United States Department of Labor
Employees' Compensation Appeals Board

K.F., Appellant	)	
and	)	**Docket No. 11-32**
	)	**Issued: September 23, 2011**
U.S. POSTAL SERVICE, POST 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:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 4, 2010 appellant filed a timely appeal from a June 15, 2010 decision of the Office of Workers' Compensation Programs, which granted him a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than eight percent permanent impairment of each upper extremity, for which he received schedule awards.

FACTUAL HISTORY

On August 27, 1997 appellant then a 42-year-old mail handler, filed a Form CA-2, notice of occupational disease, alleging that he developed bilateral carpal tunnel syndrome as a result of performing his work duties. OWCP accepted bilateral carpal tunnel syndrome. Appellant

[1] 5 U.S.C. §§ 8101-8193.

stopped work intermittently and returned to light duty on January 19, 2008 and regular duty on March 12, 2008.

A June 22, 2006 electromyogram (EMG) showed bilateral carpal tunnel syndrome, no evidence of cervical radiculopathy, brachial plexopathy, ulnar neuropathy or polyneuropathy. OWCP authorized surgery. On September 12, 2006 Dr. Howard M. Baruch, a Board-certified orthopedic surgeon, performed a right wrist carpal tunnel release and median nerve neurolysis and diagnosed right carpal tunnel syndrome. On November 16, 2006 he performed a left carpal tunnel syndrome release and median nerve neurolysis and diagnosed left carpal tunnel syndrome. In reports dated November 7, 2007 to March 12, 2008, Dr. Baruch noted that appellant was progressing well postoperatively.

On September 4, 2008 appellant filed a claim for a schedule award. He submitted a June 3, 2008 report from Dr. David Weiss, an osteopath, who diagnosed cumulative and repetitive trauma disorder, bilateral carpal tunnel syndrome and status post open bilateral carpal tunnel release. Dr. Weiss opined that appellant had a 26 percent permanent impairment of the right arm and a 38 percent impairment of the left arm in accordance with the fifth edition of the of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).[2] He opined that appellant reached maximum medical improvement on June 3, 2008. Dr. Weiss calculated that impairment on the right arm due to lateral pinch deficit was 10 percent[3]; 10 percent impairment of the right arm for Grade 4 sensory deficit or pain in the distribution of the median nerve[4]; and 9 percent impairment for Grade 3/4 motor strength deficit of the right thumb[5]; for total combined impairment of 26 percent of the right arm. With regard to the left arm, Dr. Weiss calculated impairment due to lateral pinch deficit was 10 percent[6]; 31 percent impairment of the arm for Grade 2 sensory deficit or pain in the distribution of the median nerve[7]; for total combined impairment of 38 percent of the left arm.

OWCP referred the matter to an OWCP medical adviser who, in an August 20, 2008 report, disagreed with Dr. Weiss with regard to the right arm noting that appellant had 23 percent impairment of the right arm and concurred with his findings that appellant had 38 percent impairment of the left arm pursuant to the A.M.A., *Guides*. The medical adviser calculated that impairment on the right upper extremity due to lateral pinch deficit was 10 percent; 10 percent impairment of the right upper extremity for Grade 4 sensory deficit or pain in the distribution of the median nerve; and 5 percent impairment for Grade 3/4 motor strength deficit of the right thumb; for total combined impairment of 23 percent of the right arm. For the left arm, the medical adviser calculated impairment due to lateral pinch deficit was 10 percent; 31 percent

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

[3] *Id.* at 509, Table 16-34.

[4] *Id.* at 482, 492, Table 16-10, 16-15.

[5] *Id.*

[6] *Id.* at 509, Table 16-34.

[7] *Id.* at 482, 492, Table 16-10, 16-15.

impairment of the left upper extremity for Grade 2 sensory deficit or pain in the distribution of the median nerve for total combined impairment of 38 percent of the left arm.

OWCP found a conflict in medical opinion between Dr. Weiss, the attending osteopath and OWCP's medical adviser as to the extent of impairment to appellant's arms. To resolve the conflict OWCP on November 19, 2008 referred appellant to a referee physician, Dr. Richard Lebovicz, a Board-certified orthopedist.

In a June 18, 2009 report, Dr. Lebovicz noted evaluating appellant on March 9, 2009. He reported appellant's complaints of numbness in both hands with loss of strength in the hands and difficulty with the right thumb not opposing the other fingers. Dr. Lebovicz noted examination findings for the right arm of decreased sensation to touch in the median nerve distribution, position Tinel and Phalen's tests, mild thenar muscle wasting, weak pinch strength, weakness in opposing the right thumb to the other fingers and diminished two-point discrimination. For the left arm, examination revealed decreased sensation to touch and to pinprick involving the median nerve distribution, decreased two-point discrimination and weak motor function with regard to pinch and opposition. Dr. Lebovicz applied the sixth edition of the A.M.A., *Guides*[8] and determined that appellant had eight percent rating of each arm secondary to carpal tunnel syndrome. He stated that with regard to the right upper extremity he applied the A.M.A., *Guides,* Table 15-23, page 449 and used a grade modifier of three for test findings, history and physical findings for each arm. For the functional scale, Dr. Lebovicz noted a *Quick*DASH score of 50 for the right side and 43.25 for the left. Based on this, he opined that appellant had eight percent impairment of each arm secondary to bilateral carpal tunnel problem. Dr. Lebovicz noted that appellant reached maximum medical improvement on March 12, 2008.

In a report dated July 7, 2009, an OWCP medical adviser noted that EMG and nerve conduction studies and physical examination revealed bilateral carpal tunnel syndrome. He noted that, pursuant to the sixth edition of the A.M.A., *Guides*, page 449, Table 15-23, the functional history indicated a Grade 3 modifier with constant symptoms and difficulty with thumb opposition of the right hand and numbness and tingling in the left hand. The medical adviser further noted that physical examination and findings include decreased sensation and weakness bilaterally for a Grade 3 modifier. He requested that OWCP obtain a supplemental report from the referee physician providing the quick functional scale so that he could assign the appropriate modifier for the carpal tunnel syndrome calculation.

OWCP requested a supplemental report from Dr. Lebovicz. In a September 18, 2009 letter, Dr. Lebovicz' office requested clarification from the medical adviser with regard to the "quick function scale" noting that this terminology was not in the sixth edition of the A.M.A., *Guides.* His office provided page five of his June 18, 2009 report and pointed out the *Quick*DASH score of 50 for the right side and 43.25 for the left side.

In a November 23, 2009 report, the medical adviser noted that Dr. Lebovicz used Table 15-23, page 449 of the A.M.A., *Guides*, noting for the right upper extremity, a test findings modifier of three, history grade modifier of three, physical findings grade modifier of three and a functional *Quick*DASH score of 50. He calculated an eight percent impairment of the right

[8] A.M.A., *Guides* (6th ed. 2009).

upper extremity for the default grade modifier of three. With regard to the left upper extremity, the medical adviser noted a test findings modifier of three, history grade modifier of three, physical findings grade modifier of three and a functional *Quick*DASH score of 43.25. He calculated an eight percent impairment of the right upper extremity. The medical adviser concluded that, based on Dr. Lebovicz' report and Table 15-23 of the A.M.A., *Guides*, appellant sustained an eight percent impairment for each upper extremity.

In a decision dated December 8, 2009, OWCP granted appellant a schedule award for eight percent impairment of the right and left upper extremities. The period of the award was from March 16, 2008 to February 28, 2009.

On December 15, 2009 appellant requested an oral hearing which was held on March 30, 2010.

In a decision dated June 15, 2010, the hearing representative affirmed the December 8, 2009 OWCP decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[9] provide compensation to employees sustaining impairment from loss or loss of use of specified member of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[10] Effective May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides* to calculate schedule awards.[11]

If carpal tunnel syndrome is found under the standards of Appendix 15-B, impairment is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[12] In Table 15-23, grade modifiers are described for test findings, history and physical findings. A survey completed by a given claimant, known by the name *Quick*DASH, may be used to further modify the grade and to choose the appropriate numerical impairment rating.[13] If carpal tunnel syndrome is not found under the standards of

[9] *Supra* note 1.

[10] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims* Chapter 2.808.6(a) (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[12] *See id*. at Table 15-23.

[13] *Id.* at 448.

Appendix 15-B, impairment due to median nerve dysfunction is evaluated under the scheme found in Table 15-21 (Peripheral Nerve Impairment: Upper Extremity Impairments).[14]

ANALYSIS

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and authorized carpal tunnel releases which were performed on September 12 and November 16, 2006. A conflict in the medical evidence arose between his attending physician, Dr. Weiss, who disagreed with an OWCP medical adviser, concerning impairment of the right and left upper extremities. Consequently, OWCP referred appellant to Dr. Lebovicz to resolve the conflict.[15] The impartial medical examiner, Dr. Lebovicz, found that, under the sixth edition of the A.M.A., *Guides*, appellant had eight percent impairment to each arm and the medical adviser concurred with his conclusion. Accordingly, OWCP issued a schedule award for eight percent impairment of the left and right upper extremities.

Appellant contends that there was no medical conflict between Dr. Weiss and an OWCP medical adviser with regard to his left upper extremity impairment as both opined that he was entitled to a 38 percent impairment rating pursuant to the fifth edition of the A.M.A., *Guides* and that OWCP improperly applied the sixth edition of the A.M.A., *Guides* to his case.

The Board finds that, under the circumstances of this case, the opinion of Dr. Lebovicz was not an impartial medical specialist with regard to permanent impairment because there was no conflict of medical opinion at the time of OWCP's referral to Dr. Lebovicz. As noted, both physicians agreed on appellant's left arm impairment so there was no conflict with regard to the left arm. For the right arm, Dr. Weiss' opinion on impairment was not in accordance with the fifth edition of the A.M.A., *Guides*, that was used at the time of his June 3, 2008 report. He based appellant's impairment, in part, on lateral pinch deficit of 10 percent.[16] However, the Board notes that, in a carpal tunnel schedule award case, there generally will be no ratings based on loss of motion or grip strength.[17] OWCP procedures[18] specifically provide that upper extremity impairment secondary to carpal tunnel syndrome and other entrapment neuropathies should be calculated using section 16.5d and Tables 16-10, 16-11 and 16-15.[19] Thus, Dr. Weiss' opinion was not in conformance with the standard used by OWCP to evaluate permanent impairment and was insufficient to create a medical conflict. However, while Dr. Lebovicz' opinion is not entitled to the special weight afforded to an impartial specialist, his report can still

[14] *Id*. at 437-40, Table 15-21 (portion relating to median nerves).

[15] *See* 5 U.S.C. § 8123(a) (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).

[16] *See* A.M.A., *Guides* 509, Table 16-34 (5th ed. 2001).

[17] *Id.* at 494-95. Section 16.5d of the A.M.A., *Guides* 494 provides that, "in compression neuropathies, additional impairment values are not given for decreases grip strength."

[18] *See* Federal (FECA) Procedure Manual, *supra* note 11, Chapter 2.808 (March 1995).

[19] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

be considered for its own intrinsic value[20] and can still constitute the weight of the medical evidence.[21]

In a June 18, 2009 report, Dr. Lebovicz reviewed the medical records and examined appellant and found that he had eight percent rating of each arm secondary to carpal tunnel syndrome under the standards of the sixth edition of the A.M.A., *Guides.* The Board finds that he properly applied these standards to reach his conclusion about the permanent impairment of appellant's right and left upper extremity. Dr. Lebovicz properly made reference to Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 of the sixth edition of the A.M.A., *Guides*.[22] Based on his examination and review of the record, he chose a grade modifier of three for test findings, history and physical findings. The grade modifiers were then averaged and rounded to the nearest integer to determine the average grade. The bottom of the table gives the default impairment value for each average grade.[23] Based on this, Dr. Lebovicz opined that appellant had eight percent impairment of each arm secondary to bilateral carpal tunnel problem.

An OWCP medical adviser reviewed Dr. Lebovicz' report, concurred in his findings and correlated them to provisions in the A.M.A., *Guides.* He noted that EMG and nerve conduction studies and physical examination revealed bilateral carpal tunnel syndrome. The medical adviser noted that pursuant to the sixth edition of the A.M.A., *Guides*, Table 15-23, Dr. Lebovicz' properly determined that test findings, physical findings and functional history all qualified as grade modifier three. He concluded that, based on Dr. Lebovicz' report and Table 15-23 of the A.M.A., *Guides*, appellant had eight percent impairment for each upper extremity. The Board finds that an OWCP medical adviser properly applied the A.M.A., *Guides,* to the findings presented by Dr. Lebovicz in rating impairment to appellant's bilateral upper extremities. There is no other current medical evidence applying the sixth edition of the A.M.A., *Guides*, showing any greater impairment.

The weight of the medical evidence therefore does not establish more than eight percent impairment to each arm under the sixth edition of the A.M.A., *Guides.*

On appeal, appellant asserts that he has property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). But these cases hold only that a claimant who was in receipt of benefits (in

[20] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[21] *See Leanne E. Maynard*, 43 ECAB 482 (1992) (the Board found that a physician's "opinion is probative even though he was not an impartial medical examiner" and that the opinion of this physician and another physician were sufficient to establish causal relation); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (the Board found that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence).

[22] A.M.A., *Guides* 449, Table 15-23 (6th ed. 2009).

[23] *See id*. at 448-49.

Goldberg public assistance and in *Mathews* Social Security benefits) could not have those benefits terminated without procedural due process.[24]

In *Harry D. Butler*,[25] the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[26] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the six edition of the A.M.A., *Guides*.[27] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement of when the claim for such award was filed.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that the probative evidence does not establish more than eight percent bilateral arm impairment.

[24] In *Mathews* the Court noted that the private interest that would be adversely affected by the erroneous termination of benefits was likely to be less in a disabled worker than a welfare recipient and due process would not require an evidentiary hearing.

[25] 43 ECAB 859 (1992).

[26] *Id*. at 866.

[27] FECA Bulletin No. 09-03 (March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, *supra* note 11, Chapter 2.808.6(a) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2010 is affirmed.

Issued: September 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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