United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 08-2144**
	)	**Issued: May 1, 2009**
U.S. POSTAL SERVICE, MOUNT GREENWOOD STATION, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2008 appellant filed a timely appeal from a May 28, 2008 merit decision of the Office of Workers' Compensation Programs' hearing representative. She also timely appealed a January 29, 2008 decision of the same Office hearing representative denying a telephonic hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established entitlement to a schedule award due to her employment injury; and (2) whether the Office properly converted appellant's telephonic hearing to a review of the written record.

FACTUAL HISTORY

On June 22, 2006 appellant, then a 58-year-old customer service manager, filed a traumatic injury claim (Form CA-1) alleging that on June 14, 2006 a postal carrier bent

appellant's hand backwards and slammed it against the dashboard of his vehicle while she was attempting to remove the keys from the ignition. She immediately filed a police report against the postal carrier for assault and battery and sought medical treatment. Appellant returned to light duty on June 14, 2006. She stopped working on June 16, 2006 and returned to duty on July 5, 2006. On June 27, 2006 the Office accepted appellant's claim for contusion of the right forearm and sprain of the right hand.

On January 10, 2007 appellant filed a claim for a schedule award (Form CA-7).

By letter dated January 24, 2007, the Office requested that appellant submit a physician's evaluation of her permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), fifth edition.[1] It sent a second request for a physician's evaluation on April 3, 2007.

Appellant submitted medical reports dated June 14, 2006 through March 21, 2007 related to treatment for her right arm and hand injury. In a medical report dated March 21, 2007, her treating physician performed a physical examination revealing some swelling of the forearm. An x-ray did not show any bony abnormalities. The physician opined that appellant's problem would probably clear up spontaneously and completely.

In a medical report dated May 9, 2007, Dr. Martin Hall, a Board-certified orthopedic surgeon, opined that appellant did not have any functional loss of her hand, wrist, elbow or shoulder and that her complaint of right arm soreness was not demonstrable on examination. Physical examination revealed a full range of motion in her right shoulder, elbow, hand and wrist, no tenderness of the medial or lateral epicondyle and no evident motor deficits. Dr. Hall stated that he did not do permanent or partial impairment ratings.

On June 1, 2007 the Office referred appellant, along with her medical record and a statement of accepted facts, to Dr. Jeffrey Tioco, a Board-certified orthopedic surgeon, for a second opinion evaluation of her permanent impairment to her right upper extremity.

In a medical report dated July 25, 2007, Dr. Tioco briefly reviewed appellant's medical history. Physical examination revealed full range of motion of the right shoulder, elbow, wrist and fingers and no significant deformity or atrophy of the right upper extremity. Dr. Tioco noted tenderness on the dorsal aspect of the right forearm. He stated that the grip strength of the right hand was 4+/5 as compared to the left, however, the right hand and forearm tendon strength tests were inconsistent. Appellant's sensation in the radial, ulnar and median nerve distribution were intact.

Dr. Tioco referred to Table 16-32, on page 509 of the A.M.A., *Guides*, fifth edition, to determine that appellant's normal grip strength on her dominant right hand at the age of 59 should be 22.3 kilogram (kg). He equated appellant's 4+ grip strength to approximate 20.0 kg. Dr. Tioco then subtracted the limited strength 20.0 kg from the normal strength 22.3 kg and divided by the normal strength 22.3 kg to determine a strength loss index percentage of 10.3 percent. He referred to Table 16-34, titled "Upper Extremity Joint Impairment Due to Loss of

[1] A.M.A., *Guides*, (5th ed. 2001).

Grip or Pinch Strength," to convert the 10.3 strength loss index to a 10 percent upper extremity impairment. Using Table 16-3, on page 439, Dr. Tioco converted the 10 percent upper extremity impairment to 6 percent whole person impairment. He opined that due to the inconsistency during the physical examination of appellant's upper right extremity, there was approximately five percent upper extremity impairment. Dr. Tioco then converted the five percent upper extremity impairment to three percent whole person impairment using Table 16-3, on page 439. He concluded that appellant had three percent whole person impairment rating, despite calculations of six percent due to decreased grip strength because of inconsistency during the physical examination.

On August 8, 2007 the Office forwarded appellant's file to, an Office medical adviser, Dr. Robert Wysocki, for review.

In a medical report dated August 15, 2007, Dr. Wysocki referred to Dr. Tioco's medical report dated July 25, 2007, which found a full range of motion and sensation, no atrophy and a negative Tinel's test. He also pointed out that Dr. Hall's examination on May 9, 2007 documented normal range of motion, normal sensation and no motor deficits. Dr. Wysocki opined that, given only the inconsistent strength findings on examination and vague complaints of pain, appellant sustained a zero percent permanent impairment of the right upper extremity. Further, he set the date of maximum medical improvement at July 25, 2007, which was the date of Dr. Tioco's examination and over one year since the injury.

By decision dated August 29, 2007, the Office denied appellant's claim for a schedule award on the grounds that there was no measurable scheduled impairment.

On September 26, 2007 appellant requested a telephonic hearing before a hearing representative. In a December 4, 2007 letter, the Office notified appellant that her telephonic hearing was to take place on January 10, 2008 at 10:00 a.m. Eastern time and provided the toll free dial-in-number, as well as the pass code. Appellant failed to appear.

In a January 16, 2008 letter, appellant requested an extension to submit additional evidence.

By decision dated January 29, 2008, the Office hearing representative denied postponement of appellant's hearing. Citing to section 10.622 of the Federal Employees' Compensation Act,[2] she stated that once scheduled, a hearing cannot be postponed unless the hearing representative is able to reschedule on the same docket or the request for postponement was for a limited number of exceptions found in section 10.622(c).[3] Because the request for postponement was not due to one of the enumerated exceptions and she was unable to reschedule the hearing, the hearing representative stated that she would perform a written review of the record. The hearing representative notified appellant that she had 15 days to submit additional evidence. Appellant did not submit any additional evidence.

[2] 20 C.F.R. § 10.622.

[3] *Id*. at § 10.622(c).

In a decision dated May 28, 2008, the Office hearing representative affirmed the denial of the schedule award, finding that appellant failed to meet her burden of proof in establishing a permanent impairment to her right upper extremity and that the weight of the medical evidence rested with Dr. Wysocki, who found that appellant did not have a ratable impairment to a scheduled member.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[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, 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, the Office has adopted the A.M.A., *Guides*, fifth edition, as the standard to be used for evaluating scheduled losses.[6]

ANALYSIS -- ISSUE 1

The issue is whether appellant established that she sustained a permanent impairment to her right upper extremity, entitling her to a schedule award. The Board finds that appellant has not met her burden of proof.

The Office accepted that appellant sustained a contusion of the right forearm and sprain of the right hand. In a medical report dated May 9, 2007, Dr. Hall opined that appellant had no ratable impairment. The Office referred appellant to Dr. Tioco for a second opinion evaluation on the issue of whether appellant sustained a permanent impairment to her right upper extremity in accordance with the A.M.A., *Guides*. On examination, Dr. Tioco found a full range of motion and no significant deformity or atrophy of the upper right extremity. He did note tenderness on the dorsal aspect of the right forearm and decreased grip strength in the right hand. However, Dr. Tioco stated that the right hand and forearm tendon strength tests were inconsistent.

Using the strength evaluation tables on page 509 of the A.M.A., *Guides*, Dr. Tioco determined that appellant should have a 22.3 kg grip strength, based on her age, sex and dominant hand. He then converted the 4+ grip strength to 20.0 kg and, following the strength loss formula on page 509, subtracted appellant's actual grip strength 20.0 kg from the normal grip strength (22.3kg) and divided the result by the normal grip strength (22.3kg) to determine a strength loss index of 10.3 percent. Using Table 16-34, Dr. Tioco converted the 10.3 strength loss index into 10 percent upper extremity impairment.[7] He opined that, based on the

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

[7] A.M.A., *Guides* 509.

inconsistency of the strength tests during the examination, appellant had approximately a five percent upper extremity impairment.[8]

The Office then referred the case to Dr. Wysocki, an Office medical adviser, to determine appellant's permanent impairment to her upper right extremity. He cited Dr. Tioco's examination, finding no ratable permanent impairment.

The Board finds that Dr. Wysocki properly utilized the A.M.A., *Guides*, fifth edition. On examination, Dr. Tioco found that appellant had a full range of motion in her upper extremities. Appellant did not sustain a loss of sensation. Nor did she sustain any atrophy. The Tinel's test was negative. Thus, the Board finds that Dr. Wysocki properly utilized the A.M.A., *Guides* and Dr. Tioco's clinical findings to determine that appellant did not sustain any ratable permanent impairment.

The Board notes that Dr. Tioco found five percent upper extremity impairment due to decreased grip strength. Section 16.8 of the A.M.A., *Guides*[9] states that because strength measurements are functional tests influenced by subjective factors that are difficult to control and because the A.M.A., *Guides* are primarily based on anatomic impairment, strength measurements are only to be determined in a rare case where the examiner believes the loss of strength has not been adequately considered by other methods provided in the A.M.A., *Guides*.[10] Dr. Tioco failed to explain why other methods in the A.M.A., *Guides* could not adequately address appellant's loss of strength.[11] Furthermore, he found that the strength tests were inconsistent.[12] Based on the inconsistency of the results and the reluctance of the A.M.A., *Guides* to rely on grip strength testing as a basis for evaluating impairment, the Board finds that appellant is not entitled to a schedule award solely based on Dr. Tioco's grip strength measurements. Further, because Dr. Tioco misapplied the A.M.A., *Guides*, the Board finds that the Office properly relied on Dr. Wysocki's determination that appellant did not sustain a ratable impairment, as his report constitutes the weight of medical evidence.[13]

Moreover, appellant did not submit any medical evidence supporting her claim for a schedule award. Rather, the medical reports from appellant's treating physician and Dr. Hall

[8] The Board notes that Dr. Tioco also concluded that appellant had six percent whole person impairment. However, whole person impairments are not permitted under the Act. *See Guiseppe Aversa*, 55 ECAB 164, 167 (2003).

[9] A.M.A., *Guides* 507.

[10] *Id.* at 507-08.

[11] *See Maximiana Medina*, Docket No.04-1925 (issued January 24, 2005).

[12] The Board notes that Dr. Tioco did not specifically provide the percentage of inconsistencies in appellant's strength testing. According to section 16.8b of the A.M.A., *Guides*, if there is more than a 20 percent variation in the readings, it may be assumed that individual is not exerting full effort. In this case, it appears that the grip strength measurements are deemed invalid for estimating impairment. A.M.A., *Guides* 508-09.

[13] *See Joseph Santaniello*, 42 ECAB 710 (1991) (where the Board found that the Office medical adviser's report constituted the weight of the medical evidence as he was the only physician who properly applied the A.M.A., *Guides*).

support the Office's finding that she did not sustain a ratable impairment. In a May 9, 2007 medical report, Dr. Hall concluded that appellant did not have any function deficits and that her complaints of pain were not even demonstrable on examination. Further, in the March 21, 2007 medical report, appellant's treating physician opined that her condition would likely clear up spontaneously and completely, implying that she would not sustain any permanent impairment. None of the other medical reports submitted by appellant discussed any permanent impairment to her upper extremity that would be considered by the A.M.A., *Guides* in determining a schedule award.[14]

Thus, the Board finds that appellant did not meet her burden of proof in establishing a ratable impairment to her upper right extremity entitling her to a schedule award.[15]

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provide as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[16]

Section 10.622 of the Office's regulations provide that once an oral hearing is scheduled and the Office has sent the claimant the appropriate written notice, the oral hearing cannot be postponed at the claimant's request except where the claimant is hospitalized for a reason that is not elective or where the death of the claimant's parent, spouse or child prevents attendance at the hearing.[17] When the request to postpone the hearing does not comport with these requirements and it cannot be accommodated on the docket during the same hearing trip, no further opportunity for an oral hearing will be provided. Instead a review of the written record will be performed or, at the discretion of the hearing representative, a teleconference will be held.[18]

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[14] Subsequent to the issuance of the hearing representative's May 29, 2008 decision, appellant submitted additional evidence. As this evidence was not previously submitted to the Office for consideration, it represents new evidence which cannot be considered by the Board in the current appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c). *See also Mary A. Ceglia*, 55 ECAB 626 (2004).

[15] On appeal, appellant contends that she was off work from June 17 through July 7, 2006 and used sick leave. She has not filed a claim for compensation Form (CA-7) for leave buy-back for this period of time and the Office has not issued a decision on this issue. Thus, this matter is not before the Board on appeal. *See* 20 C.F.R. § 501.2(c).

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. § 10.622.

[18] *Id. See also C.N.*, Docket No. 07-1259 (issued October 2, 2007).

ANALYSIS -- ISSUE 2

The issue is whether the hearing representative properly performed a written review of the record in lieu of a telephonic hearing.

By letter dated December 4, 2007, the Office properly gave appellant 30 days notice that her telephonic hearing was scheduled for January 10, 2008 at 10:00 a.m. Eastern time and provided her the toll free dial-in number and pass code.[19] Appellant failed to appear for her telephonic hearing and by letter dated January 16, 2008 requested an extension.

The Board finds that the hearing representative properly converted the telephonic hearing to a review of the written record. The hearing representative stated that appellant could not reschedule the telephonic hearing on the same docket. Further, appellant did not provide a reason for her request to postpone her hearing and thus, her request does not fall within the exceptions provided in section 10.622(c). Therefore, the hearing representative properly performed a review of the written record pursuant to section 10.622(b) and appropriately issued a decision on May 28, 2008.[20]

CONCLUSION

The Board finds that appellant did not establish that she is entitled to a schedule award due to her employment injury. Further, the Board finds that the Office hearing representative properly converted appellant's telephonic hearing into a review of the written record.

[19] *See* 20 C.F.R. § 10.618(b).

[20] *See M.P.*, Docket No. 07-744 (issued September 26, 2007) (where appellant contacted the Office one hour after the time scheduled for the telephonic hearing due to a difference in time zones. The Office denied appellant's request to reschedule the telephonic hearing and the hearing representative performed a review of the written record pursuant to 20 C.F.R. § 10.622).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2007 decision of the Office of Workers' Compensation Programs and the May 28 and January 29, 2008 decisions of the Office hearing representative are affirmed.

Issued: May 1, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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