United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 08-308**
	)	**Issued: May 22, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 8, 2007 appellant timely appealed the June 19, 2007 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant's cervical and left shoulder conditions are employment related; and (2) whether appellant has greater than 15 percent impairment of the right upper extremity and greater than 5 percent impairment of the left upper extremity.

FACTUAL HISTORY

Appellant, a 57-year-old former retail sales associate, has an accepted occupational disease claim for bilateral carpal tunnel syndrome, which arose on or about March 20, 2001.[1] He filed a claim for a schedule award on June 16, 2003 and submitted an April 21, 2003 impairment

[1] Appellant retired from federal service effective January 3, 2006.

rating from Dr. David Weiss, a Board-certified orthopedist. In addition to the accepted condition of bilateral carpal tunnel syndrome, Dr. Weiss diagnosed cumulative and repetitive trauma disorder, occupational cervical spine, left shoulder acromioclavicular (AC) joint arthropathy with impingement, partial thickness left rotator cuff tear and left upper extremity radiculitis. He found 64 percent impairment of the left upper extremity and 56 percent impairment of the right upper extremity. Dr. Weiss' left upper extremity rating included impairments for loss of motion in the shoulder, loss of grip strength, sensory deficits involving the C6 nerve root and the median nerve, a motor strength deficit for thumb abduction plus an additional three percent rating for pain. His right upper extremity rating included the same components except there was no right shoulder range of motion impairment.

On the advice of its medical adviser, the Office referred appellant for evaluation by Dr. Robert A. Smith, a Board-certified orthopedic surgeon.[2] In an October 24, 2003 report, Dr. Smith found 15 percent impairment of the right upper extremity due to sensory and motor deficits involving the median nerve. He also found five percent impairment of the left upper extremity due to residual carpal tunnel syndrome. Dr. Smith indicated that appellant reached maximum medical improvement on June 2, 2003; the date of his latest electrodiagnostic study. The Office's medical adviser agreed with Dr. Smith's impairment rating.

On December 2, 2003 the Office granted a schedule award for 15 percent impairment of the right upper extremity and 5 percent impairment of the left upper extremity. The award covered a period of 62.4 weeks from October 24, 2003 to January 2, 2005. Appellant subsequently requested an oral hearing.

Concurrent with the development of the schedule award claim, the Office also sought information about whether appellant was claiming any additional employment-related medical conditions. Appellant advised the Office that he believed the problems with his hands, neck and left shoulder were all work related. The Office received an April 2, 2002 x-ray and magnetic resonance imaging (MRI) scans of the left shoulder and cervical spine dated April 11, 2002 and June 9, 2003, respectively. The left shoulder x-ray showed minimal degenerative changes and the MRI scan revealed a partial under surface tear of the supraspinatus tendon, a small amount of fluid and AC joint hypertrophic changes. Appellant's June 9, 2003 cervical MRI scan showed severe multilevel degenerative changes, moderately severe cervical canal stenosis at C4-5, C5-6 and C6-7 with cord flattening and multilevel foraminal stenosis. The Office also received May 27 and June 13, 2003 reports from Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, who stated that appellant was symptomatic largely for a "middle[-]aged neck" as well as some preexisting "congenital" spinal stenosis with some superimposed acquired spinal stenosis. Dr. Meller also noted disc protrusions at C3-4 and C4-5, with several areas of foraminal narrowing.

On December 10, 2003 the Office advised appellant's counsel that the then-current record did not justify expanding the claim to include appellant's left shoulder and cervical conditions.

[2] Dr. Michael F. Quinlan, the district medical adviser, noted, among other things, that Dr. Weiss' should not have included loss of grip strength in his overall impairment rating.

Appellant's oral hearing regarding his schedule award was held July 21, 2004. At the hearing, counsel argued for an increased scheduled award in addition to expanding the claim to include appellant's cervical and left shoulder conditions. She also argued that the Office should have considered appellant's preexisting impairments in determining entitlement to a schedule award. Additionally, counsel submitted a February 11, 2004 report from Dr. Meller, who indicated that appellant's severely degenerated cervical spine had been aggravated by his employment. Dr. Meller explained that "repetitive types of activities such as casing and distributing mail can aggravate an underlying condition" such as appellant's.

By decision dated November 3, 2004, the hearing representative set aside the December 2, 2003 schedule award and remanded the case for further medical development. According to the hearing representative, further development was necessary to determine if appellant's cervical and left shoulder conditions were employment related. Further development was also warranted in order to determine if appellant had any preexisting impairments affecting his upper extremities.

On remand, the Office referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, who found 4 percent impairment of the left upper extremity and 10 percent impairment of the right upper extremity. In his September 15, 2006 report, Dr. Hanley diagnosed bilateral carpal tunnel syndrome, partial undersurface tear of the left rotator cuff and cervical spinal stenosis. According to him, neither the left shoulder condition nor the cervical condition was employment related. Only the cervical condition predated the onset of appellant's carpal tunnel symptoms in 2000. Dr. Hanley's impairment rating was based on sensory deficits in the distribution of the median nerve, bilaterally. He did not separately calculate or identify any upper extremity impairment attributable to appellant's preexisting cervical condition.

Dr. Morley Slutsky, the Office's medical adviser, reviewed the case file on October 14, 2006 and concurred with Dr. Hanley's impairment rating.

In a decision dated October 27, 2006, the Office found that appellant was not entitled to an increased schedule award. The Office further found that the evidence did not justify expanding the claim to include appellant's cervical condition and left shoulder condition.

Appellant requested a hearing, which was held on February 21, 2007. The Office's hearing representative issued a June 19, 2007 decision affirming the Office's October 27, 2006 decision.

LEGAL PRECEDENT -- ISSUE 1

Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.[3]

[3] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

ANALYSIS -- ISSUE 1

Appellant claims that his cervical condition and left shoulder condition were either caused or aggravated by his 34-year tenure with the employing establishment. However, he failed to substantiate his claim with rationalized medical opinion evidence. In his April 21, 2003 report, Dr. Weiss stated that the "duties and exertions" of appellant's employment was the "competent producing factor" for his subjective and objective findings. However, he did not otherwise explain how appellant's particular job duties either caused or contributed to his so-called "occupational cervical spine" and his left shoulder condition.

Dr. Meller was the only other physician of record to attribute appellant's cervical condition to his employment. He too failed to explain the basis of his opinion on causal relationship. Dr. Meller stated that appellant's severely degenerated cervical spine had been aggravated by his employment. He further commented that "repetitive types of activities such as casing and distributing mail ***can*** aggravate an underlying condition...." Dr. Meller's February 11, 2004 opinion is arguably equivocal and certainly less than definitive. It also lacks a clear explanation of how he was able to distinguish the aggravating effects of appellant's employment from the naturally occurring degenerative process in his cervical spine.

Appellant's counsel takes issue with Dr. Hanley's September 15, 2006 opinion negating a causal relationship between the cervical and left shoulder conditions and appellant's employment. Counsel argued that Dr. Hanley's opinion was not based on a proper understanding of appellant's employment history. Assuming *arguendo* that Dr. Hanley did not have a complete history of employment as alleged, the fact remains that it is appellant's burden to establish all elements of entitlement.[4] Thus, even if Dr. Hanley's report were discarded, appellant has still not provided sufficient evidence to warrant acceptance of any additional conditions. Accordingly, the Board finds that the Office properly declined to accept appellant's cervical and left shoulder conditions as employment related.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees' Compensation Act sets 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

[4] The Board notes that the September 4, 2003 statement of accepted facts and the August 24, 2006 addendum the Office provided Dr. Hanley are consistent with the employment history appellant submitted to the Office in conjunction with his September 20, 2001 occupational disease claim.

[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).

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 -- ISSUE 2

The Office previously granted a schedule award for 15 percent impairment of the right upper extremity and 5 percent impairment of the left upper extremity. This was based on Dr. Smith's October 24, 2003 impairment rating. Although Dr. Weiss provided a considerably higher impairment rating, his April 21, 2003 findings were based on somewhat dated studies and his rating was inconsistent with the A.M.A., *Guides* (5th ed. 2001).[8] The Office's medical adviser correctly noted that a combination of impairments due to loss of grip strength and compression neuropathies was inconsistent under the A.M.A., *Guides*.[9] Dr. Weiss also incorrectly awarded an additional three percent impairment for pain, bilaterally.[10] Additionally, he neglected to explain how he arrived at the various impairment ratings he calculated. Because of these deficiencies, the Office properly declined to rely on Dr. Weiss' April 21, 2003 impairment rating.

Appellant argues that his preexisting impairments should be taken into account when determining the extent of his upper extremity impairment. While the Board agrees with the legal premise underlying counsel's argument, the facts in the instant case do not warrant such a finding. In determining entitlement to a schedule award, preexisting impairment to the schedule member should be included.[11] 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.[12]

There is no evidence that appellant's left shoulder condition predated his accepted carpal tunnel syndrome. The April 2002 left shoulder x-ray and MRI scan represent the earliest confirmed evidence of appellant's degenerative AC joint condition and rotator cuff tear. As the evidence does not establish that appellant's current left shoulder condition predated his accepted

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[6] 20 C.F.R. § 10.404 (2007).

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

[8] Dr. Smith relied on June 2, 2003 electromyographic and nerve conduction studies whereas Dr. Weiss based his opinion on studies administered on August 20, 2001.

[9] "In compression neuropathies, additional impairment values are not given for decreased grip strength." A.M.A., *Guides* 491, 494, section 16.5d.

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

[11] *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (November 1998).

condition of bilateral carpal tunnel syndrome, any impairment of the left shoulder would properly be excluded.

With respect to appellant's preexisting cervical condition, the record does not include any probative evidence of cervical-related permanent impairment effecting appellant's upper extremities. Dr. Hanley did not specifically identify any permanent impairment relative to appellant's cervical condition. However, Dr. Weiss found six percent impairment bilaterally due to sensory deficits involving the C6 nerve root. His April 21, 2003 report noted that appellant "perceived [a] sensory deficit over the C6 dermatome involving the left upper extremity." It is not readily apparent from the doctor's report how this "perceived sensory deficit" translated to six percent impairment of the upper extremity. It is also difficult to fathom how appellant's perceived sensory deficit in C6 dermatome of the left upper extremity also represented a six percent impairment of the opposite, right upper extremity. As previously discussed, Dr. Weiss' April 21, 2003 impairment rating was properly disregarded by the Office.

Appellant has not presented any probative medical evidence of an upper extremity permanent impairment in excess of the award he received on December 2, 2003. Dr. Hanley's September 15, 2006 report indicated a lesser permanent impairment than previously awarded. But even if one disregards Dr. Hanley's findings as counsel suggested, the burden of proof nonetheless remains with appellant.

CONCLUSION

The Board finds that the Office properly declined to expand appellant's claim to include his diagnosed left shoulder and cervical conditions. The Board further finds that appellant has not established that he has greater than 15 percent impairment of the right upper extremity and greater than 5 percent impairment of the left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2007 decision of the Office of Workers' Compensation Program is affirmed.

Issued: May 22, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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