

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUANN MIDDLETON and U.S. POSTAL SERVICE,
AIRPORT MAIL FACILITY, JOHN F. KENNEDY AIRPORT,
Jamaica, NY

*Docket No. 03-1643; Submitted on the Record;
Issued April 2, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has a ratable impairment of both upper extremities attributable to her accepted carpal tunnel syndrome.

The Office of Workers' Compensation Programs accepted that appellant, a 44-year-old mail handler, sustained bilateral carpal tunnel syndrome.¹ The record indicates that appellant stopped work on August 19, 1997 and did not return.

In reports dated January 13, 1998 to August 6, 1999, Dr. Joseph I. Lopez, an attending Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome. He noted that physical examination demonstrated bilateral positive Tinel's and Phalen's signs, pain and sensory deficit in the median nerve distribution and electrodiagnostic findings. Dr. Lopez recommended bilateral median nerve releases in his reports through March 1, 2000.

On February 19, 2000 appellant claimed a schedule award.

In a May 22, 2000 chart note, Dr. Lopez noted continued pain, paresthesias, positive Tinel's and Phalen's signs and decreased sensation in the median nerve distribution bilaterally.

¹ Appellant's claim was dated January 13, 1998. The Office initially denied the claim for carpal tunnel syndrome in a May 4, 1998 decision, affirmed by a September 7, 1999 decision. By decision dated February 9, 2000, the Office vacated its September 7, 1999 decision and accepted appellant's claim for bilateral carpal tunnel syndrome. The Office also accepted an August 17, 1997 lumbar strain. There are no decisions regarding the lumbar sprain on appeal before the Board.

Dr. Lopez recommended a 15 percent permanent impairment rating of each hand.² He reiterated this opinion in November 10, 2000, March 12 and May 30, 2001 chart notes.³

In April 16, 2001 reports, Dr. Richard S. Goodman, Board-certified orthopedic surgeon and second opinion physician, stated that appellant did not have sensory loss, positive Tinel's and Phalen's signs and muscle atrophy required to diagnose carpal tunnel syndrome. Dr. Goodman opined that appellant did not have any ratable impairment of the upper extremities according to the A.M.A., *Guides*.⁴

The Office found a conflict of medical opinion between Dr. Goodman, for the government and Dr. Lopez, for appellant, regarding the presence of a ratable impairment of the upper extremities. The Office initially referred appellant to Dr. Donald I. Goldman, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Goldman submitted a June 20, 2001 report; however, the Office found the report to be deficient and subsequently referred appellant to Dr. Issac Cohen, a Board-certified orthopedic surgeon, for the impartial medical evaluation. Dr. Cohen submitted a November 12, 2001 report finding bilaterally negative Tinel's signs, no atrophy of the thenar eminence, normal pinch and grip strength and no neurological abnormalities. Dr. Cohen commented that although appellant's electromyogram (EMG) results supported the diagnosis of chronic carpal tunnel syndrome, these results were invalid as she had no thenar atrophy or neurotrophic changes. Dr. Cohen, therefore, concluded that there was no ratable impairment of either upper extremity.

By decision dated February 14, 2002, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence was insufficient to establish a ratable impairment, based on Dr. Cohen's impartial medical opinion.

Appellant disagreed with this decision and in a March 8, 2002 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review. A hearing was held on October 29, 2002 at which appellant submitted additional evidence.

Dr. Lawrence J. Robinson, an attending Board-certified neurologist, performed March 11, 2002 nerve conduction velocity (NCV) and EMG testing demonstrating bilateral distal median neuropathy and carpal tunnel syndrome, with no significant change from a July 9, 1998 study.

In an October 28, 2002 report, Dr. Lopez noted continuing symptoms of pain, numbness and paresthesias along the median nerve distribution of both hands. Dr. Lopez commented that

² In an April 12, 2000 letter, the Office requested that Dr. Lopez provide an assessment of appellant's upper extremity impairments according to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

³ In a December 5, 2001 report, Dr. Lopez noted bilateral numbness and paresthesias of the hands in the median nerve distribution and positive Tinel's and Phalen's signs. He stated an impression of bilateral carpal tunnel syndrome and requested that the Office authorize a series of three cortisone injections to both wrists.

⁴ In a May 15, 2001 report, an Office medical adviser found that Dr. Goodman did not provide objective evidence of "residual bilateral carpal tunnel syndrome neuropathy upon which to give a schedule award."

appellant's carpal tunnel syndrome was confirmed by EMG and NCV testing. On examination Dr. Lopez found positive tenderness over the transverse carpal ligament of both hands, a bilaterally positive Phalen's test and decreased sensation in the median nerve distribution. He explained that "[o]ne can have carpal tunnel syndrome without atrophy." Dr. Lopez opined that appellant had a 15 percent permanent impairment of each upper extremity according to the A.M.A., *Guides*. Dr. Lopez reiterated these findings in a January 10, 2003 report.

By decision dated and finalized January 22, 2003, the Office hearing representative affirmed the February 14, 2002 decision denying appellant's claim for a schedule award. However, the hearing representative found that Dr. Lopez and Dr. Robinson presented objective evidence of ongoing carpal tunnel syndrome and an estimate of a 15 percent impairment of the upper extremities according to the A.M.A., *Guides*. The hearing representative directed that Dr. Cohen, the impartial medical specialist, review the reports of Dr. Lopez and Dr. Robinson and discuss the findings of the physicians.

On remand the Office requested that Dr. Cohen review the additional medical evidence.

In an April 11, 2003 report, Dr. Cohen reiterated that as of his November 12, 2001 examination, there was no evidence of carpal tunnel syndrome and that appellant's condition remained unchanged according to the March 11, 2002 EMG and NCV report, which showed "no significant change" from a July 9, 1998 study. Dr. Cohen agreed with Dr. Goodman that there was no basis for a schedule loss under the A.M.A., *Guides*. Dr. Cohen did not specifically address Dr. Lopez's October 28, 2002 and January 10, 2003 reports.

By decision dated May 9, 2003, the Office found that appellant had not established that she sustained a ratable impairment of the upper extremities. The Office noted that, although Dr. Cohen did not review Dr. Lopez's reports as requested, this was acceptable as the reports were unsigned and did not constitute medical evidence. The Office also noted that Dr. Lopez's reports did not contain sufficient rationale to create a conflict with Dr. Cohen's opinion. The Office found that Dr. Cohen's opinion continued to represent the weight of the medical evidence.

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

Under section 8107 of the Federal Employees' Compensation Act⁵ and section 10.304 of the implementing federal regulations,⁶ schedule awards are payable for the permanent impairment of specified body members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁷ However, neither the Act nor the regulations specify the method, by which the percentage of impairment shall be determined.⁸ The method used in making such determinations rests in the

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.304.

⁷ 5 U.S.C. § 8107(c)(19).

⁸ *George Lampo*, 45 ECAB 441, 443 (1994).

sound discretion of the Office.⁹ For consistent results and to ensure equal justice for all claimants, the Office has adopted and the Board has approved the use of the appropriate edition of the A.M.A., *Guides* as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.¹⁰

The Office has accepted that appellant sustained bilateral carpal tunnel syndrome. Appellant claimed a schedule award and medical reports from Dr. Lopez, an attending Board-certified orthopedic surgeon, who found a 15 percent impairment of each upper extremity due to the accepted carpal tunnel syndrome. The Office obtained a second opinion report from Dr. Goodman, a Board-certified orthopedic surgeon, who found that appellant did not have carpal tunnel syndrome or a ratable impairment. Based on this conflict of medical opinion, the Office appointed Dr. Goldman, a Board-certified orthopedic surgeon, to resolve the conflict.¹¹ Due to deficiencies in Dr. Goldman's report, the Office subsequently appointed Dr. Cohen, a Board-certified orthopedic surgeon, as impartial medical examiner.

In a November 12, 2001 report, Dr. Cohen opined that, although appellant's EMG and NCV results supported the diagnosis of carpal tunnel syndrome, she did not demonstrate thenar trophy or neurotrophic changes. Based on this finding, Dr. Cohen stated that appellant did not have carpal tunnel syndrome or any ratable impairment of the upper extremities according to the A.M.A., *Guides*. Based on Dr. Cohen's report, the Office denied appellant's schedule award claim by decision dated February 14, 2002.

Following remand by an Office hearing representative, the case was sent back to Dr. Cohen for additional medical opinion addressing the medical evidence submitted by appellant at oral argument. In an April 11, 2003 report, Dr. Cohen reiterated his belief that appellant did not have carpal tunnel syndrome, although July 9, 1998 and March 11, 2002 EMG and NCV studies documented bilateral median neuropathy. Dr. Cohen concluded that appellant had no ratable impairment. Despite the hearing representative's request that the impartial specialist address the October 28, 2002 and January 10, 2003 reports of Dr. Lopez, Dr. Cohen made no mention of them in his report. Based on Dr. Cohen's opinion the Office found that appellant had no ratable impairment of the upper extremities.

The Board finds that Dr. Cohen's report is deficient such that it cannot represent the weight of the medical evidence. Dr. Cohen was requested to consider all of the new evidence submitted by appellant at oral argument; specifically, the October 28, 2002 and January 10, 2003 reports of Dr. Lopez and to discuss whether the reports established a ratable impairment of the upper extremities. However, in his April 11, 2003 report, Dr. Cohen failed to mention Dr. Lopez's reports. The Office subsequently found that the reports of Dr. Lopez did not have to be reviewed as they were unsigned and, therefore, did not constitute medical evidence. However, the Office erred in failing to comply with the directions of the hearing representative.

⁹ *George E. Williams*, 44 ECAB 530, 532 (1993).

¹⁰ *James J. Hjort*, 45 ECAB 595, 599 (1994).

¹¹ 5 U.S.C. § 8123(a) provides that, 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.

In this case, the name and address stamp used on Dr. Lopez's October 28, 2002 and January 10, 2003 chart notes is identical to that used on the chart notes of record as early as May 23, 1995.¹² In each case the stamp was imprinted at the beginning of the chart note. Also, the format and type font of the reports are virtually indistinguishable throughout the case record. Dr. Lopez did not sign any of the chart notes of record, including those relied upon by the Office in accepting appellant's claim. At no prior time has the Office raised any objection to the lack of a formal signature until the May 9, 2003 decision. There is no allegation or evidence in this case that Dr. Lopez's chart notes were not authored by him. The Board finds that Dr. Lopez's October 28, 2002 and January 10, 2003 chart notes should be considered as probative medical evidence. It is well established that proceedings under the Act are not adversarial in nature. Once the Office attempts to develop the medical evidence of record, it should do so in a fair and just manner.¹³

The case will be remanded to the Office for further development of the medical evidence, as appropriate, to obtain a supplemental report from Dr. Cohen, who should again be requested to address the findings of Dr. Lopez. The materials referred to Dr. Cohen should note that the Office has accepted bilateral carpal tunnel syndrome and provide an opinion as to the existence of any permanent impairment of the upper extremities based on the A.M.A., *Guides*. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.¹⁴

¹² The same name and address stamp appears on chart notes dated January 13 and August 13, 1998, June 24, 1999, May 22, 2000, May 30 and December 5, 2001.

¹³ See *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁴ Should the supplemental report of Dr. Cohen not be forthcoming or if the physician is unable or unwilling to clarify his opinion, the Office should proceed with appropriate medical development. See *Roger W. Griffith*, 51 ECAB 491 (2000).

The decision of the Office of Workers' Compensation Programs dated May 9, 2003 is hereby set aside and the case remanded to the Office for further development consistent with this decision.

Dated, Washington, DC
April 2, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member