United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
and	)	**Docket No. 13-503**
	)	**Issued: September 19, 2013**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, MILITARY OCEAN TERMINAL, Bayonne, 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:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 2, 2013 appellant, through her attorney, filed a timely appeal from a September 21, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming a prior schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 has greater than 13 percent impairment of the left upper extremity, for which she received a schedule award.

On appeal, counsel asserts that OWCP did not utilize the proper procedures in selecting an impartial medical examiner. He also argues that the impartial medical examiner failed to perform Semmes-Weinstein monofilament testing, provide complete measurements for range of

[1] 5 U.S.C. § 8101 *et seq.*

motion or explain why he excluded a preexisting left elbow condition from his impairment rating.

FACTUAL HISTORY

OWCP accepted that on June 2, 1993 appellant, then a 33-year-old purchasing agent, sustained a right elbow contusion and C6-7 disc herniation without myelopathy when she slipped and fell on a waxed floor.[2] On February 15, 1994 Dr. A.A. Steinberger, an attending Board-certified neurosurgeon of professorial rank, performed a left hemilaminectomy and laminotomy of C5 and C7, left foraminotomy at C5-6 and C6-7 and excision of extruded disc on the left at C6-7. He opined that the procedures were medically necessary to address severe, unremitting left-sided cervical radiculopathy with radiation into the left arm. Based on an OWCP medical adviser's February 4, 1997 report, OWCP approved the procedure.[3] By decision dated October 20, 2009, OWCP granted appellant a schedule award for $3,500.00 for disfigurement due to the surgical scar.[4] Appellant continued to seek medical treatment through 2009 for continued neck pain with left-sided radicular symptoms.

OWCP conducted additional development on the issue of permanent impairment. On November 5, 2009 it obtained a second opinion from Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, who opined that appellant had no ratable impairment of the left upper extremity, noting that her symptoms were out of proportion to her clinical findings. Dr. Hutter noted in a December 17, 2009 supplemental report that appellant had no neurologic, motor or reflex deficits on clinical examination. In a December 28, 2009 report, an OWCP medical adviser concurred that appellant had no ratable impairment of the left upper extremity. By decision dated January 14, 2010, OWCP denied appellant's schedule award claim on the grounds that the medical evidence did not establish impairment of a scheduled member of the body.

In a February 5, 2010 letter, appellant, through counsel, requested a hearing which was held on May 17, 2010. At the hearing, appellant described difficulties with activities of daily living and an inability to type due to loss of sensation in her left hand. She contended that Dr. Hutter did not perform a thorough examination. Counsel asserted that the opinion of Dr. Nicholas Diamond, an attending osteopathic physician, which rated 23 percent impairment to the left arm, should be accorded the weight of the medical evidence.

[2] OWCP initially denied the claim for a C6-7 disc herniation on January 4, 1995. Following further development, it issued a January 27, 1997 decision expanding the claim to include C6-7 disc herniation.

[3] Appellant declined a transfer to Norfolk, Virginia, and was separated from the employing establishment effective December 12, 1997.

[4] On August 1, 2004 appellant claimed a schedule award for disfigurement of the back of her neck due to the surgical scar from the February 15, 1994 procedure. Following additional development, OWCP advised her by August 7, 2009 letter of the evidence needed to establish her claim. In an October 7, 2009 report, an OWCP medical adviser opined that appellant's surgical scar had reached maximum medical improvement. Appellant had a scar at the midline posterior neck from C2 to C7, which the adviser opined warranted the maximum $3,500.00 schedule award for disfigurement.

Following the hearing, counsel submitted appellant's May 16, 2010 statement describing functional difficulties she attributed to the sequelae of the accepted injuries. Appellant also provided a March 20, 2010 electromyography (EMG) and nerve conduction velocity (NCV) study demonstrating left-sided C5-6 radiculopathy.

Counsel also submitted Dr. Diamond's April 21, 2010 report reviewing appellant's history of injury and treatment. He noted a pain questionnaire score of 118, indicating a "severe pain disability." On examination of the left upper extremity, Dr. Diamond found decreased sensation in the C6 and C7 dermatomes, decreased range of left elbow motion, loss of grip and pinch strength, decreased sensibility at 3.61 milligrams with Semmes-Weinstein monofilament testing, 8 millimeters two-point discrimination and deep tendon reflexes at 2+/4. He diagnosed postsurgical status and C5-6 radiculopathy. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), Dr. Diamond found a class 1 diagnosis-based-impairment (CDX) for sensory deficit of the left C6 axillary nerve root, equaling a one percent impairment. He found a grade modifier for Functional History (GMFH) of three percent due to a pain questionnaire score of 118 according to Table 15-7,[5] and a grade modifier for Clinical Studies (GMCS) of three percent according to Table 15-9 for EMG, NCV and magnetic resonance imaging (MRI) scan studies.[6] Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) resulted in a modifier of 4, for a one percent impairment of the left arm. Dr. Diamond also found a class 1 sensory deficit for the left C7 radial nerve root, with a GMFH of 3 and GMCS of 3, equaling a one percent impairment of the left arm. He also found a 17 percent impairment of the left upper extremity due to a class 2 3/5 motor strength deficit of left elbow supination. Dr. Diamond combined these impairments to equal 25 percent impairment of the left upper extremity.

By August 10, 2010 decision, an OWCP hearing representative vacated the January 14, 2010 decision. The hearing representative found a conflict in medical opinion between Dr. Diamond, for appellant, and Dr. Hutter, for OWCP, regarding the extent of permanent impairment.

To resolve the conflict, OWCP selected Dr. Michael Gordon, a Board-certified orthopedic surgeon, as impartial medical examiner. It included screen captures demonstrating its use of the Physicians Directory System (PDS) to select Dr. Gordon.

Dr. Gordon submitted an October 29, 2010 report regarding his findings on an October 5, 2010 examination. He reviewed the medical record and provided a statement of accepted facts. On examination of the left upper extremity, Dr. Gordon found a positive Spurling's test on the left, zero degrees carrying angle of the left elbow with significant loss of supination, no atrophy, mild biceps weakness in the C6 enervation, mild weakness in the left wrist in the C7 and C8 nerve root distributions, left elbow supination limited to 20 degrees, diminished grip strength that

[5] Table 15-7, page 406 of the sixth edition of the A.M.A., *Guides* is entitled "Functional History Adjustment: Upper Extremities."

[6] Table 15-9, page 410 of the sixth edition of the A.M.A., *Guides* is entitled "Clinical Studies Adjustment: Upper Extremities."

did not fit a verifiable bell curve pattern and two-point discrimination testing within normal limits. He diagnosed a contusion of the right elbow, herniated C6-7 disc and C6 radiculopathy. Dr. Gordon noted that the medical evidence indicated that appellant attained maximum medical improvement in August 1994. He opined that appellant had voluntary restriction of left shoulder motion as there was no atrophy in the shoulder girdle indicating objectively restricted motion. Referring to the sixth edition of the A.M.A., *Guides*, Dr. Gordon found a class 1 mild motor deficit with no sensory deficit according to Table 15-20,[7] equaling nine percent impairment of the left arm and a GMFH of 3 according to Table 15-7. Using the net adjustment formula resulted in a grade modifier of +1, for a total 10 percent impairment of the left upper extremity. Dr. Gordon explained that limitation of left elbow supination could not be rated as a stand-alone impairment under the grading rubric of Table 15-20.

On November 29, 2010 an OWCP medical adviser reviewed Dr. Gordon's report and concurred with his clinical findings; but found that Dr. Gordon did not properly use the net modifier table. The medical adviser found a grade modifier of +2, raising the default value of 9 percent to a 13 percent impairment of the left upper extremity.

By decision dated December 22, 2010, OWCP granted appellant a schedule award for a 13 percent permanent impairment of the left upper extremity, based on Dr. Gordon's opinion as reviewed by OWCP's medical adviser. The period of the award ran from August 19, 1994 to May 29, 1995, equaling a one-time payment of $14,280.94.

Appellant disagreed with the amount of the schedule award.[8] Through counsel, she requested an oral hearing. In support of her claim, appellant submitted a March 31, 2011 impairment rating from Dr. Diamond, reiterating his April 21, 2010 opinion that appellant had a 25 percent impairment of the left upper extremity according to the sixth edition of the A.M.A., *Guides*. Dr. Diamond asserted that Dr. Gordon did not perform appropriate or adequate testing and misapplied the A.M.A., *Guides*.

At the hearing, held April 13, 2011, counsel asserted that Dr. Gordon's opinion could not represent the weight of the medical evidence as he performed inadequate testing and misapplied the A.M.A., *Guides*. He asserted that OWCP should accord the weight of the medical evidence to Dr. Diamond. Following the hearing, counsel submitted a February 17, 2010 report from Dr. Gordon Donald, an attending Board-certified orthopedic surgeon, diagnosing chronic cervical radiculitis.

By decision dated July 5, 2011, an OWCP hearing representative vacated the December 22, 2010 decision and remanded the case to OWCP for additional medical development. The hearing representative directed that OWCP request a supplemental report

[7] Table 15-20, page 434 of the sixth edition of the A.M.A., *Guides* is entitled "Brachial Plexus Impairment: Upper Extremity Impairments."

[8] Appellant provided an April 11, 2011 statement reviewing her history of medical treatment and the processing of her compensation claims.

from Dr. Gordon reviewing Dr. Diamond's impairment rating, then forward the supplemental report to an OWCP medical adviser for review.[9]

On remand of the case, OWCP obtained an August 8, 2011 supplemental report from Dr. Gordon, explaining that the loss of supination in the left elbow was completely unrelated to cervical radiculopathy as the loss was equal in both active and passive motion. If the loss were neuromuscular, there would have been a difference between the loss of active and passive motion. Dr. Gordon opined that the restricted left elbow motion was either congenital or due to a pediatric supracondylar fracture.

An OWCP medical adviser reviewed Dr. Gordon's supplemental report on October 13, 2011 and found that it created a new conflict of opinion with Dr. Diamond regarding the nature and extent of the left elbow impairment. To resolve the conflict, OWCP selected Dr. Robert Dennis, a Board-certified orthopedic surgeon, as impartial medical examiner. OWCP included four print screens and a PDS referral form documenting the selection of Dr. Dennis.

Dr. Dennis submitted a December 19, 2011 report providing a detailed review of the medical record and statement of accepted facts. On examination, he observed restriction of left elbow extension to 20 degrees. Dr. Dennis opined that this limitation was unrelated to the accepted 1993 injuries, as the bony stops objectively present indicated a congenital fracture. He therefore "removed any and all considerations of any left elbow abnormality from the permanency determinations." Dr. Dennis found no reproducible sensory deficits on monofilament testing, inconsistent grip strength results, slightly diminished left biceps reflexes consistent with surgical history. He noted that electrodiagnostic studies demonstrated cervical radiculopathy. Regarding the percentage of permanent impairment, Dr. Dennis concurred with OWCP's medical adviser's November 29, 2010 finding of 13 percent impairment of the left arm. On February 29, 2012 an OWCP medical adviser not previously associated with appellant's claim concurred with Dr. Dennis' findings and impairment rating.

By decision dated March 14, 2012, OWCP denied appellant's claim for an augmented schedule award on the grounds that the medical evidence did not establish that she sustained greater than the 13 percent impairment of the left upper extremity for which she received a schedule award.

In a March 20, 2012 letter, appellant requested a hearing, held by video link on July 13, 2012. Prior to the hearing, she submitted February 9 and July 11, 2012 statements reviewing the history of injury and treatment. Appellant asserted that the June 2, 1993 work injury caused restricted motion of the left elbow. At the hearing, counsel asserted that OWCP did not properly document its selection of Dr. Dennis as an impartial medical examiner, that Dr. Dennis failed to perform Semmes-Weinstein monofilament testing, and failed to mention the cervical radiculopathy demonstrable on the March 23, 2010 EMG study. Counsel also argued

[9] In a July 14, 2011 letter, counsel requested to participate in the selection of a new impartial medical examiner if OWCP determined that Dr. Gordon could no longer serve. He asserted that such participation would help assure a truly impartial evaluation. By August 17, 2011 decision, OWCP denied counsel's request as he did not provide sufficient reason to participate in selecting an impartial medical examiner. The August 17, 2011 decision is not before the Board on the present appeal.

that Dr. Dennis failed to provide detailed measurements from his clinical testing and failed to consider a preexisting left elbow condition.

Following the hearing, appellant submitted a July 12, 2012 letter from Dr. Diamond expressing his disagreement with Dr. Dennis' December 19, 2011 impairment rating. Dr. Diamond asserted that Dr. Dennis did not fully describe his findings of muscle weakness or their relationship to cervical radiculopathy. He asserted that his April 21, 2010 impairment rating remained unchanged.

By decision dated and finalized on September 21, 2012, an OWCP hearing representative affirmed OWCP's March 14, 2012 decision. The hearing representative found that OWCP used and documented the appropriate procedures in selecting Dr. Dennis and properly relied on his opinion as the weight of the medical evidence. The hearing representative noted that Dr. Dennis provided detailed findings on sensory testing, explaining that appellant's results were too inconsistent to be considered reliable. Also, Dr. Dennis explained that he excluded the congenital condition as it was not ratable under the A.M.A., *Guides*' motor loss or peripheral nerve impairment rubrics.

LEGAL PRECEDENT

The schedule award provisions of FECA[10] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the OWCP. 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[11] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[12]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[13] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, Physical Examination (GMPE) and GMCS.[14] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

[10] 5 U.S.C. § 8107.

[11] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[13] A.M.A., *Guides* 3 (6th ed. 2008), Section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[14] A.M.A., *Guides* 494-531 (6th ed. 2008).

Section 8123 of FECA provides that, 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.[15] In situations where there exist 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 upon a proper factual background, must be given special weight.[16]

When OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[17] If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.[18]

ANALYSIS

Appellant claimed a schedule award for left upper extremity impairment due to an accepted June 2, 1993 C6-7 herniation. OWCP obtained a second opinion from Dr. Hutter, a Board-certified orthopedic surgeon, who opined on November 5, 2009 that appellant had no ratable impairment of the left arm. It denied the schedule award claim by decision dated January 14, 2010.

Following a May 17, 2010 hearing, counsel submitted an April 21, 2010 impairment rating from Dr. Diamond, an attending osteopathic physician, finding severe restriction of left elbow motion. OWCP issued an August 10, 2010 decision vacating the January 14, 2010 determination due to a conflict between Dr. Diamond and Dr. Hutter. It selected Dr. Gordon, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Gordon opined on October 29, 2010 that appellant had 10 percent impairment of the left arm due to cervical nerve root involvement. He also noted severely restricted left elbow motion not attributable to a nerve root injury and therefore not included in the impairment rating. Dr. Gordon opined that the restriction was due to a remote supracondylar fracture. An OWCP medical adviser corrected Dr. Gordon's mathematical error in applying the grade modifiers to arrive at a 13 percent impairment of the left upper extremity, for which OWCP issued a schedule award on December 22, 2010.

Following an April 13, 2011 hearing and submission of additional reports from Dr. Diamond, OWCP vacated the December 22, 2010 schedule award on July 5, 2011 and remanding the case for additional development. This development resulted in the emergence of

[15] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[16] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[17] *Harry T. Mosier*, 49 ECAB 688 (1998).

[18] *Guiseppe Aversa*, 55 ECAB 164 (2003).

a conflict of medical opinion between Dr. Gordon and Dr. Diamond. OWCP selected Dr. Dennis, a Board-certified orthopedic surgeon, to resolve it.

The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.[19] The record contains four print screens and a PDS referral form documenting the selection of Dr. Dennis. The Board finds that these documents establish that OWCP properly followed the appropriate procedures in selecting Dr. Dennis as impartial medical examiner. As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that counsel's argument is not substantiated.[20]

Dr. Dennis submitted an extensive December 19, 2011 report concurring with the 13 percent impairment rating proffered by OWCP's medical adviser. Regarding the left elbow, Dr. Dennis opined that this limitation was unrelated to the accepted 1993 injuries, as it was apparently a congenital fracture. He therefore "removed any and all considerations of any left elbow abnormality from the permanency determinations."

OWCP denied an augmented schedule award by March 14, 2012 decision. Following a July 13, 2012 hearing, it affirmed the March 14, 2012 decision on September 21, 2012. The Board finds, however, that the case is not in posture for a decision.

Although OWCP did not accept a left elbow injury or condition, the observed restricted motion could be included in an impairment rating if it was established as a preexisting condition. It is well established that, in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[21] Dr. Gordon opined on October 29, 2010 that the restricted motion was due to a childhood supracondylar fracture. Dr. Dennis noted on December 19, 2011 that the bony nature of the restriction demonstrated a congenital supracondylar fracture. Both physicians therefore attributed the restriction of left elbow motion to congenital or childhood events that occurred prior to June 2, 1993. These opinions therefore establish the left elbow condition as preexisting. Despite this, Dr. Gordon and Dr. Dennis both failed to include it in their impairment ratings. The case will be remanded to OWCP to obtain a supplemental report from Dr. Dennis addressing the left elbow condition in the impairment rating, or explaining why it should be omitted from the impairment rating.[22] Following this and all other necessary development, OWCP will issue an appropriate decision in the case.

On appeal, counsel asserts that OWCP did not utilize the proper procedures in selecting an impartial medical examiner. As noted, the Board finds that the print screens and referral form establish that OWCP properly utilized the PDS in selecting Dr. Dennis. Counsel also asserts that Dr. Dennis did not conduct appropriate testing or address the left elbow condition. The case will

[19] *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

[20] *Id.*

[21] *Michael C. Milner*, 53 ECAB 446, 450 (2002).

[22] *Harry T. Mosier*, 49 ECAB 688 (1998).

be remanded to OWCP for further development to determine the appropriate percentage of permanent impairment.

CONCLUSION

The Board finds that the case is not in posture for a decision. The case will be remanded to OWCP for appropriate development regarding the percentage of left upper extremity impairment attributable to her left elbow condition.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 21, 2012 is set aside and the case remanded to OWCP for additional development consistent with this decision and order.

Issued: September 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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