

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

V.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**

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**Docket No. 13-1844
Issued: February 4, 2014**

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
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 5, 2013 appellant, through his attorney, filed a timely appeal from a May 14, 2013 schedule award decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative. 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 schedule award issue of this case.

ISSUE

The issue is whether appellant has more than 20 percent impairment of the left arm for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted that on May 10, 1992 appellant, then a 41-year-old mail processing equipment mechanic, sustained a laceration of the

¹ 5 U.S.C. § 8101 *et seq.*

left index and middle fingers and left carpal tunnel syndrome in the performance of duty. He stopped work intermittently and returned to limited duty on June 27, 1992. Appellant underwent surgery of the left index and middle fingers. On November 19, 1992 he requested a schedule award. OWCP granted a schedule award for four percent permanent impairment of the left upper extremity.

On June 20, 2002 appellant, through counsel, requested an increased schedule award.

In a July 13, 2001 report, Dr. David Weiss, a Board-certified osteopath, advised that appellant had a 70 percent impairment of the left upper extremity under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a January 19, 2005 report, OWCP's medical adviser reviewed the medical record. He opined that appellant had 18 percent impairment of the left upper extremity according to the fifth edition of the A.M.A., *Guides*.

OWCP determined that a conflict in medical opinion arose between Dr. Weiss and OWCP's medical adviser regarding the extent of appellant's impairment. It referred appellant to Dr. Paul Foddai, a Board-certified orthopedic surgeon, for an impartial medical examination. In a February 14, 2006 report, Dr. Foddai conducted an examination and determined that appellant had 17.75 percent impairment of the left upper extremity. He reported that appellant reached maximum medical improvement on December 1, 2004. On October 5, 2006 the medical adviser reviewed Dr. Foddai's report and agreed with his opinion and impairment rating.

In an August 9, 2007 decision, OWCP granted a schedule award for 18 percent impairment of the left upper extremity. Appellant disagreed and requested a hearing through his attorney, which was held on December 12, 2007. By decision dated March 5, 2008, OWCP's hearing representative affirmed the August 9, 2007 schedule award.

In an April 3, 2009 decision,² the Board set aside OWCP's August 9, 2007 and March 5, 2008 decisions and remanded the case for further development. It found that Dr. Foddai, the impartial medical examiner, was improperly selected as he had previously examined appellant. Therefore, Dr. Foddai's opinion did not carry special weight.

Following the Board's remand, OWCP referred appellant to Dr. Stanley Soren, a Board-certified orthopedic surgeon, to conduct an impartial medical examination. In an October 6, 2009 report, Dr. Soren provided findings on examination and found that appellant had 19 percent impairment of the left arm under the sixth edition of the A.M.A., *Guides*. On March 21, 2010 OWCP's medical adviser reviewed Dr. Soren's report and agreed with his impairment rating.

In an April 6, 2010 decision, OWCP granted appellant a schedule award for an additional one percent impairment of the left upper extremity.

Appellant, through his attorney, requested an oral hearing. On July 20, 2010 he changed his request to a review of the written record. By decision dated October 5, 2010, OWCP's hearing representative affirmed the April 6, 2010 schedule award decision.

² Docket No. 08-1776 (issued April 3, 2009).

In a January 12, 2012 decision,³ the Board set aside the October 5, 2010 schedule award decision finding that OWCP did not meet its obligation to establish that the impartial medical examiner was properly selected. It remanded the case for selection of another impartial medical specialist and further development regarding appellant's entitlement to a schedule award.

On March 26, 2012 OWCP referred appellant, together with the case record and statement of accepted facts, to Dr. Ernest Tolentino, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion.

In an April 30, 2012 memorandum, the claims examiner stated that Dr. Tolentino called OWCP, but the claims examiner did not speak to him.

By letter dated May 3, 2012, OWCP advised Dr. Tolentino to conduct a referee examination in order to resolve a conflict between appellant's treating physician, Dr. Weiss, and the medical adviser. It also informed him of the requirements for him to remain impartial during the examination process.

In a May 2, 2012 report, Dr. Tolentino reviewed an accurate history of the May 10, 1992 employment injury and appellant's records, including the statement of accepted facts. Examination of appellant's left upper extremity revealed a normal contour except at the palmar aspect of the left hand where there was atrophy of the distal aspect of the left second and third fingers and thenar eminence. Dr. Tolentino observed healed surgical scars at the index and middle fingers and a healed laceration along the ulnar aspect of the left middle finger. He also noted hypersensitivity to touch and weakness of pinch and grasp. Examination of the left wrist was normal with full range of dorsiflexion, palmar flexion and radial and ulnar deviations. Tinel's sign at the left wrist was positive. Range of motion of the left index finger revealed full extension of the metacarpophalangeal (MP), proximal interphalangeal (PIP) and distal interphalangeal (DIP) joints. Flexion of the MP and PIP joints was to 90 degrees and the DIP joint was to 15 degrees. Range of motion of the left middle finger revealed flexion of the MP and PIP joints to 90 degrees and of the DIP joint to 15 degrees. Dr. Tolentino stated that appellant reached maximum medical improvement.

According to the sixth edition of the A.M.A., *Guides*, Table 15-31 on page 470, for finger range of motion, appellant had 25 and 27 percent digit impairment for the left second and third fingers. Utilizing Table 15-12 on page 421, Dr. Tolentino stated that appellant had 5 percent digit impairment for each for a total of 10 percent upper extremity impairment. He also referenced Table 15-17 on page 427 and Table 15-11 on page 420 to determine that 10 percent digit loss equaled 2 percent loss of the hand, which equaled 4 percent loss of the hand for two digits. Regarding appellant's accepted carpal tunnel syndrome, Dr. Tolentino referenced Table 15-23 on page 449 and determined that appellant had eight percent left upper extremity impairment. He concluded that appellant had a total of 22 percent total impairment of the left upper extremity.

In a May 29, 2012 report, Dr. Henry Magliato, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record. He concurred with Dr. Tolentino's

³ Docket No. 11-605 (issued January 12, 2012).

opinion that appellant had 10 percent impairment for his two digits, 8 percent impairment for left carpal tunnel syndrome and 4 percent impairment for digital nerve involvement. Dr. Magliato determined, however, that Dr. Tolentino did not utilize the Combined Values Chart on page 604. He explained that Dr. Tolentino combined the percentages of 10, 8 and 4 to total 22 percent, but according to the Combined Values Chart on page 604 appellant had a total of 20 percent permanent impairment of the left upper extremity.

In a letter dated June 27, 2012, OWCP requested clarification from Dr. Tolentino concerning his calculations under the A.M.A., *Guides* and whether he agreed with the medical adviser's reference to use the Combined Values Chart on page 604.

In a July 13, 2012 report, Dr. Tolentino stated that, upon review of his calculation, it was evident that he did not use the Combined Values Chart and that the medical adviser was correct. Under the Combined Values Chart, he concluded that appellant had 20 percent impairment of the left upper extremity.

On October 26, 2012 OWCP granted appellant a schedule award for 20 percent impairment of the left arm as a result of the accepted May 10, 1992 employment injuries.

By letter dated November 15, 2012, counsel requested a telephone hearing. By letter dated March 21, 2013, he requested that the scheduled telephone hearing be changed to an examination of the record.

In a decision dated May 14, 2013, OWCP's hearing representative affirmed the October 26, 2012 decision as modified. He affirmed the 20 percent impairment rating but determined that appellant was entitled to compensation at the augmented rate of 75 percent rather than the statutory rate of 66 2/3 percent.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage of 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 the appropriate standards for evaluating schedule losses.⁵

Under the six edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.404 (1999); *see also* Jacqueline S. Harris, 54 ECAB 139 (2002).

(GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁶ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁷

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸

ANALYSIS

OWCP accepted appellant's claim for a laceration of the left index and middle fingers and left carpal tunnel syndrome. Appellant filed a claim for a schedule award. In a July 31, 2001 report, Dr. Weiss, appellant's treating physician, opined that appellant had 70 percent impairment of the left upper extremity. In a January 19, 2005 report, OWCP's medical adviser determined that appellant had 18 percent impairment of the left upper extremity. OWCP found that a conflict in medical opinion arose between appellant's treating physician and the medical adviser. It referred appellant to an impartial medical examiner to resolve the conflict in medical opinion. The Board finds that OWCP properly determined that a conflict in medical opinion existed between appellant's treating physician and OWCP's referral physician.

In a May 2, 2012 report, Dr. Tolentino, the impartial medical examiner, reviewed appellant's records, including the statement of accepted facts and provided findings on examination. He determined that, according to the sixth edition of the A.M.A., *Guides*, Table 15-31 on page 470 for finger range of motion, appellant had 25 and 27 percent digit impairment for the left second and third fingers. Utilizing Table 15-12 on page 421, Dr. Tolentino stated that appellant had 5 percent digit impairment for each for a total of 10 percent upper extremity impairment. He also referenced Table 15-17 on page 427 and Table 15-11 on page 420 to determine that 10 percent digit loss equaled 2 percent loss of the hand, which equaled 4 percent loss for two digits. Regarding appellant's accepted carpal tunnel syndrome, Dr. Tolentino referenced Table 15-23 on page 449 and determined that appellant had eight percent left upper extremity impairment. He concluded that appellant had a 22 percent total impairment of the left upper extremity and had reached maximum medical improvement. In a July 13, 2012 supplemental report, Dr. Tolentino reported that he should have used the Combined Values Chart on page 604 and determined that according to that chart appellant had a total of 20 percent impairment of the left upper extremity.

The Board finds that Dr. Tolentino was properly selected as the impartial medical specialist to resolve the issue of extent and degree of any employment-related impairment. Dr. Tolentino's opinion constitutes the special weight of the medical evidence. He reviewed the medical record and provided findings on examination. Dr. Tolentino provided a well-rationalized opinion and calculation under the sixth edition of the A.M.A., *Guides* and

⁶ A.M.A., *Guides* 405-419.

⁷ *Id.* at 521.

⁸ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

determined that appellant had a total of 20 percent impairment of the left upper extremity. His opinion is entitled to special weight and represents the weight of the medical evidence.

The Board finds that Dr. Magliato, OWCP's medical adviser, properly reviewed the record on May 29, 2012 and determined that appellant had 20 percent impairment of the left upper extremity in accordance with the sixth edition of the A.M.A., *Guides*.

On appeal, counsel alleges that OWCP made two mistakes relative to the referee medical examination. He stated that it was clear from Dr. Tolentino's May 2, 2012 impartial medical report that he had contact with the district office. Counsel contended that Dr. Tolentino's opinion should be disregarded and the case referred to a new referee examiner. If found proper, he contends that Dr. Tolentino's report was not well reasoned and did not comply with the sixth edition of the A.M.A., *Guides*. The Board notes that, although Dr. Tolentino's office contacted the district office by telephone on April 30, 2012, the record reveals that the claims examiner did not speak to Dr. Tolentino. OWCP responded to Dr. Tolentino by letter dated May 3, 2012 in accordance with OWCP procedures. Accordingly, the Board finds that Dr. Tolentino did not have any improper contact with OWCP such that his opinion is tainted.

Appellant did not submit sufficient medical evidence to establish that he sustained greater than 20 permanent impairment of the left upper extremity.

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 is not entitled to greater than 20 percent impairment of the left upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2013 decision of the Office of Workers' Compensation Programs is 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