United States Department of Labor
Employees' Compensation Appeals Board

N.F., Appellant	)	
and	)	**Docket No. 07-864**
	)	**Issued: July 13, 2007**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Southeastern, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 8, 2007 appellant timely appealed the October 16, 2006 merit decision of the Office of Workers' Compensation Programs, which affirmed a schedule award for permanent impairment of the upper extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has greater than 2 percent impairment of the left upper extremity and greater than 13 percent impairment of the right upper extremity.

FACTUAL HISTORY

Appellant, a 55-year-old mail processor/flat sorter machine operator, has an accepted occupational disease claim for bilateral shoulder tendinitis, lumbosacral strain and right thumb strain, which occurred on or about October 14, 2001. On December 3, 2003 the Office granted a

schedule award for 30 percent impairment of the right thumb.[1] The award covered a period of 22.5 weeks from July 17 to December 21, 2003.

On September 17, 2004 appellant, with the assistance of counsel, filed a request for reconsideration. The request was accompanied by an August 9, 2004 impairment rating from Dr. David Weiss, a Board-certified osteopath, who diagnosed cumulative and repetitive trauma disorder, bilateral shoulder acromioclavicular arthropathy, carpometacarpal (CMC) arthropathy of the right thumb, low grade CMC arthropathy of the left thumb and bilateral median nerve dysfunction by history. He found a 23 percent impairment of the left upper extremity based upon a combination of impairments, including left shoulder loss of range of motion (2 percent), left thumb motor strength deficit, abduction (18 percent) and pain (3 percent). With respect to the right upper extremity, he found an overall impairment of 37 percent. This included impairment due to pain (3 percent), right thumb motor strength deficit, abduction (18 percent) and right pinch key strength deficit (20 percent).

The Office referred the claim to its medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, who concurred with Dr. Weiss' finding of two percent left upper extremity impairment due to loss of range of motion in the shoulder.[2] With respect to the right upper extremity, Dr. Berman disagreed with Dr. Weiss' assignment of 18 percent impairment for right thumb motor strength deficit. He explained that there was no basis for an award for neurological deficit because there was no evidence of carpal tunnel syndrome or median nerve deficit. Dr. Berman found that appellant had a loss of function of the right thumb basilar joint as previously determined by Dr. Mandel in July 2003. The 30 percent impairment of the right thumb represented 11 percent impairment of the right upper extremity. Dr. Berman also recommended that appellant receive an additional 2 percent impairment for pain, for a total right upper extremity impairment of 13 percent.

By decision dated February 7, 2006, the Office granted a schedule award for two percent impairment of the left upper extremity. Appellant also received an additional two percent impairment of the right upper extremity. The award covered a period of 12.48 weeks from December 22, 2003 to March 18, 2004.[3]

Appellant requested a hearing, which was held on July 13, 2006. At the hearing, his counsel challenged the December 3, 2003 schedule award. Counsel argued that instead of granting 30 percent impairment of the right thumb (22.5 weeks), appellant should have been awarded 11 percent impairment of the right upper extremity impairment (34.32 weeks). She claimed that appellant was entitled to at least an additional 11.82 weeks of compensation.

[1] The December 3, 2003 schedule award was based on the July 17, 2003 examination and findings of Dr. Richard Mandel, a Board-certified orthopedic surgeon and Office referral physician.

[2] Dr. Berman did not specifically comment on the upper extremity impairment Dr. Weiss attributed to appellant's left thumb/hand/wrist impairment. The Office had not accepted that appellant injured his left thumb/hand/wrist in the performance of duty on or about October 14, 2001 and Dr. Weiss did not identify the left thumb/hand/wrist impairment as a preexisting condition.

[3] Although the February 7, 2006 decision indicated that appellant would be compensated at the basic rate of 66⅔ percent, the Office actually paid appellant at the augmented rate of 75 percent due to his dependent spouse.

Counsel also argued that the Office should have based the February 7, 2006 schedule award on Dr. Weiss' August 9, 2004 impairment rating.[4]

In a decision dated October 16, 2006, the hearing representative affirmed the Office's February 7, 2006 schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act set forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[5] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[6] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[7]

ANALYSIS

As a preliminary matter, the Board notes that hearing representative's October 16, 2006 decision erroneously indicated that appellant's accepted conditions included bilateral carpal tunnel syndrome. On February 21, 2002 the Office mistakenly advised appellant that his claim had been accepted for bilateral carpal tunnel syndrome and that the surgery recommended by Dr. Corder had been approved. However, appellant's October 27, 2001 claim did not identify carpal tunnel syndrome as one of the claimed conditions and the record does not include a surgical request or recommendation from a Dr. Corder. The employing establishment brought this error to the Office's attention and on February 26, 2002, the Office wrote appellant explaining that the February 12, 2002 acceptance letter should be disregarded. The Office stated that the prior letter was intended for a totally different injured worker whose case number was similar to appellant's case number. In a separate letter, also dated February 26, 2002, the Office informed appellant that his claim was accepted for right thumb strain, lumbosacral strain and bilateral shoulder tendinitis. By letter dated October 13, 2004, the Office similarly advised appellant's counsel that carpal tunnel syndrome was not an accepted condition. Accordingly, the Office hearing representative erred in identifying bilateral carpal tunnel syndrome as an accepted condition.

[4] At the July 13, 2006 hearing, counsel did not challenge the Office's award of 2 percent impairment of the left upper extremity.

[5] For a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2000).

[6] 20 C.F.R. § 10.404 (2006).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

As to the extent of appellant's upper extremity permanent impairment, the Board finds that the case is not in posture for decision. With respect to appellant's right upper extremity impairment, the Office erred in determining the percentage the current award should be offset by the prior award dated December 3, 2003.[8] Dr. Berman found a current right upper extremity impairment of 13 percent; 11 percent of which he attributed to loss of function of the right thumb basilar joint. As appellant previously received a schedule award for impairment of the right thumb basilar joint, the Office reduced the February 7, 2006 award to two percent (6.24 weeks) for the right upper extremity. The Office ostensibly based its reduction on the belief that appellant previously received a schedule award for 11 percent impairment of the right upper extremity. However, as counsel correctly noted at the July 13, 2006 hearing, appellant was only awarded 30 percent impairment of the right thumb, which corresponded to 22.5 weeks' compensation.[9] In contrast, 11 percent impairment of the right upper extremity entitles a claimant to 34.32 weeks' compensation[10] and a 13 percent impairment of the right upper extremity corresponds to 40.56 weeks' compensation. Appellant received a total of 28.74 weeks' compensation for impairment attributable to his right upper extremity. Although counsel raised the offset issue at the July 13, 2006 hearing, the Office hearing representative did not address it in her October 16, 2006 decision. Accordingly, the Office erred in calculating the amount of offset.

The February 7, 2006 schedule award, which the hearing representative affirmed on October 16, 2006, is also deficient in that Dr. Berman, whose finding the Office relied upon, failed to explain why appellant should receive an additional two percent impairment for pain. Dr. Weiss assigned three percent impairment due to pain and Dr. Berman reduced it to two percent. Both physicians cited Figure 18-1, A.M.A., *Guides* 574, as support for assigning additional impairment due to pain. But neither physician offered a clear explanation as to why the additional pain rating was justified. The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using Chapter 18.[11] The A.M.A., *Guides* provide for an incremental adjustment of up to three percent for pain when the conventional rating system does not adequately encompass the burden of the individuals condition. Where the pain-related impairment appears to increase the burden of the individual's condition "slightly," the physician can increase the percentage found under the conventional rating system by up to three percent.[12]

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[8] Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (November 1998).

[9] For a total or 100 percent loss of use of a thumb, an employee shall receive 75 weeks' compensation. 5 U.S.C. § 8107(c)(6) (30 percent multiplied by 75 weeks's compensation = 22.5 weeks).

[10] *See* 5 U.S.C. § 8107(c)(1) (11 percent multiplied by 312 weeks's compensation = 34.32 weeks).

[11] A.M.A., *Guides* 571, section 18.3b.

[12] A.M.A., *Guides* 573, section 18.3d; A.M.A., *Guides* 574, Figure 18-1.

Because neither Dr. Weiss nor Dr. Berman explained why the conventional impairment rating provided under Chapter 16 was ostensibly inadequate, an additional two percent impairment for pain is unjustified in the instant case.[13] The Office medical adviser did not explain why he reduced Dr. Weiss' pain assessment from three percent to two percent. Dr. Berman also failed to explain why he disagreed with Dr. Weiss' assignment of 20 percent upper extremity impairment for right pinch key strength deficit. In light of the noted deficiencies in the Office medical adviser's impairment rating, the case is remanded to the Office for further medical development, followed by a *de novo* decision regarding appellant's entitlement to a schedule award.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: July 13, 2007
Washington, DC

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

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

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

[13] *See Mark A. Holloway*, 55 ECAB 321, 326 (2004); *Philip A. Norulak*, 55 ECAB 690, 696 (2004).