United States Department of Labor
Employees' Compensation Appeals Board

V.W., Appellant	)	
	)	**Docket No. 09-704**
and	)	**Issued: October 26, 2009**
	)	
U.S. POSTAL SERVICE, MAIN OFFICE, Newark, 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:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2009 appellant filed a timely appeal of January 16 and August 27, 2008 decisions of the Office of Workers' Compensation Programs adjudicating her schedule award claim. 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 10 percent left upper extremity impairment.

FACTUAL HISTORY

This is the second appeal in this case.[1] By decision dated September 7, 2007, the Board set aside a September 21, 2006 Office decision and remanded the case for further development of the medical evidence. The Board found a conflict in the medical opinion evidence between Dr. David Weiss, an attending physician, and Dr. Harry L. Collins, an Office medical adviser,

[1] *See* Docket No. 07-1002 (issued September 7, 2007).

and remanded the case for referral to an impartial medical specialist. The facts and the law of the case contained in the Board's prior decision are incorporated herein by reference.

Appellant sustained bilateral carpal tunnel syndrome in the performance of duty. On February 10, 1995 she underwent a right carpal tunnel release. Appellant did not undergo surgery on her left hand. She submitted a claim for a schedule award. On October 18, 2001 the Office granted appellant a schedule award for 31.20 weeks from March 5 to October 9, 2001 based on a 10 percent impairment of her left upper extremity.[2]

By letter dated October 3, 2007, the Office referred appellant, together with a statement of accepted facts, a list of questions, guidelines for determining impairment due to carpal tunnel syndrome and the entire case file, to Dr. Donald Getz, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion evidence between Dr. Weiss and Dr. Collins.[3] The statement of accepted facts noted that bilateral carpal tunnel syndrome was an accepted condition and that the Office previously granted appellant a schedule award for 20 percent right arm impairment and 10 percent left arm impairment. The Office asked Dr. Getz to determine whether she had left arm impairment due to factors of her federal employment. If he found work-related impairment, Dr. Getz was asked to provide a detailed, rationalized report, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[4] (A.M.A., *Guides*) and a completed impairment evaluation form.

In a report dated October 24, 2007, Dr. Getz reviewed the medical history and provided findings on physical examination. He indicated that previous electrodiagnostic studies were normal.[5] Dr. Getz noted that the Office did not provide any reports from Dr. Collins. He stated that appellant had good muscle bulk in her left upper extremity with good range of motion at the elbow. There was no thenar or hypothenar atrophy of the left hand. There was full range of motion of all 10 fingers. Tinel's sign was positive. Grip strength was 60 pounds on the right and 20 pounds on the left measured with a Jamar dynamometer. Two-point discrimination testing results for the median nerve varied widely in all 10 fingers with detection sometimes at less than 5 millimeters (mm) and other times more than 15 mm in the same fingers. The average of the last five tests was 5 mm two-point discrimination on the fourth and fifth fingers and 15 mm on the index and long fingers and one-half of the fourth finger. Two-point discrimination testing of the proximal phalanges on the dorsal side of the hand innervated by the uninvolved radial nerve was either undetectable or over two centimeters (cm). Dr. Getz stated that the results from the median and radial nerve two-point discrimination testing invalidated the sensibility testing. He found no objective evidence of left carpal tunnel syndrome. Dr. Getz opined that appellant had

[2] Appellant received a schedule award based on 20 percent right upper extremity on July 17, 1997.

[3] Of record is an appointment schedule form with a list of 18 physicians in the Physicians Directory System (PDS) who were contacted by the Office and the reason each physician was bypassed before the Office contacted Dr. Getz. On an unspecified date appellant moved to North Carolina.

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

[5] The record reflects that electrodiagnostic tests were last performed on appellant's left upper extremity on June 28, 2000. Dr. Getz indicated that he reviewed an electrodiagnostic study dated December 16, 1994.

no ratable left upper extremity causally related to her employment based on normal electrodiagnostic testing and the invalid sensitivity testing.

By letter dated November 16, 2007, the Office provided Dr. Getz with the May 15, 1997 impairment rating of Dr. Weiss and the January 19, 2001 notes of Dr. Collins. It asked whether Dr. Getz' impairment rating remained the same after he reviewed the reports of Dr. Weiss and Dr. Collins. The Office asked Dr. Getz to provide a supplemental report with a rationalized opinion as to whether appellant had any work-related left upper extremity impairment. It enclosed a copy of Form CA-1303 used for calculating impairment due to carpal tunnel syndrome. In response, Dr. Getz provided a completed CA-1303 form in which he indicated that appellant reached maximum medical improvement approximately June 14, 1999 and that she had no left upper extremity impairment due to decreased strength or sensory deficit or pain based on his physical findings and the fifth edition of the A.M.A., *Guides*.

By decision dated January 16, 2008, the Office denied appellant's claim for more than 10 percent left upper extremity impairment.

On January 23, 2008 appellant requested a hearing before an Office hearing representative that was held on June 25, 2008. By decision dated August 27, 2008, the Office affirmed the January 16, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8]

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."[9] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.*

[9] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

Board case precedent provides that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the deficiency in his original report. Only when the impartial specialist is unable or unwilling to clarify or elaborate on his original report, or if his supplemental report is incomplete, vague, speculative or lacking in rationale, should the Office refer the claimant to a second impairment specialist.[11]

ANALYSIS

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is necessary to determine whether appellant has more than 10 percent left upper extremity impairment.

Dr. Getz provided findings on physical examination and indicated that previous electrodiagnostic studies were normal. He stated that appellant had good muscle bulk in her left upper extremity with good range of motion at the elbow, no thenar or hypothenar atrophy of the left hand and full range of motion of all 10 fingers. Dr. Getz failed to provide range of motion measurements for the fingers, hand or elbow based on the A.M.A., *Guides* procedures at pages 450 to 474 of the (5th ed.). He found that Tinel's sign was positive but this finding is inconsistent with his statement that appellant had no clinical evidence of left carpal tunnel syndrome. Two-point discrimination testing results for the median nerve varied but the average was 5 mm discrimination on the fourth and fifth fingers and 15 mm on the index and long fingers and one-half of the fourth finger. Two-point discrimination testing of the proximal phalanges on the dorsal side of the hand innervated by the radial nerve was either undetectable or over two cm. Dr. Getz opined that the results from the median and radial nerve two-point discrimination testing invalidated the sensibility testing. However, he did not explain why he questioned the validity of the two-point discrimination testing but did not question the validity of the Tinel's test. Dr. Getz opined that appellant had no ratable left upper extremity impairment causally related to her employment based on normal electrodiagnostic testing and the invalid sensitivity testing. As noted, the record shows that the last electrodiagnostic testing of appellant's left upper extremity was performed on June 28, 2000, more than five years before Dr. Getz's examination of appellant's left upper extremity. The electrodiagnostic study that Dr. Getz reviewed was not the 2000 study but an even older December 16, 1994 study, 13 years before his evaluation of appellant's impairment. He did not address the issue of whether it was necessary to obtain a current electrodiagnostic study. Such explanation is particularly important in light of the fact that appellant did not undergo a left carpal tunnel surgical release. In his supplemental report, Dr. Getz provided a completed CA-1303 form in which he indicated that appellant had no left upper extremity impairment due to decreased motor strength or sensory deficit or pain, based on his physical findings and the fifth edition of the A.M.A., *Guides*. However, he did not provide

[10] *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

[11] *See Nancy Keenan*, 56 ECAB 687 (2005).

all of the information requested by the Office. It asked Dr. Getz to review the impairment ratings of Dr. Weiss and Dr. Collins and indicate whether his impairment rating remained the same. The Office asked Dr. Getz to provide a supplemental report with a rationalized opinion as to whether appellant had any work-related left upper extremity impairment. Dr. Getz did not provide a supplemental report with this information. When an impartial specialist is unable or unwilling to clarify or elaborate on his original report or if his supplemental report is incomplete, vague, speculative or lacking in rationale, the Office should refer the claimant to a second impartial medical specialist. The Board finds that the impairment evaluation of Dr. Getz is not based on a complete and accurate factual and medical background, lacks specific measurements on physical examination regarding range of motion, does not explain the inconsistency between a positive Tinel's sign and his opinion that appellant has no sensory deficit, does not explain why a 13-year-old electrodiagnostic study is adequate to evaluate impairment due to carpal tunnel syndrome in a case where there was no surgical release of the median nerve and fails to provide sufficient medical rationale explaining his opinion that appellant has no work-related left upper extremity impairment. Due to these deficiencies, the impairment rating of Dr. Getz is not entitled to special weight and is not sufficient to resolve the conflict in the medical opinion evidence. On remand, the Office should refer appellant to a new impartial medical specialist for an impairment rating of her left upper extremity based on Office procedures and the A.M.A., *Guides*. After such further development as the Office deems necessary, it should issue an appropriate decision.

The Board also notes that the Office failed to follow its procedures that require referral of the medical evidence to an Office medical adviser in cases where an impartial medical specialist examination was arranged to resolve a conflict in a schedule award case.[12] The Office did not refer the impairment rating of Dr. Getz to an impartial medical specialist as required.

On appeal, appellant asserts that the case record does not reflect that Dr. Getz was properly selected from the PDS. The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of impartial medical specialists is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.[13] The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.[14] The PDS database of physicians is obtained from the American Board of Medical Specialties (ABMS) which contains the names of physicians who are Board-certified in certain specialties. In this case, the record contains a list of 18 physicians contacted by the Office using the PDS, along with the dates they were contacted and the reason why each physician was bypassed before Dr. Getz was selected. The case record documents that the Office properly selected Dr. Getz as the impartial medical specialist in rotation from the PDS. There is no indication in the record,

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5 (March 2005).

[13] Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 3.500.4b (March 2005).

[14] Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 3.500.7 (March 2005).

nor has appellant provided evidence, that the Office did not follow its procedures in selecting Dr. Getz as the impartial medical specialist from the PDS. Therefore, this argument is without merit.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should refer appellant to a new Board-certified impartial medical specialist for a left upper extremity impairment rating.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 27 and January 16, 2008 are set aside and the case is remanded for further development consistent with this opinion.

Issued: October 26, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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