United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 09-1570**
	)	**Issued: March 4, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Springfield, MO, Employer	)	

Appearances:
Alan J. Shapiro, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 3, 2009 appellant filed a timely appeal from the May 5, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant has more than an eight percent impairment of her left upper extremity.

FACTUAL HISTORY

On April 13, 1996 appellant, then a 37-year-old distribution clerk, filed a claim for compensation alleging that she sustained a bilateral hand and wrist injury as a result of casing mail, throwing bundles, lifting heavy bags and throwing mail in sacks in the performance of duty. The Office accepted her claim for bilateral forearm muscle strain and bilateral de Quervain's disease with releases.

On December 18, 2007 the Office issued a schedule award for an eight percent permanent impairment of the left upper extremity due to residuals of the accepted de Quervain's disease. On June 24, 2008 an Office hearing representative remanded the case for further development because neither the evaluating physician nor the reviewing Office medical adviser had a statement of accepted facts properly reflecting the approved surgeries.[1]

The Office prepared a new statement of accepted facts finding that appellant's claim was now approved for the additional condition of bilateral carpal tunnel syndrome with releases. It referred appellant, together with the statement of accepted facts and the medical record, to Dr. Robert B. Wyrsch, an orthopedic surgeon, for an impairment evaluation.

On August 28, 2008 Dr. Wyrsch related appellant's history of injury, current complaints and his findings on physical examination. He concluded that appellant's examination did not fit that of carpal tunnel syndrome. Dr. Wyrsch added that grip strength testing did not bear out her complaints of hand weakness, so that would not be included in any rating.

Instead, Dr. Wyrsch found that appellant had classic symptoms of de Quervain's tenosynovitis and showed physical findings consistent therewith. He discussed treatment options and appellant stated that she wanted to proceed with surgery:

> "I have suggested considering first dorsal compartment release on the right wrist to see if this will help alleviate any of her chronic symptoms. [Appellant] understands that due to the chronic nature of the condition she may not get any significant improvement of her symptoms. We will attempt to schedule this as an outpatient. We will begin with the right wrist. We will hold off on performing a final rating at this time, since I do not believe that she has reached maximum medical improvement with regards to her wrist tend[i]nitis."

In a decision dated September 14, 2008, the Office denied an additional schedule award. As there were no findings to support an impairment due to carpal tunnel syndrome, and as appellant was not at maximum medical improvement from her de Quervain's tenosynovitis, the Office found no basis for an additional schedule award.

On March 2, 2009 appellant's representative advised the Office that appellant desired to have the surgery recommended by Dr. Wyrsch and that she was willing to have Dr. Wyrsch perform the surgery. The representative requested authorization.

On March 18, 2009 the Office denied authorization for Dr. Wyrsch to assume appellant's care or perform surgery, but the Office instructed appellant how to request both a change of physician and authorization for surgery.

[1] Appellant submitted an October 3, 2006 impairment evaluation finding a 19 percent impairment of each upper extremity due to a 40 percent sensory deficit in both the median and ulnar nerves. An Office medical adviser reported that the physician gave no examination findings to support any impairment in the ulnar nerve at the wrist: Finkelstein test for de Quervain's tenosynovitis was negative, as was the Phalen's test for carpal tunnel syndrome. The Tinel's test was the left median nerve was also negative but caused "some pain" on the right. The medical adviser concluded that the Office could not accept the extreme weight the evaluating physician gave to appellant's complaint of pain and recommended referral to a physician skilled in the protocols of rating impairment.

In a decision dated May 5, 2009, an Office hearing representative affirmed the denial of an additional schedule award. She found that the evidence was insufficient to establish that appellant had reached maximum medical improvement. The hearing representative explained that a determination of maximum medical improvement could not be made until after the requested surgeries, if authorized, or until appellant indicated she would not undergo surgery. She added that appellant could thereafter file a claim for an additional schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[2] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[3]

The A.M.A., *Guides* explains that impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized:

> "It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached [maximum medical improvement], a permanent impairment rating may be performed."[4]

ANALYSIS

The Office accepted appellant's claim for the conditions of bilateral forearm muscle strain, bilateral de Quervain's disease with releases, and bilateral carpal tunnel syndrome with releases. The question is whether any of these injuries have caused more than an eight percent impairment of appellant's left upper extremity, for which she received a schedule award.

Dr. Wyrsch, the orthopedic surgeon and second opinion physician, examined appellant on August 28, 2008 and found that her examination did not fit that of carpal tunnel syndrome, but the lack of positive clinical findings, by itself, does not mean appellant has no residual carpal tunnel syndrome. The A.M.A., *Guides* explains that an impairment rating of up to five percent for residual carpal tunnel syndrome may be justified where there is normal sensibility and opposition strength on examination.[5] The critical element is the presence of an abnormal sensory or motor latency or abnormal electromyogram (EMG) testing of the thenar muscles. Dr. Wyrsch

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides* 19 (5th ed. 2001); *see Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum improvement -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

[5] A.M.A., *Guides* 495 (scenario 2).

obtained no EMG or nerve conduction studies, so his evaluation of appellant is not sufficient to rule out residual carpal tunnel impairment under the A.M.A., *Guides*.

Dr. Wyrsch did find that appellant presented with classic symptoms of de Quervain's tenosynovitis, and his findings on examination were consistent with residuals of the disease, but it was his opinion that she was not at maximum medical improvement from this condition because he believed further surgery could alleviate her chronic symptoms. Given appellant's desire to proceed with surgery, the Office properly found that no additional schedule award could be granted for de Quervain's tenosynovitis in the meantime. Her condition cannot be considered permanent and stationary until after an optimal recovery time following the recommended surgery.

The Board will affirm the Office's May 5, 2009 decision on the issue of maximum medical improvement from the accepted de Quervain's disease and will set aside the decision on the issue of ratable impairment for residual carpal tunnel syndrome. After an optimal recovery time following the surgery recommended by the Office second opinion physician, the Office shall refer appellant for a proper evaluation of impairment under the A.M.A., *Guides*, including electrodiagnostic testing for residual carpal tunnel syndrome. After such further development as may become necessary, the Office shall issue an appropriate final decision on appellant's entitlement to an additional schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant has more than an eight percent impairment of her left upper extremity. Further development is warranted following the recommended surgery.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: March 4, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board