

**United States Department of Labor
Employees' Compensation Appeals Board**

J.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baltimore, MD, Employer**

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**Docket No. 13-1677
Issued: February 4, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 3, 2013 appellant filed a timely appeal from March 1 and June 20, 2013 merit decisions of the Office of Workers' Compensation Programs denying her claim for an increased schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 a 27 percent impairment of each upper extremity, for which she received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated June 14, 2006, the Board set aside an August 10, 2005 decision granting appellant a schedule award for a four

¹ 5 U.S.C. § 8101 *et seq.*

percent permanent impairment of each upper extremity.² The Board found that the medical opinions from her attending physician and an OWCP medical adviser failed to conform to the provisions of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). The case was remanded for further development to determine the extent of any permanent impairment of the upper extremities. By decision dated February 19, 2010, the Board affirmed a March 20, 2009 decision finding that appellant had no more than a 27 percent permanent impairment of each upper extremity.³ In a December 12, 2012 order, the Board set aside a January 19, 2012 decision denying her request for reconsideration as untimely and insufficient to establish clear evidence of error.⁴ The Board determined that OWCP erred in denying appellant's request for reconsideration under the clear evidence of error standard instead of adjudicating her request for an increased schedule award. The facts and the circumstances as set forth in the prior decisions and order are hereby incorporated by reference.

On remand, OWCP referred the October 3, 2011 report from Dr. Weerasak W. Lima, a Board-certified orthopedic surgeon, to an OWCP medical adviser for review. In an October 3, 2011 report, Dr. Lima measured supination of 0 degrees, pronation of 90, flexion of 5 degrees and extension of 20 degrees of the right wrist. He found a "fixed varus deformity of the wrist about 10 degrees" and atrophy of the interossei muscles of the dorsum of the hand. For the left wrist, Dr. Lima measured supination to 30 degrees, pronation of 90 degrees, radial deviation of 15 degrees and ulnar deviation of 5 degrees with a slight varus deformity of 10 degrees. He diagnosed advanced arthritis of the wrists bilaterally confirmed by x-ray and a history of wrist sprain.

In a report dated February 26, 2013, Dr. Morlet Slutsky, an OWCP medical adviser, reviewed Dr. Lima's report and found that he did not provide valid range of motion measurements for the upper extremity as he documented only one motion per joint movement. He determined that appellant had no impairment due to cubital tunnel syndrome as electrodiagnostic testing obtained on April 30, 2009 showed only a relatively mild slowing. Dr. Slutsky found that the results were insufficient to meet the criteria of the A.M.A., *Guides* for rating ulnar nerve impairment due to compression neuropathy. Utilizing the wrist regional grid at Table 15-3 on page 397 of the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as class 1 bilateral post-traumatic degenerative joint disease of the wrists based on x-ray evidence. Dr. Slutsky utilized a grade modifier of 1 for functional history based on appellant's symptoms. He found a grade modifier of 0 for physical examination as the range of motion measurements did not conform to the A.M.A., *Guides* and as the muscle atrophy was unrelated

² Docket No. 05-1920 (issued June 14, 2006). On April 30, 1999 appellant, then a 47-year-old flat sorting machine operator, filed an occupational disease claim alleging that she sustained tendinitis due to factors of her federal employment. OWCP accepted her claim for bilateral tendinitis of the wrists. Appellant stopped work on April 22, 1999 and returned to modified work on July 6, 1999. By decision dated November 28, 2001, OWCP determined that she had no loss of wage-earning capacity based on its finding that her actual earnings as a modified flat sorting machine operator effective July 6, 1999 fairly and reasonably represented her wage-earning capacity.

³ Docket No. 09-1167 (issued February 19, 2010). In a decision dated October 3, 2006, OWCP granted appellant schedule awards for 27 percent impairment of the right and left upper extremity, minus the 4 percent previously paid for each extremity.

⁴ *Order Remanding Case*, Docket No. 12-1341 (issued December 12, 2012).

to the wrist arthritis. Dr. Slutsky determined that appellant had no modifier for clinical studies as x-rays were used to identify the correct diagnosis and class. He applied the net adjustment formula to find that appellant had a three percent impairment of each upper extremity due to her wrist arthritis. Dr. Slutsky then applied the elbow regional grid at Table 15-4 on page 398, to the diagnosis of class 1 nonspecific bilateral elbow pain, which yielded a default value of one. He found a grade modifier of 1 for Functional History (GMFH), a grade modifier of 2 for Physical Examination (GMPE) findings of interosseous atrophy and no grade modifier for Clinical Studies (GMCS) as electrodiagnostic studies were used to reach the diagnosis and class. Dr. Slutsky applied the net adjustment formula and found a one percent impairment of each upper extremity due to appellant's elbow impairment, which he combined with the three percent wrist impairment to total four percent impairment to each arm.

By decision dated March 1, 2013, OWCP denied appellant's claim for an increased schedule award. On March 7, 2013 appellant requested a review of the written record by an OWCP hearing representative.

In a report dated March 13, 2013, Dr. Margit L. Bleecker, a neurologist, discussed appellant's work history and current symptoms of pain in the wrists and fingers with difficulty performing activities of daily living. She provided detailed findings on examination. Dr. Bleecker noted that she obtained electrodiagnostic studies that were normal. She also noted that appellant requested that she become her treating physician.

In a decision dated June 20, 2013, an OWCP hearing representative affirmed the March 1, 2013 decision. She noted that Dr. Bleecker did not provide any impairment rating.

On appeal appellant questioned why OWCP relied upon the medical adviser rather than Dr. Lima's October 3, 2011 report. She advised that she wished to change physicians to Dr. Bleecker. Appellant questioned whether OWCP used Dr. Bleecker's finding in its denial and noted that she had not received payment.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing federal regulations,⁶ 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

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.⁹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS

OWCP accepted that appellant sustained bilateral tendinitis of the wrists. In a decision dated October 3, 2006, it granted her a schedule award for permanent impairment to each upper extremity of 27 percent. The period of the awards ran from April 28, 2005 to January 27, 2008.

In a report dated October 3, 2011, Dr. Lima measured range of motion of the wrists bilaterally and found a 10-degree fixed varus deformity of the right wrist and a 10-degree slight varus deformity of the left wrist. He found atrophy of the interossei muscles of the right hand. Dr. Lima diagnosed a history of bilateral wrist sprain and advanced bilateral wrist arthritis, worse on the right.

On February 26, 2013 Dr. Slutsky, a medical adviser, applied the provisions of the A.M.A., *Guides* to Dr. Lima's clinical findings. He found that Dr. Lima's range-of-motion measurements did not conform to the A.M.A., *Guides* as he did not provide more than one joint movement. The A.M.A., *Guides* indicates that to evaluate an impairment using range of motion, the examiner should obtain "the active measurements from [three] separate range of motion efforts."¹⁰ The medical adviser determined that appellant had a class 1 impairment due to x-ray evidence of bilateral post-traumatic degenerative joint disease of the wrists using the wrist regional grid set forth in Table 15-3 on page 397, which yielded a default value of one percent. He found a grade modifier of 1 for functional history based on appellant's symptoms and a grade modifier of 0 for physical examination as the range of motion measurements were invalid and as the interossei atrophy was due to the elbow condition rather than the wrist. Dr. Slutsky further determined that there was no grade modifier for clinical studies as the x-rays were used to select the correct class of diagnosis. Utilizing the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (1-1) + (0-1) = -1, moved the grade one over to the left, for a final upper extremity impairment of each wrist of three percent.¹¹

Dr. Slutsky determined that appellant had no ratable impairment due to cubital tunnel syndrome based on the finding of only mild slowing of the muscles under Appendix 15-B, page

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ A.M.A., *Guides* 494-531.

¹⁰ *Id.* at 464.

¹¹ *Id.* at 397, Table 15-3.

488, but found that he could rate the elbows using the diagnostic-based criteria. He used the diagnosis of class 1 nonspecific bilateral elbow pain, which yielded a default value of one under the elbow regional grid.¹² Dr. Slutsky applied a grade modifier of 1 for functional history, 2 for physical examination findings of interosseous atrophy and none for clinical studies as electrodiagnostic studies were used to reach the diagnosis and class. He applied the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (1-1) + (2-1) = 1, which moved the grade one over to the right for a final impairment of each upper extremity based on the elbow impairment of one percent. Dr. Slutsky combined the elbow and wrists impairment to find a total impairment of each extremity of four percent.

There is no evidence of record conforming to the A.M.A., *Guides* to establish that appellant has more than the 27 percent impairment of each upper extremity as previously awarded for sensory loss at the ulnar nerve of the elbows and loss of range of motion of the wrists. On March 13, 2013 Dr. Bleecker evaluated appellant, who wanted to have her as an attending physician. She listed findings on examination but did not provide any impairment evaluation. Consequently, Dr. Bleecker's opinion is insufficient to establish that appellant has a greater upper extremity impairment.

On appeal appellant asserted that OWCP should rely on the findings of Dr. Lima. As discussed, however, Dr. Lima's report did not fully conform to the provisions of the A.M.A., *Guides* and is of diminished probative value.¹³ Appellant also requested that Dr. Bleecker become her attending physician. The Board's jurisdiction, however, is limited to reviewing final decisions of OWCP.¹⁴ OWCP has not issued a final decision on this issue. Thus, it is not before the Board.

Appellant also inquired into whether OWCP used Dr. Bleecker's finding in its denial. As discussed, OWCP used the impairment rating provide by the medical adviser based on his review of Dr. Lima's clinical findings.

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 appellant has no more than a 27 percent impairment of each upper extremity, for which she received schedule awards.

¹² *Id.* at 398, Table 15-4.

¹³ See *Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment).

¹⁴ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the June 20 and March 1, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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