United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 12-1390**
	)	**Issued: February 13, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Sioux Falls, SD, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 31, 2012 appellant, through his attorney, filed a timely appeal from an April 19, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this schedule award decision.

ISSUE

The issue is whether appellant has more than a 12 percent permanent impairment of the right hand, for which he received a schedule award.

FACTUAL HISTORY

On December 3, 1990 appellant, then a 47-year-old area maintenance technician, filed a traumatic injury claim alleging that on November 30, 1990 he injured his right hand in the performance of duty. OWCP accepted the claim, assigned file number xxxxxx547, for a sprain

[1] 5 U.S.C. § 8101 *et seq.*

of the right finger and instability of the metacarpal joints of the four fingers of the right hand. It further accepted appellant's 1997 occupational disease claim, assigned file number xxxxxx554, for bilateral carpal tunnel syndrome. Appellant retired on August 1, 1998.

OWCP granted appellant a schedule award for a one percent permanent impairment of the right hand. In a decision dated July 20, 1998, it granted him a schedule award for an additional 11 percent permanent impairment of the right hand.[2]

On January 26, 2010 appellant requested an increased schedule award. He submitted a November 13, 2009 impairment evaluation from Dr. Scott J. Fillmore, a Board-certified physiatrist, who noted that appellant dislocated his fingers and injured his right wrist on November 30, 1990 at work. Dr. Fillmore further discussed appellant's history of a right carpal tunnel release. On examination, he found a negative Phalen's test bilaterally, right hand atrophy, a nonfocal loss of sensation and loss of range of motion of the right wrist, hand and fingers. Dr. Fillmore opined that appellant had a 14 percent whole person impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). He attributed the 14 percent whole person impairment to loss of range of motion of the "right index, middle, ring, little finger and the wrist of the right hand." Dr. Fillmore found that appellant had no current impairment due to carpal tunnel syndrome. He advised that it was appropriate to use range of motion rather than the diagnosis-based impairment in "this specific case." Dr. Fillmore concluded that appellant had a 24 percent right upper extremity impairment.

On October 5, 2010 OWCP referred appellant to Dr. James F. Johnson, a Board-certified orthopedic surgeon, for a second opinion examination regarding the cause of appellant's current condition and disability.

On November 4, 2010 OWCP's medical adviser requested that OWCP obtain the range of motion measurements Dr. Fillmore used in calculating the extent of impairment. On November 14, 2010 Dr. Fillmore provided his range of motion for appellant's right fingers and wrist.

On November 22, 2010 OWCP's medical adviser recommended a second opinion examination. He noted that Dr. Fillmore did not diagnose instability of the four fingers of the right hand and provided only one joint motion measurement, rather than the three measurements required under the sixth edition of the A.M.A., *Guides*. The medical adviser further found that the results of electrodiagnostic testing were not in the record to review. He opined that it was possible that nonemployment-related osteoarthritis caused the loss of finger motion.

In a report dated November 30, 2010, Dr. Johnson diagnosed status post bilateral wrist fusions for osteoarthritis, bilateral carpal tunnel syndrome, status post near complete amputation of the left index finger and ulnar deviation of the right index, long, ring and little fingers. He found a positive Tinel's sign of the left wrist and decreased right hand sensation in the median nerve.

[2] In decisions dated July 18 and November 17 2003, OWCP found that appellant had not established a recurrence of disability beginning December 6, 2002 causally related to his accepted employment injury.

On March 10, 2011 OWCP referred appellant to Dr. Colin W. Fennell, a Board-certified orthopedic surgeon, for an impairment evaluation. In a March 29, 2011 report, Dr. Fennell discussed the history of injury and reviewed the medical evidence of record. He measured range of motion of the bilateral wrists and fingers and bilateral grip strength. Dr. Fennell interpreted x-rays as showing early degenerative changes of the index, middle and ring finger at the metacarpophalangeal (MCP) joint. On examination he found "minor ulnar deviation of approximately 10 degrees of the CMC [carpometacarpophalngeal] joints of the index, middle and ring fingers" on the right side. Dr. Fennell stated:

> "[Appellant] presents for evaluation of work[-]related injuries of December 3, 1990 involving sprains of the right fingers. Not included in the assessment of his current impairment are issues related to wrist arthritis. Included in the statement of accepted facts are bilateral carpal tunnel syndrome relating to the claim[ed] injury of July 24, 1997. [Appellant] has undergone right carpal tunnel release in 2004. Subsequent symptomatology of the right hand has resolved and current examination shows no continued impairment of the neurologic function in either the right or left hands. Physical examination at this time confirms that [appellant's] principle issues related to function of the right hand are related to the nonwork[-]related pathology of the right wrist arthritis."

Dr. Fennell stated, "Physical examination grade modifiers show that the phalangeal joints remain stable, pain-free and without crepitation during motion. The principle issue is loss of range of motion." Dr. Fennell related that appellant had "other impairments of his hands including the loss of mobility and function secondary to his bilateral wrist arthritis, but this is not included in this work[-]related impairment rating." He concluded that appellant had a 24 percent impairment of the right hand due to loss of range of motion of the fingers or a 22 percent upper extremity rating. Dr. Fennell advised that the bilateral carpal tunnel syndrome had resolved.

On April 14, 2011 OWCP's medical adviser noted that if appellant had positive electrodiagnostic evidence of carpal tunnel syndrome he would be entitled to a rating even in the absence of clinical findings. He requested a copy of any diagnostic studies. The medical adviser noted that a finger sprain would not cause loss of motion without laxity of a ligament. He related that Dr. Fennell found arthritis of the fingers on x-ray and stated, "It is the arthritis that is responsible for the ulnar deviation at the MCP joints, not the sprains." The medical adviser further opined that Dr. Fennell's report was insufficient as he only provided one motion measurement per joint instead of three. He further indicated that he did not have any medical evidence available for review regarding the prior impairment rating.

On September 15, 2011 OWCP provided OWCP's medical adviser with medical evidence from 1997 through 1999. On September 20, 2011 the medical adviser noted that appellant had previously received schedule awards totaling 12 percent for loss of range of

motion. He found that appellant did not have any impairment due to instability of the metatarsophalangeal (MP) joints of the fingers of the right hand based on the lack of findings on clinical examination. The medical adviser stated:

> "Dr. Fennell indicates that there is arthritis in the[r]ight index, middle and ring finger MCP joints on x-ray with cyst formation. It is the arthritis that is responsible for the ulnar deviation at the MCP joints, not the sprains or MP joint instability. *Based upon this information, the claimant is not eligible for impairment related to right finger sprain*." (Emphasis in the original.)

OWCP's medical adviser indicated that he was unable to provide an impairment rating for carpal tunnel syndrome without a *Quick*DASH evaluation. He found that the electromyography (EMG) and nerve conduction velocity (NCV) test was not legible but noted that a contemporaneous medical report revealed delayed motor latency. The medical adviser used Table 15-23 on page 449 of the A.M.A., *Guides* to evaluate the impairment due to carpal tunnel syndrome. He found that appellant had a grade modifier of one for the nerve conduction delay, a grade modifier of one for history, a grade modifier of one for physical findings and no modifier for functional scale. The medical adviser indicated that even with a completed *Quick*DASH the impairment would not be more than three percent.

By decision dated November 30, 2011, OWCP denied appellant's claim for an additional schedule award. On December 18, 2011 counsel requested a review of the written record by an OWCP hearing representative. He argued that OWCP ignored the findings by Dr. Johnson in his November 30, 2010 report.

In a decision dated April 19, 2012, OWCP's hearing representative affirmed the November 30, 2011 decision.

On appeal, counsel contends that OWCP ignored the findings of Dr. Johnson because he did not rate the extent of any impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations[4] 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 has adopted

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[7] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[8] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[9]

ANALYSIS

OWCP accepted that appellant sustained a right finger sprain and instability of the metacarpal joints of the four fingers of the right hand due to a November 30, 1990 employment injury. It further accepted that he sustained bilateral carpal tunnel syndrome under file number xxxxxx554. OWCP granted appellant schedule awards for a 12 percent permanent impairment of the right hand. It based its schedule award determination on his loss of range of motion.

On January 26, 2011 appellant requested an increased schedule award. In a November 13, 2009 impairment evaluation, Dr. Fillmore found that appellant had a 24 percent permanent impairment of the right lower extremity due to loss of range of motion of the right wrist and the fingers of the right hand. On November 22, 2010 OWCP's medical adviser reviewed Dr. Fillmore's report and found that he had provided only one motion measurement for each joint rather than three as required by the A.M.A., *Guides*. He recommended a second opinion examination.

In a report dated March 29, 2011, Dr. Fennell, an OWCP referral physician, indicated that he was evaluating the extent of any impairment due to appellant's work-related injury to his right fingers and his bilateral carpal tunnel syndrome. He did not provide an impairment rating for the wrist as the wrist arthritis was not an accepted condition. Dr. Fennell determined that appellant had a 24 percent right hand impairment or a 22 percent right upper extremity impairment due to loss of range of motion of the fingers of the right hand. He opined that there was no impairment due to carpal tunnel syndrome based on the lack of symptoms.

OWCP's medical adviser reviewed Dr. Fennell's report and asserted that the loss of range of motion of the fingers resulted from arthritis rather than the accepted condition of ligamental laxity. He further determined that the carpal tunnel syndrome could be rated based on positive

[5] *Id.* at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] *Vanessa Young*, 55 ECAB 575 (2004).

[8] *Richard E. Simpson*, 55 ECAB 490 (2004).

[9] *Melvin James*, 55 ECAB 406 (2004).

prior EMG findings if appellant completed a *Quick*DASH evaluation but that any rating for carpal tunnel syndrome would be three percent or less.

The Board finds that the case is not in posture for decision. Dr. Fennell evaluated the extent of appellant's work-related impairment and opined that he had a 24 percent permanent impairment of the right hand due to loss of range of motion of the fingers. OWCP's medical adviser, however, found that the reduced range of motion of the fingers resulted from nonemployment-related arthritis rather than the accepted work injury. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[10] Accordingly, once it undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[11] The Board finds that, although Dr. Fennell does not explain how appellant's work injury resulted in reduced range of motion of the fingers, his report raises an inference of causal relationship sufficient to require further development by OWCP. Accordingly, the Board finds that the case must be remanded. On remand, OWCP should request that Dr. Fennell address whether appellant's loss of range of motion resulted from his November 30, 1990 employment injury. Dr. Fennell should also evaluate any impairment due to carpal tunnel syndrome based on diagnostic studies in accordance with the sixth edition of the A.M.A., *Guides*. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision as to whether appellant is entitled to an additional schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision.

[10] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[11] *See supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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