United States Department of Labor
Employees' Compensation Appeals Board

C.P., Appellant	)	
	)	
and	)	**Docket No. 07-360**
	)	**Issued: April 17, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Burlington, NJ, Employer	)	

Appearances:
Appellant, pro se
Office of 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 November 21, 2006 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated December 20, 2005 granting her a schedule award and an August 21, 2006 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the August 21, 2006 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has more than a five percent permanent impairment of each upper extremity; and (2) whether the Office properly refused to reopen her case for review of the merits pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On October 28, 1996 appellant, then a 39-year-old mail clerk, filed an occupational disease claim alleging that she sustained bilateral carpal tunnel syndrome (CTS) causally related to factors of her federal employment. The Office accepted her claim for bilateral CTS and

authorized bilateral surgical releases. Appellant underwent a right carpal tunnel release on February 4, 1997 and a left carpal tunnel release on March 10, 1997.[1]

On June 13, 2003 appellant filed a claim for a schedule award. She submitted an impairment evaluation dated April 22, 2003 from Dr. David Weiss, an osteopath, who discussed appellant's complaints of bilateral wrist numbness and left wrist pain. On examination, Dr. Weiss found a bilateral negative Phalen's test, a positive Tinel's sign of the left wrist and negative Tinel's sign of the right wrist. For the right side, he determined that appellant had a 20 percent impairment due to loss of grip strength according to Tables 16-32 and 16-34 on page 509 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). Dr. Weiss further found a 9 percent motor deficit in right thumb abduction for a combined right upper extremity impairment of 27 percent.[2] For the left side, he opined that appellant had a 10 percent impairment due to loss of grip strength[3] and a 9 percent impairment due to a motor deficit in left thumb abduction, for a combined left upper extremity impairment of 15 percent.[4] Dr. Weiss next added an additional 3 percent impairment due to pain according to Figure 18-1 on page 574 of the A.M.A., *Guides* to find a total right upper extremity impairment of 30 percent and a total left upper extremity impairment of 18 percent. He opined that appellant reached maximum medical improvement on April 22, 2003.

On November 19, 2003 an Office medical adviser reviewed Dr. Weiss' report. He noted that, according to pages 493 through 495 of the A.M.A., *Guides*, an additional impairment for loss of grip strength was not included in evaluating compression neuropathies. The Office medical adviser found that the maximum impairment for a median nerve deficit below the midforearm was 10 percent according to Table 16-15 on page 492. He multiplied the 10 percent maximum impairment by a 25 percent graded impairment according to Table 16-10 on page 482 to find a 2.5 percent impairment of each upper extremity.

The Office determined that a conflict in medical opinion existed between Dr. Weiss and the Office medical adviser. The Office referred appellant to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated March 22, 2004, Dr. Glenn listed findings of a negative Tinel's sign and Phalen's test. He noted that "[appellant] did report blunting of sensation to involve the thumb, index, long and ring digit bilaterally on the palmar aspect with a normal pinprick response dorsally[;] this is a bilateral

[1] By decision dated December 30, 1997, the Office reduced appellant's compensation to zero based on its finding that her actual earnings as a modified distribution clerk effective October 15, 1997 fairly and reasonably represented her wage-earning capacity.

[2] A.M.A., *Guides* at 492, 484, Tables 16-15, 16-14.

[3] *Id*. at 509, Tables 16-32, 16-34.

[4] *Id*. at 492, 484, Tables 16-15, 16-11.

finding." Dr. Glenn found no motor weakness or atrophy. He indicated that appellant's examination was normal except for her subjective complaints of numbness. Dr. Glenn stated:

> "The [A.M.A.,] *Guides* report that three possible scenarios can be present (page 495 -- carpal tunnel syndrome). As you can see each of these is dependent in part upon the interpretation of a recent electromyogram [EMG] and nerve conduction study [NCS].
>
> "[Appellant] did have EMG and NCS on…." At this point Dr. Glenn's report abruptly ended.

An NCS and EMG conducted for Dr. Glenn on April 12, 2004 revealed bilateral mild CTS.

On August 23, 2004 an Office medical adviser reviewed Dr. Glenn's March 23, 2004 report and found that it conflicted with the April 22, 2003 report of Dr. Weiss. He noted that Dr. Glenn found sensory rather than motor impairment. The Office medical adviser determined that appellant had a Grade 4 sensory impairment of the median nerve below the midforearm, which constituted a maximum impairment of 39 percent.[5] He multiplied the 39 percent by a graded 25 percent impairment for sensory loss of find that appellant had a 10 percent impairment of each upper extremity.[6]

On January 28, 2005 a second Office medical adviser reviewed Dr. Glenn's March 23, 2004 report. He stated:

> "Dr. Glenn really did not resolve the issue of whether there is any [schedule award] for each [upper extremity] but rather ended his commentary that it would all depend on the results of a recent EMG [and] NCV test. He left blank the date such a test was done [and] he offered no conclusion as to which of the three scenarios in the [A.M.A.], *Guides* applies."

The Office medical adviser noted that, if recent electrodiagnostic studies were positive, a five percent upper extremity impairment could be awarded for each upper extremity.

In a decision dated February 28, 2005, the Office granted appellant a schedule award for a five percent impairment of each upper extremity. Appellant requested reconsideration.[7] In a report dated April 1, 2005, Dr. Weiss reviewed the April 12, 2004 EMG and NCS and opined that appellant continued to have bilateral CTS. He disagreed with Dr. Glenn's finding that appellant could not receive an award for loss of grip strength.

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[5] *Id*. at 492, Table 16-15.

[6] *Id*. at 482, Table 16-11.

[7] The Office's February 28, 2005 decision and appellant's request for reconsideration are not contained in the case record.

On December 19, 2005 an Office medical adviser found that appellant had a five percent impairment of both upper extremities based on increased latencies of the bilateral median nerve on NCV testing according to page 495 of the A.M.A., *Guides*.

By decision dated December 20, 2005, the Office denied modification of its February 28, 2005 schedule award decision. On May 23, 2006 appellant requested reconsideration of her claim. She submitted an impairment evaluation dated March 14, 2006 from Dr. Weiss. In a decision dated August 21, 2006, the Office denied merit review of the prior decision. The Office noted that, as Dr. Weiss indicated that appellant's symptoms had worsened, it would adjudicate her request for reconsideration as a claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[8] and its implementing federal regulation,[9] 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, the Act 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, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) as the uniform standard applicable to all claimants.[10]

Section 8123(a) provides that, if there is 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.[11] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12] Where there exist 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.[13]

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] 20 C.F.R. § 10.404(a).

[11] 5 U.S.C. § 8123(a).

[12] 20 C.F.R. § 10.321.

[13] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

report from the specialist for the purpose of correcting the defect in the original opinion.[14] If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[15]

ANALYSIS

The Office accepted that appellant sustained bilateral CTS due to factors of her federal employment. Appellant underwent a right carpal tunnel release on February 4, 1997 and a left carpal tunnel release on March 10, 1997. On June 13, 2003 she filed a claim for a schedule award. Appellant submitted an April 22, 2003 impairment evaluation from Dr. Weiss, who found that she had a 30 percent impairment of the right upper extremity and an 18 percent impairment of the left upper extremity. An Office medical adviser reviewed Dr. Weiss' report and opined that appellant had a 2.5 percent impairment of both upper extremities.

The Office determined that a conflict in medical opinion existed between appellant's physician, Dr. Weiss and the Office medical adviser regarding the extent of her permanent impairment of the upper extremities. The Office referred appellant to Dr. Glenn for resolution of the conflict.

Section 8123(a) of the Act provide that, if there is 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.[16] In situations where there are 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.[17]

In a report dated March 22, 2004, Dr. Glenn listed findings on physical examination of a negative Tinel's sign and Phalen's test. He discussed appellant's complaints of blunting of sensation along the thumb, index, long and ring fingers. Dr. Glenn noted that, under the A.M.A., *Guides*, three scenarios were possible in CTS cases and that each depended on "the interpretation of a recent EMG and NCV study." He stated, "[Appellant] did have EMG and NCV study on…." Dr. Glenn's report then ended without the physician reaching any conclusion regarding the relevant issue of the extent of appellant's permanent impairment of the upper extremities. In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be

[14] *Guiseppe Aversa*, 55 ECAB 164 (2003).

[15] *Id*.

[16] 5 U.S.C. § 8123.

[17] *Thomas J. Fragale*, 55 ECAB 619 (2004).

referred to another appropriate impartial medical specialist.[18] The Office should have requested a supplemental report from Dr. Glenn containing his complete findings and an opinion on the extent of appellant's permanent impairment of the upper extremities. An Office medical adviser reviewed Dr. Glenn's report and found that appellant had a five percent impairment of each upper extremity. In order to properly resolve the conflict created, however, it is the impartial medical examiner who should have provided a reasoned opinion as to the extent of permanent impairment in accordance with the A.M.A., *Guides*. An Office medical adviser may review the opinion but the resolution of the conflict is the responsibility of the impartial medical examiner.[19]

The case is, therefore, remanded for the Office to secure a supplemental report from Dr. Glenn regarding the extent of appellant's permanent impairment of the upper extremities. If he is unable to clarify or elaborate on his opinion, the case should be referred to another appropriate impartial medical examiner. After such further development as the Office deems necessary, it should issue an appropriate merit decision on the schedule award issue.

CONCLUSION

The Board finds that the case is not in posture for decision. The case is remanded to the Office for further development of the medical evidence to be followed by an appropriate decision.[20]

[18] *See Guiseppe Aversa*, *supra* note 14.

[19] *Richard R. LeMay*, 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005).

[20] In view the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 21, 2006 and December 20, 2005 are set aside and the case is remanded for further proceedings consistent with this decision by the Board.

Issued: April 17, 2007
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