United States Department of Labor
Employees' Compensation Appeals Board

V.B., Appellant	)	
and	)	**Docket No. 11-2099**
	)	**Issued: June 13, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 19, 2011 appellant filed a timely appeal from a May 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) and an August 8, 2011 nonmerit decision. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish more than a five percent impairment of the right upper extremity and five percent impairment on the left, for which she received a schedule award; and (2) whether OWCP properly denied her request for a hearing.

On appeal, appellant generally asserts that she is entitled to a greater award and that she should have been compensated at the augmented, 75 percent rate.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 15, 2000 appellant, then a 43-year-old distribution clerk, filed an occupational disease claim alleging that repetitive motion on a daily basis at work injured both hands. OWCP accepted that she sustained bilateral tendinitis and bilateral carpal tunnel syndrome. On May 17 and June 1, 2004 appellant filed schedule award claims.

Dr. Rommel G. Childress, an attending Board-certified orthopedic surgeon, submitted a number of reports dating from August 21, 2000. A July 6, 2004 electromyographic (EMG) examination and nerve conduction study (NCS) of the upper extremities demonstrated mild bilateral carpal tunnel syndrome and no evidence of radiculopathy. On January 10, 2005 Dr. Childress advised that technically, appellant had not reached maximum medical improvement because she had active carpal tunnel syndrome. He, however, stated that, due to her ongoing pain, numbness and difficulty functioning with the wrist, she had five percent impairment on the left and five percent impairment on the right, due to carpal tunnel syndrome and a zero impairment due to bilateral tendinitis. In a February 25, 2005 report, Dr. Harry L. Collins, Jr., an OWCP medical adviser, who is a Board-certified orthopedist, stated that, based on his review of Dr. Childress' report, it did not appear that appellant had reached maximum medical improvement.

By decision dated March 2, 2005, OWCP denied appellant's claim for a schedule award on the grounds that the medical evidence did not demonstrate that she had reached maximum medical improvement. Appellant timely requested a hearing. In reports dated March 28 to October 6, 2005, Dr. Childress noted her complaint of hand pain. A hearing was held on October 20, 2005. In a November 28, 2005 report, Dr. Childress advised that appellant had elected conservative treatment and did not want surgical intervention. He advised that maximum medical improvement was reached on November 20 2003.

In a December 12, 2005 decision, an OWCP hearing representative vacated a March 2, 2005 decision and remanded the case to OWCP for further development of the medical evidence regarding appellant's upper extremity impairment. In a December 13, 2005 report, Dr. G.M. Pujadas, a Board-certified orthopedic surgeon and OWCP medical adviser, advised that, because Dr. Childress' impairment rating was not in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[2] appellant did not have a ratable impairment.

In a January 3, 2006 decision, OWCP denied appellant's claim for a schedule award, finding the weight of the medical evidence rested with the opinion of an OWCP medical adviser who concluded that the medical evidence did not support a permanent impairment of her upper extremities. On February 6, 2006 appellant requested a hearing and in a March 22, 2006 decision, OWCP denied the request as untimely. On June 2, 2006 she requested reconsideration and submitted a February 6, 2006 report, in which Dr. Childress advised that she continued to have problems with her hands. In a nonmerit decision dated June 7, 2006, OWCP denied appellant's request for reconsideration.

[2] A.M.A., *Guides* (5th ed. 1999).

Dr. Childress continued to submit reports describing appellant's complaints. On October 30, 2006 appellant again requested reconsideration and in a February 6, 2007 nonmerit decision, OWCP denied her request. In reports dated February 12 to November 8, 2007, Dr. Childress discussed her condition. On January 15, 2008 he reported that appellant should be allowed an impairment rating and stated that he would review the A.M.A., *Guides*. A May 29, 2008 EMG/NCS examination demonstrated bilateral sensory carpal tunnel syndrome, worse on the right. Dr. Childress continued to submit reports.

By letter dated March 25, 2010, OWCP asked Dr. Childress to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*[3] and provided a permanent impairment worksheet. Dr. Childress submitted additional treatment notes and on February 18, 2011 advised that appellant had increasing difficulty with her hands. He provided physical examination findings and advised that she had stenosing tenosynovitis of the flexor sheath of the middle finger on the left and was developing tenosynovitis on the right. On March 28, 2011 Dr. Childress advised that appellant needed surgical release of the triggering right third digit.

In an undated letter, received by OWCP on April 6, 2011, Dr. Childress advised that he was responding to OWCP's March 25, 2010 letter. He stated that appellant continued to have significant carpal tunnel symptoms, including swelling and pain, which affected her activities of daily living. Dr. Childress assigned December 9, 2010 as the date of maximum medical improvement and referred to his February 18, 2011 report for examination and range of motion findings. He indicated that, in accordance with Table 15-23 of the sixth edition of the A.M.A., *Guides*, appellant had a clinical studies grade modifier of 1 due to EMG/NCS findings; a functional history modifier of 2 due to significant symptoms of numbness, tingling and pain with activity and being awakened at night; and a physical examination modifier of 2, based on decreased sensation and two-point discrimination. Dr. Childress determined an overall grade of two with a default value of five percent for each upper extremity for carpal tunnel syndrome. He further found that appellant had a one percent impairment of each arm due to tenosynovitis or triggering, for a total six percent impairment of each upper extremity.

In an April 11, 2011 report, Dr. H.P. Hogshead, an OWCP medical adviser and Board-certified orthopedic surgeon, noted his review of Dr. Childress' report. He stated that Dr. Childress utilized Table 15-23 and the grade modifiers properly for a five percent impairment of each upper extremity due to carpal tunnel syndrome. Dr. Hogshead concluded that, as the A.M.A., *Guides* stated that, only one diagnosis should be used per region, appellant was only entitled to a schedule award for five percent impairment on the right and five percent impairment on the left and was not entitled to an additional impairment due to bilateral tendinitis.

On May 18, 2011 appellant was granted a schedule award for a five percent impairment of the right arm and five percent impairment on the left. She was compensated at the basic rate of 66 2/3 percent, for a total of 31.2 weeks, for the period December 9, 2010 to July 15, 2011. On June 23, 2011 appellant requested a hearing. In an August 8, 2011 decision, OWCP denied her request as untimely and advised her that the issue in the case could equally be addressed by requesting reconsideration with OWCP.

[3] *Id*. (6th ed. 2008).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[4] and its implementing federal 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, FECA 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 for all claimants, OWCP adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[9] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11]

Impairment due to carpal tunnel syndrome 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 levels (ranging from 0 to 4) are described for the categories test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[13]

Section 15.2 of the A.M.A., *Guides* provides that in most cases only one diagnosis in each limb involved with be appropriate.[14] The A.M.A., *Guides* state, "If a patient has two

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, "The [ICF], Disability and Health: A Contemporary Model of Disablement."

[10] *Id*. at 385-419.

[11] *Id*. at 411.

[12] *Id*. at 449.

[13] *Id*. at 448-50.

[14] *Id*. at 387.

significant diagnoses, for instance, rotator cuff tear and biceps tendinitis, the examiner should use the diagnosis with the highest causally related impairment rating for the impairment calculation." Section 15.3f of the A.M.A., *Guides* further provides:

> "If there are multiple diagnoses within a specific region, then the most impairing diagnosis is rated because it is probable this will incorporate the functional losses of the less impairing diagnoses. In rare cases, the examiner may combine multiple impairments within a single region if the most impairing diagnosis does not adequately reflect the losses."[15]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[16]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she has more than a five percent impairment of the right upper extremity and five percent impairment on the left. The accepted conditions are bilateral carpal tunnel syndrome and bilateral upper extremity tendinitis. On May 18, 2011 appellant was granted a schedule award for upper extremity impairments of five percent on the right and five percent on the left.

The relevant medical evidence includes an undated report, received by OWCP on April 6, 2011, in which Dr. Childress, an attending orthopedic surgeon, advised that December 9, 2010 was the date of maximum medical improvement. He rated appellant's upper extremities in accordance with Table 15-23 of the sixth edition of the A.M.A., *Guides*, indicating that she had a clinical studies grade modifier of 1 due to EMG/NCS findings; a functional history modifier of 2 due to significant symptoms of numbness, tingling and pain with activity and being awakened at night; and a physical examination modifier of 2, based on decreased sensation and two-point discrimination. Dr. Childress determined an overall grade of two with a default value of five percent for each upper extremity due to carpal tunnel syndrome. He further found that appellant had a one percent impairment of each upper extremity due to tenosynovitis or triggering, for a total six percent impairment of each upper extremity.

The medical adviser, Dr. Hogshead, provided an April 11, 2011 report, in which he noted his review of Dr. Childress' report and found that Dr. Childress had correctly applied Table 15-23 and the grade modifiers with regard to carpal tunnel syndrome and agreed with his conclusion that appellant had a five percent impairment of each upper extremity due to carpal tunnel syndrome. Dr. Hogshead also properly noted that section 15.3f of the sixth edition

[15] *Id*. at 419; *see M.P*., Docket No. 10-1918 (issued May 16, 2011).

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

provides that only one diagnosis should be used per region and the most impairing diagnosis should be rated unless the most impairing diagnosis does not adequately reflect the losses.[17]

The medical evidence of record thus supports that appellant has five percent impairment on the right and five percent impairment on the left due to bilateral carpal tunnel syndrome and there is no rationalized medical evidence to support that she was entitled to an additional impairment due to bilateral tendinitis.

As to appellant's argument on appeal that she is entitled to the augmented compensation rate of 75 percent, the record indicates that her only dependent, a daughter, was born on January 25, 1992. Section 8107 of FECA provides that compensation for a schedule award shall be based on the employee's monthly pay.[18] Section 8105(a) provides that, if the disability is total, the United States shall pay the employee during the disability monetary compensation equal to 66 2/3 percent of his or her monthly pay, the basic compensation rate for total disability.[19] Under section 8110, an employee is entitled to compensation at the augmented rate of 75 percent of the weekly pay if he or she has one or more dependents.[20]

An unmarried child living with the employee is a dependent if he or she is under 18 years of age or if he or she is under 23 years of age and is a full-time student.[21] Appellant's daughter's 18th birthday was on January 25, 2010 well before the May 18, 2011 schedule award decision. There is no evidence of record to show that she is a full-time student. Appellant would therefore not be entitled to schedule award compensation at the augmented, 75 percent rate.

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.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[22] The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this

[17] *Supra* note 15.

[18] 5 U.S.C. § 8107; *see R.S.*, 58 ECAB 362 (2007).

[19] 5 U.S.C. § 8105(a).

[20] *Id*. at § 8110; *see R.E.*, 59 ECAB 323 (2008).

[21] *Id*. at § 8101(17); *see Jenny M. Drost*, 56 ECAB 587 (2005).

[22] *Claudio Vazquez*, 52 ECAB 496 (2001).

discretionary authority in deciding whether to grant a hearing.[23] OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.[24]

ANALYSIS -- ISSUE 2

In its August 8, 2011 decision, OWCP denied appellant's request for a hearing on the grounds that it was untimely filed. It found that she was not, as a matter of right, entitled to a hearing as her request, dated June 23, 2011, had not been made within 30 days of its May 18, 2011 decision. As appellant's request was dated June 23, 2011, more than 30 days after the date of the May 18, 2011 OWCP decision, the Board finds that OWCP properly determined that she was not entitled to a hearing as a matter of right as her request was untimely filed.

OWCP also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In the August 8, 2011 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[25] The Board finds that OWCP properly denied appellant's request for a hearing.

CONCLUSION

The Board finds that appellant has a five percent impairment of each upper extremity and that OWCP properly denied her request for a hearing.

[23] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[24] *Claudio Vazquez*, *supra* note 22.

[25] *Mary Poller*, 55 ECAB 483 (2004).

ORDER

IT IS HEREBY ORDERED THAT the August 8 and May 18, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 13, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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