United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 06-1609**
	)	**Issued: November 21, 2006**
DEPARTMENT OF THE ARMY, CAMP LEJEUNE, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 12, 2006 nonmerit decision and May 15, 2006 and December 1, 2005 schedule award decisions. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant is entitled to an impairment greater than the 14 percent impairment of the right upper extremity and a 7 percent impairment of the left upper extremity already awarded; and (2) whether the Office properly refused to reopen his case for reconsideration of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

Appellant, a 52-year-old mechanic, filed a Form CA-2 claim for benefits on November 20, 2003 alleging that he developed a bilateral carpal tunnel condition causally related to employment factors. The Office accepted the claim for bilateral carpal tunnel syndrome.

In a report dated July 18, 2003, Dr. Richard S. Moore, a specialist in orthopedic surgery, stated that appellant had a status of post left finger repair and had developed a post-traumatic pronator teres syndrome/carpal tunnel syndrome. He stated that on examination appellant had a slight PIP contracture of less than 30 degrees, with some limitation of composite flexion in his ring finger. Dr. Moore performed Jamar grip testing in positions 1, 3, 5 which indicated right over left 90/80, 110/90, 70/60 with key pinch 26/23 and chuck pinch 24/18. He stated:

> "In the absence of further surgical intervention it's my opinion that [appellant] is at maximum medical improvement. It remains my opinion that his limited range of motion associated with his tendon injury and his neurologic symptoms are related to [appellant's] initial injury and, therefore, these have been considered in the calculation of his impairment. Based on the Guidelines of [the American Medical Association's *Guides to the Evaluation of Permanent Impairment*] and the North Carolina Industrial Commission[,] it is my opinion that [appellant] has an eight percent partial impairment of the left hand."

In a report dated August 21, 2003, an Office medical adviser found that appellant had a seven percent left upper extremity impairment pursuant to the A.M.A., *Guides* (5th ed.). He calculated an 11 percent impairment of the left ring finger pursuant to Figure 16-23, page 463 of the A.M.A., *Guides* based on Dr. Moore's findings which translated to a 2 percent impairment of the left upper extremity. The Office medical adviser accorded five percent impairment for left-sided carpal tunnel syndrome based on Dr. Moore's findings pursuant to page 495 of the A.M.A., *Guides*, for a total seven percent left upper extremity impairment.[1]

In a report dated June 8, 2004, Dr. Ray B. Armistead, Board-certified in orthopedic surgery, found that appellant had two-point discrimination over the median innervated fingers of both hands, more pronounced in the right middle finger. In a May 23, 2005 report, he found that appellant had a 14 percent impairment of the right and left upper extremities pursuant to the A.M.A., *Guides* (5th ed.). Dr. Armistead derived these ratings based on ulnar and median nerve dysfunction of the extremities as defined in Table 16-15, page 492 of the A.M.A., *Guides*, modified by the severity index in Table 16-10, page 482.

On June 6, 2005 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use, of his left and right upper extremities.

In a report dated July 12, 2005, an Office medical adviser, relying on Dr. Armistead's findings and calculations, found that appellant had a 14 percent impairment of his right upper extremity and a 7 percent impairment of his left extremity based on the A.M.A., *Guides*. He stated that Dr. Armistead had derived his 14 percent upper extremity impairment of both extremities based on a Grade 3 sensory deficit of the median nerve, relying on Tables 16-15 and 16-10. The Office medical adviser, citing the August 21, 2003 impairment evaluation, noted that appellant had previously been accorded a seven percent impairment based on five percent impairment for left-sided carpal tunnel release and two percent impairment for surgical repair of

[1] The Office medical adviser stated that the award for carpal tunnel syndrome "apparently was approved," but that appellant had "decided against it." He further stated that "I assume this means we have accepted carpal tunnel syndrome."

a flexor tendon laceration on his ring finger. He stated that there had been no additional studies to suggest any change in his left-sided carpal tunnel syndrome since that rating. Therefore, the Office medical adviser granted a 14 percent impairment of his right upper extremity and a 7 percent impairment of his left extremity.

On October 11, 2005 the Office granted appellant a schedule award for a 14 percent impairment of his right upper extremity, noting that a 7 percent impairment of his left extremity had already been paid. This award covered the period May 23, 2005 to January 17, 2006, for a total of 34.16 weeks of compensation.

On November 8, 2005 appellant requested reconsideration. He submitted an October 24, 2005 report from Dr. Armistead who opined that the 7 percent impairment of the left hand should be subtracted from the 14 percent left arm impairment he had accorded him. Dr. Armistead advised that the 7 percent impairment of the hand would be approximately 5 percent of the arm, which when subtracted from 14 percent impairment would yield a total 9 percent impairment of the left upper extremity.

In a November 23, 2005 report, the Office medical adviser found that appellant was not entitled to any additional impairment for his left upper extremity. He stated that he had already been paid for a seven percent impairment for the left upper extremity for an injury which was not part of the acromioclavicular joint, in accordance with Dr. Moore's July 29, 2003 report.

In a decision dated December 1, 2005, the Office granted appellant an amended schedule award for his right arm finding that it had erroneously paid him an award for a 14 percent impairment of the right hand in its October 11, 2005 decision, this decision superceded the October 11, 2005 decision. The Office, therefore, granted appellant compensation for an additional 66.64 days of impairment, for a total of 305.76 days impairment for the right arm. In addition, it denied his request for modification of the seven percent award for permanent impairment of the left upper extremity, finding that he was not entitled to an award based on a greater impairment.

By letter dated January 24, 2005, appellant requested reconsideration. He submitted the results of June 12, 2005 nerve condition studies and a February 14, 2006 functional capacity test.

By decision dated May 15, 2006, the Office denied modification of the December 9, 2005 schedule award decision.

By letter dated May 23, 2006, appellant requested reconsideration. In a report dated May 23, 2006, Dr. Armistead stated:

> "[Appellant] is seen for follow-up of his problems involving his hands. Basically his problems involved paperwork regarding resolution of his [workers' compensation] items. I have advised [appellant] that I will write a letter to [the Office] regarding his current symptoms and suggest functional capacity evaluation testing to determine his suitability for continuing in his current position or perhaps retraining. Regarding his rating, I have advised [appellant] that the rating given him at the time of the letter to [the Office] in May 2005, remains accurate and I will so inform the [Office]."

By decision dated June 12, 2006, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] sets forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5th ed.) as the standard to be used for evaluating schedule losses.[4]

ANALYSIS

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

The Office medical adviser, relying on Dr. Armistead's findings and calculations, found in his July 12, 2005 report, that appellant had a 14 percent impairment of his right upper extremity and a 7 percent impairment of his left upper extremity based on the A.M.A., *Guides.* He stated that Dr. Armistead had derived his 14 percent right upper extremity impairment based on a Grade 3 sensory deficit of the median nerve, relying on Tables 16-10 and 16-15.[5] However, the Office medical adviser substituted his own findings and conclusions without explanation and failed to specify the methods by which he determined that appellant had a 14 percent rating based on nerve impairment of the right upper extremity. He did not examine appellant and derived his 14 percent impairment rating without indicating the source of the measurements he relied on. While the Office medical adviser stated that he calculated impairment based on a Grade 3 sensory deficit at Table 16-10, a Grade 3 sensory deficit at Table 16-10 yields a sensory deficit of 26 to 60 percent; the Office medical adviser does not provide any explanation of how he used this calculation in rendering his impairment rating.

In addition, the Office medical adviser did not indicate the manner by which he relied on Table 16-15 in calculating his nerve impairment rating. Dr. Armistead indicated in his June 8, 2004 report that appellant had two-point discrimination over the median innervated fingers of both hands. Although the Office medical adviser stated that he relied on Dr. Armistead's findings of ulnar and median nerve dysfunction in his hands, he failed to indicate which sections of Table 16-15 he relied on in calculating his 14 percent rating based on nerve impairment. The

[2] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 8107(c).

[3] 5 U.S.C. § 8107(c)(19).

[4] 20 C.F.R. § 10.404.

[5] Table 16-15 provides a method for determining upper extremity impairments due to unilateral sensory or motor deficits or to combined 100 percent deficits of the major peripheral nerves. A.M.A., *Guides* at 492.

Office, therefore, erred in finding that appellant had a 14 percent impairment based on the opinion of the Office medical adviser.

With regard to the left upper extremity, the Office medical adviser, citing the August 21, 2003 impairment evaluation, noted that appellant had previously been rated a seven percent impairment based on a combined five percent impairment for left-sided carpal tunnel release and two percent impairment for surgical repair of a flexor tendon laceration on his ring finger. He found that, because there had been no additional studies to suggest any change in his left-sided carpal tunnel syndrome since the August 2003 rating, appellant was not entitled to an additional award for his left-sided carpal tunnel syndrome. The finding, however, is not consistent with Board case law or the facts of this case. The Board has held that where a claimant submits medical evidence demonstrating that the progression of an employment-related condition has resulted in a greater impairment than previously calculated, he is entitled to an increased schedule award.[6] Dr. Armistead's report indicated that the impairment stemming from appellant's accepted left carpal tunnel syndrome had increased from the 5 percent recorded in August 2003 to 14 percent as of May 23, 2005. The Office medical adviser, therefore, acted improperly in refusing to address this additional medical evidence indicating an increase in the impairment derived from appellant's work-related carpal tunnel syndrome.

Accordingly, the Office's December 1, 2005 decision is set aside and the case remanded to the Office for referral to an appropriate medical specialist to consider Dr. Armistead's June 8, 2004 and May 23, 2005 reports and determine whether appellant was entitled to an increased schedule award based on increased impairment for his right-sided median nerve impairment and left-sided carpal tunnel syndrome. The specialist will be instructed to obtain a complete assessment of appellant's right and left upper extremities impairment in accordance with the standards of the A.M.A., *Guides*. Following such further development as deemed necessary, the Office should issue a *de novo* decision regarding the matter.[7]

CONCLUSION

The Board finds that the case is not in posture for decision with regard to an impairment based on the left and right upper extremities and the case is remanded for further development. After such development, as it deems necessary, the Office shall issue a *de novo* decision.

[6] *Linda T. Brown*, 51 ECAB 115 (1999).

[7] As the Board has set aside the December 1, 2005 schedule award decision, it need not consider the issue of whether the Office properly refused to reopen the case for reconsideration of his claim under 5 U.S.C. § 8128 in its June 12, 2006 decision.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: November 21, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board