United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 08-658**
	)	**Issued: November 4, 2008**
DEPARTMENT OF THE ARMY, SAFETY DIVISION, FORT SMITH, GA, Employer	)	

Appearances:
Appellant, pro se
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 December 26, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated November 15, 2007[1] granting him schedule awards. 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 nine percent impairment of his right upper extremity and four percent impairment of his left upper extremity for which he received schedule awards.

[1] In his appeal to the Board, appellant limited his appeal to the Office's November 15, 2007 schedule award decision.

FACTUAL HISTORY

This case has previously been before the Board. On September 20, 2000 appellant, then a 45-year-old maintenance mechanic, sustained a deep cut to his right forearm when a sheet of glass fell on him while in the performance of duty. The Office accepted appellant's claim for laceration of the right forearm. Appellant underwent a surgical repair of the right brachioradialis tendon on February 28, 2001. The surgeon stated, "The brachioradialis was freed up distally and we tried to attempt to bring it back to an elongated position but it was not able to be because of fibrosis proximally and tendon adherence distally."

Appellant filed a notice of occupational disease on February 4, 2002 alleging that he developed carpal tunnel syndrome due to factors of his federal employment. On April 5, 2002 the Office accepted that he sustained an aggravation of left carpal tunnel syndrome on May 1, 2001. Dr. Scott Gillogly, a Board-certified orthopedic surgeon, completed a report on December 14, 2001. He opined that appellant had reached maximum medical improvement. Dr. Gillogly diagnosed bilateral carpal tunnel syndrome and brachioradialis weakness, numbness and dysesthesias. Appellant filed an additional claim for carpal tunnel syndrome on December 24, 2003 when employed by the Department of the Navy. The Office accepted this claim for aggravation of carpal tunnel syndrome.

In a report dated December 19, 2003, Dr. Gillogly diagnosed bilateral carpal tunnel syndrome and work-related forearm laceration with concomitant brachioradialis weakness with persistent symptoms. The district medical adviser reviewed appellant's claims on January 25, 2005 and stated that appellant's repair of the brachioradialis muscle had no complications and a good result based on a November 29, 2000 magnetic resonance imaging scan.[2] He opined that appellant had four percent impairment of each of his upper extremities. In a letter dated February 1, 2005, the Office informed appellant that he had four percent impairment to his upper extremities bilaterally due to carpal tunnel syndrome but that he was not entitled to receive compensation for wage loss concurrent with a schedule award.

By decision dated February 1, 2005, the Office found that appellant's actual earnings as a procurement technician fairly and reasonably represented his wage-earning capacity and reduced his wage-loss compensation benefits. On February 28, 2005 appellant requested reconsideration of his wage-earning capacity determination.[3] By decision dated March 18, 2005, the Office finalized an overpayment determination finding that appellant was not entitled to waiver. It determined to withhold $200.00 from appellant's continuing compensation benefits effective March 20, 2005. At appellant's request, the Board reviewed the February 1 and March 18, 2005 decisions and issued an order remanding case on March 10, 2006.[4] The Board remanded the case for additional development and merit decisions pertaining to appellant's pay rate, wage-

[2] The Board notes that this MRI scan predates the February 28, 2001 surgery which identified and repaired the brachioradialis tear.

[3] As the Office has not issued a final decision on this request, the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).

[4] Docket No. 05-1391 (issued March 10, 2006).

earning capacity and overpayment. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Dr. Gillogly examined appellant on February 7, 2005 and found that he had reached maximum medical improvement on that date. He diagnosed carpal tunnel syndrome in the right upper extremity based on electromyelogram (EMG) and nerve conduction velocity studies (NCV) as well as a work-related forearm laceration with brachioradialis weakness, numbness and dysesthesia and surgical tendon repair. Dr. Gillogly stated that appellant experienced continuing brachioradialis symptoms. He found carpal tunnel syndrome in the left upper extremity based on EMG and NCV. In the right upper extremity, Dr. Gillogly found appellant demonstrated two percent impairment of the upper extremity due to median nerve radial sensory deficit of the right index finger, two percent impairment the upper extremity due to median nerve radial sensory deficit of the right middle finger, one percent upper extremity impairment due to radial sensory deficit of the median nerve in the ring finger and four percent upper extremity impairment due to dysesthesias of the median nerve affecting appellant's thumb. He described that appellant had decreased grip strength due to brachioradialis laceration and repair resulting in 10 percent impairment of the right upper extremity. Dr. Gillogly concluded that appellant had 19 percent impairment of the right upper extremity. He also found that appellant had four percent impairment of the left upper extremity due to median nerve radial sensory deficits in the left index finger, left middle finger and thumb of one, one and two percent respectively.

In a report dated June 15, 2006, the district medical adviser found that appellant had reached maximum medical improvement on February 7, 2005 and agreed that appellant had nine percent permanent impairment of his right upper extremity due to median nerve neuropathy in the index, middle, ring and thumb of the right hand which was caused by his employment-related bilateral carpal tunnel syndrome. He disagreed that appellant was entitled to an additional impairment rating for loss of grip strength. The district medical adviser stated that the brachioradialis did not act on grip strength and that there were reports of full recovery of function of the brachioradialis after repair. He found that appellant had four percent impairment of the left upper extremity due to median nerve neuropathies.

Dr. Gillogly completed a second report on August 4, 2006 and repeated his earlier diagnoses and impairment ratings. He described appellant's history of injury including the September 27, 2000 right forearm laceration and bilateral carpal tunnel syndromes. Dr. Gillogly stated that May 2002 electrodiagnostic studies confirmed bilateral carpal tunnel syndrome. He noted that appellant's current findings included decreased grip strength and decreased sensation particularly in the right hand and wrist. Dr. Gillogly stated that appellant did not currently wish to undergo carpal tunnel releases.

In a letter dated November 21, 2006, the Office provided Dr. Gillogly with a copy of the district medical adviser's report and requested an updated impairment rating. Dr. Gillogly completed a report on August 9, 2007 and reiterated his conclusions.

In a telephone call on September 21, 2007, the Office informed appellant that there was disagreement between his physician and the district medical adviser and that additional development of the medical evidence in the form of an impartial medical examination was necessary. On November 1, 2007 the Office telephoned appellant and informed him that

additional medical evidence was not necessary as the district medical adviser was reviewing Dr. Gillogly's reports.

By decision dated November 15, 2007, the Office granted appellant schedule awards for nine percent impairment of his right upper extremity and four percent impairment of his left upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7] 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.[8]

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.[9] 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.[10]

ANALYSIS

Appellant's attending physician, Dr. Gillogly, a Board-certified orthopedic surgeon, completed reports on February 7, 2005, August 4 and 9, 2006 and opined that appellant had 19 percent impairment of his right upper extremity due to sensory impairments of the median nerve impacting his thumb, middle and ring finger as well as motor deficits of the brachioradialis

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Id.*

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

[9] 5 U.S.C. §§ 8101-8193, 8123.

[10] 20 C.F.R. § 10.321.

tendon resulting in a loss of grip strength. The district medical adviser reviewed Dr. Gillogly's reports on behalf of the Office and opined that appellant was not entitled to an impairment rating due to motor impairment of his brachioradialis. He disagreed both with the use of grip strength to determine a motor impairment and with Dr. Gillogly's finding that appellant had continuing symptoms in his brachioradialis following the surgical repair.

The Board finds that there is an unresolved conflict of medical opinion evidence regarding the extent of appellant's permanent impairment due to both of his accepted right arm injuries. As noted, the district medical adviser found that the medical evidence suggested that appellant did not have any continuing symptoms of his brachioradialis following the surgical repair. Dr. Gillogly examined appellant and found that he had continuing motor deficits which warranted a permanent impairment rating. Based on these differences of medical opinion, the case will be remanded to refer appellant to an appropriate Board-certified physician for an opinion on the extent of permanent impairment. After such other development of the evidence as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that there is an unresolved conflict of medical opinion evidence regarding the extent of appellant's permanent impairment for schedule award purposes which requires additional development of the medical evidence by the Office.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2007 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: November 4, 2008
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