United States Department of Labor
Employees' Compensation Appeals Board

RONALD O. TINSLEY, Appellant	)	
and	)	**Docket No. 05-1598**
	)	**Issued: October 25, 2005**
U.S. POSTAL SERVICE, SOUTH JERSEY 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:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 25, 2005 appellant filed a timely appeal of a March 23, 2005 merit decision of a hearing representative of the Office of Workers' Compensation Programs that denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has an impairment of his left arm related to his accepted carpal tunnel syndrome.

FACTUAL HISTORY

On February 15, 2000 appellant, then a 52-year-old clerk, filed a claim for compensation for an occupational disease of carpal tunnel syndrome of the left wrist, which he attributed to the repetitive motion of his duties as a letter sorting machine operator and manual clerk. He submitted a September 3, 1999 report from Dr. Robert A. Sammartino, an osteopath, who stated

that an electromyogram (EMG) that day showed left median motor nerve distal latency in the upper limits of normal, suggestive of borderline left carpal tunnel syndrome. In a January 3, 2000 report, Dr. Jeffrey P. Kovacs, an osteopath Board-certified in orthopedic surgery, diagnosed overuse syndrome of the left forearm and mild left carpal tunnel syndrome, which he treated with a splint and medications. In a March 24, 2000 report, Dr. Anthony D. DiBona, Jr., an osteopath Board-certified in family practice, diagnosed overuse syndrome of the left forearm and mild carpal tunnel syndrome noted on an EMG.

The Office initially denied appellant's claim for left carpal tunnel syndrome, but accepted the claim after receiving a November 28, 2000 report from Dr. DiBona stating that the mild carpal tunnel syndrome and mild tendinitis of the left forearm were a direct result of appellant's repetitive keying.

On June 24, 2002 appellant filed a claim for a schedule award. He submitted a May 13, 2002 report from Dr. David Weiss, an osteopath, who noted that appellant complained of left hand numbness and a pins and needles sensation daily and of left hand and wrist pain at a level of 6 on a 0 to 10 scale. Examination revealed no atrophy, a full range of wrist motion with pain at the extremes, positive Tinel's and Phalen's signs, a grade of 4/5 for resistive thumb abduction, and grip strength on the Jamar dynamometer of 46 kilograms on the left versus 56 on the right.[1] Dr. Weiss stated that application of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* resulted in a 10 percent impairment for grip strength deficit, 5 percent for 4/5 motor strength in left thumb abduction and 3 percent for pain, for a total of 21 percent impairment of the left upper extremity.

An Office medical adviser reviewed Dr. Weiss's report on September 28, 2002 and concluded that appellant's only impairment was the 10 percent for loss of grip strength. The medical adviser noted that the loss of motor strength in thumb abduction was part of grip strength, that pain was not well documented as part of the examination and that Dr. Weiss routinely gave patients three percent for pain, which made that rating highly questionable.

On August 8, 2003 the Office referred appellant, the case record and a statement of accepted facts to Dr. Robert Bachman, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion on the extent of impairment between Dr. Weiss and the Office medical adviser. In an August 13, 2003 letter, the Office advised appellant that Dr. Stephen Horowitz, a Board-certified orthopedic surgeon, who is an associate of Dr. Bachman, would be conducting the examination since Dr. Bachman was on vacation. In an August 19, 2003 report, Dr. Horowitz set forth appellant's history and reviewed his medical records, stating that the September 3, 1999 EMG really appeared to be pretty unremarkable with minimal findings. Examination revealed a complaint of decreased sensation throughout the left upper extremity in a patchy nonanatomic distribution, normal motor and reflex evaluations, full range of motion of the left wrist, no atrophy, two-point discrimination of three millimeters or less in all fingers tested and negative Tinel's and Phalen's signs. Dr. Horowitz concluded:

> "Based upon the information available today, it is my opinion that [appellant] does not have clinically significant carpal tunnel syndrome. His provocative

[1] Appellant is left-hand dominant.

> signs, such as Tinel's sign and Phalen's test today are both negative on exam[ination] and this appears to be consistent with the majority of exam[ination]s in the chart over the last several years. In addition, he did have an EMG study done in the past which really just showed minimal findings. It is not uncommon for patients that are asymptomatic to even have some mild findings on EMGs. There are no findings at all on exam[animation] of any type of muscle atrophy. Sensation is intact and excellent in all fingers tested and there really is no evidence of any significant carpal tunnel syndrome that I can see on exam[ination]. It should also be noted that [appellant] does have some nonphysiologic findings on exam[ination] such as the patchy decrease in sensation in his entire left upper extremity."

An Office medical adviser reviewed Dr. Horowitz's report on January 15, 2004 and stated that it showed nothing objectively wrong, which indicated a zero percent impairment.

By decision dated January 20, 2004, the Office found that the evidence failed to establish a permanent impairment of appellant's left arm. He requested a hearing, which was held on December 1, 2004. By decision dated March 23, 2005, an Office hearing representative found that Dr. Horowitz must be considered a second opinion rather than an impartial medical specialist, since there was no indication he was selected in accordance with the impartial medical specialist rotation system. The hearing representative found that the opinion of Dr. Horowitz nonetheless constituted the weight of the medical evidence, as his report, unlike Dr. Weiss', was consistent with the objective findings and with the findings on earlier medical reports. The denial of a schedule award was affirmed.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] sets 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.

In situations where there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist for the purpose of resolving

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

the conflict, pursuant to section 8123(a) of the Act.[4] Impartial medical specialists are selected by a strict rotational system to eliminate any inference of bias or partiality.[5]

ANALYSIS

The Board finds that an Office hearing representative, in a March 23, 2005 decision, properly concluded that Dr. Horowitz, a Board-certified orthopedic surgeon, could not be considered an impartial medical specialist for the reason that he was not the physician selected by the Office's rotational system, but rather was an associate of that physician.[6] The report of Dr. Horowitz, thus, is considered that of a second opinion examiner.

In his August 19, 2003 report, Dr. Horowitz concluded that appellant did not have clinically significant carpal tunnel syndrome, based on his absence of muscle atrophy, intact sensation, negative Tinel's and Phalen's signs and minimal findings on EMG. The Board finds that this report created a conflict of medical reports with the reports of appellant's attending physicians, Dr. Sammartino, Dr. Kovacs, Dr. DiBona and Dr. Weiss, all of whom concluded that he did have carpal tunnel syndrome. Dr. Weiss, the only attending physician who rated his impairment, found such impairment based on loss of strength and pain. Dr. Horowitz reported a normal motor evaluation, but did not provide an objective measurement of appellant's strength, unlike Dr. Weiss, who measured his grip using a Jamar dynamometer. These doctors also reported different findings on examination, with Dr. Horowitz reporting that the Tinel's and Phalen's signs were negative and Dr. Weiss reporting that these tests for carpal tunnel syndrome were positive.

CONCLUSION

The Board finds that there is an unresolved conflict of medical opinion on the question of whether appellant has any impairment of his left arm due to the accepted carpal tunnel syndrome.

[4] 5 U.S.C. § 8123(a) states in pertinent part: "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."

[5] *Miguel A. Muniz*, 54 ECAB ___ (Docket No. 02-58, issued December 9, 2002); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

[6] *Saundra B. Williams*, 53 ECAB 334 (2002).

ORDER

IT IS HEREBY ORDERED THAT the March 23, 1005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for referral to an appropriate impartial medical specialist to resolve the conflict of medical opinion, to be followed by an appropriate decision.

Issued: October 25, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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