. Glenn's August 26 and September 25, 2008 reports. He utilized Dr. Glenn's findings and analyzed them in conjunction with the sixth edition of the A.M.A., *Guides*. Dr. Pick indicated that Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 was the appropriate table to evaluate appellant's left carpal tunnel syndrome. Based on Dr. Glenn's findings, he chose grade modifiers from the table for the various categories, including test findings, history and physical findings.[2] Dr. Pick then correctly averaged the grade modifiers and chose the default value of five under Grade Modifier 2. He determined the functional scale and found that appellant's mild *Quick*DASH score moved his rating one space to the left of the default value in Table 15-23. This meant that appellant had a four percent permanent impairment of his left arm under the standards of the sixth edition of the A.M.A., *Guides*. Since Dr. Glenn did not provide a specific date of maximum medical improvement, the date of his evaluation on August 26, 2008 was chosen.[3]

In an October 29, 2010 decision, OWCP determined that appellant had not shown that he has more than a four percent permanent impairment of his left arm, for which he received a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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, FECA does not

[2] The values were 1, 2 and 2, respectively.

[3] Appellant saw other physicians after that date but they did not describe any substantive change in his carpal tunnel condition.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

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 Director of OWCP adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[6] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.[7]

It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[8] Section 8123(a) of FECA provides in pertinent part: "If there is 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."[9]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[10] In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[11]

ANALYSIS

OWCP accepted that appellant sustained left carpal tunnel syndrome due to the repetitive duties of his job. On February 1, 2007 appellant underwent a left carpal tunnel release that was authorized by OWCP. He received a schedule award for a four percent permanent impairment of his left arm, but he claimed that he was entitled to receive a greater amount of schedule award compensation.

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[6] *Id.* at 866.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.(6)(a) (January 2010).

[8] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

[9] 5 U.S.C. § 8123(a).

[10] *See* A.M.A., *Guides* 449, Table 15-23.

[11] A survey completed by a given claimant, known by the name *Quick*DASH, may be used to determine the Function Scale score. *Id.* at 448-49.

In response to an OWCP hearing representative's request for further development of the evidence, appellant was referred to Dr. Pick, a Board-certified orthopedic surgeon who served as an OWCP medical adviser. In an October 24, 2010 report, Dr. Pick discussed his review of the medical records and provided an opinion that appellant had a four percent permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.[12] He properly applied these standards to reach his conclusion about appellant's permanent left arm impairment.

Dr. Pick properly made reference to Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 of the sixth edition of the A.M.A., *Guides*.[13] He chose grade modifiers from the table for the various categories, including test findings, history and physical findings, based on Dr. Glenn's findings. Dr. Pick then averaged the grade modifiers and chose the default value of five under grade modifier two. He determined the functional scale and found that appellant's mild *Quick*DASH score moved his rating one space to the left of the default value in Table 15-23. Therefore, he properly concluded appellant had a four percent permanent impairment of his left arm under the standards of the sixth edition of the A.M.A., *Guides*.

On appeal, counsel argued that there was a conflict in the medical opinion between the reports of Dr. Pick and Dr. Weiss. In an October 7, 2009 revision of an earlier evaluation, Dr. Weiss used the sixth edition of the A.M.A., *Guides* and determined that appellant had a 13 percent permanent impairment of his left arm comprised of a 4 percent impairment related to carpal tunnel syndrome combined with a 9 percent impairment related to left wrist degenerative joint disease. The Board finds that Dr. Weiss did not provide a rationalized medical opinion explaining how the observed left wrist degenerative joint disease either constituted a work-related condition or a condition that preexisted the accepted condition of left carpal tunnel syndrome.[14] Dr. Weiss' failure to provide such medical rationale means that the nine percent impairment he attributed to this condition may not be included in the October 9, 2009 revised impairment evaluation. This leaves Dr. Weiss' four percent impairment rating for left carpal tunnel syndrome as the only remaining impairment rating for the left arm in his report, *i.e.*, the same degree of impairment for this condition as found by Dr. Pick. Therefore, there is no conflict between the reports of Dr. Weiss and Dr. Pick.[15]

On appeal, counsel argued that OWCP unnecessarily delayed the development of appellant's case such that the assessment of his permanent impairment was made under the sixth edition of the A.M.A., *Guides* rather than the fifth edition, hence resulting in a lower impairment rating. OWCP appropriately developed appellant's case and counsel has not shown that an unnecessary delay in the development of his case occurred.

Counsel asserts that appellant has a property right in a schedule award benefit under the fifth edition and a protected property interest cannot be deprived without due process, citing

[12] OWCP's decision regarding impairment was not issued until after May 1, 2009 and therefore evaluation of appellant's impairment under the sixth edition of the A.M.A., *Guides* was appropriate. *See supra* note 8.

[13] A.M.A., *Guides* 449, Table 15-23 (6th ed 2009).

[14] *See supra* note 9 regarding the inclusion of preexisting conditions in schedule award calculations.

[15] *See supra* note 10.

Goldberg v. Kelly, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). As noted in *Harry D. Butler*,[16] Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[17] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.[18] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.

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

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a four percent permanent impairment of his left arm, for which he received a schedule award.

[16] 43 ECAB 859 (1992).

[17] *Id.* at 866.

[18] *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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