United States Department of Labor
Employees' Compensation Appeals Board

V.F., Appellant	)	
	)	**Docket No. 08-2198**
and	)	**Issued: May 14, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, 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 August 6, 2008 appellant filed a timely appeal from a May 6, 2008 decision of the Office of Workers' Compensation Programs regarding his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than three percent permanent impairment of the right upper extremity for which he received a schedule award.

FACTUAL HISTORY

On March 6, 2000 appellant, then a 49-year-old file clerk, filed an occupational disease claim alleging that he developed a right elbow condition as a result of performing his work duties including sorting letters since 1990. He reported his job duties included sorting and pitching letters and dispatching trays of letters into a metal case. Initial medical reports noted complaints of elbow pain and diagnosed lateral epicondylitis. The Office accepted appellant's claim for right lateral epicondylitis and paid appropriate compensation.

Appellant came under the treatment of Dr. James M. Hurley, a Board-certified orthopedist, from October 9, 2000 to May 4, 2001. Dr. Hurley noted appellant's complaints of persistent lateral elbow pain without dysesthesias and recommended lidocaine injections and light-duty work. In 2001 appellant was also treated by Dr. Scott M. Fried, an osteopath, who advised that bilateral hand and wrist x-rays revealed no significant deformity bilaterally and physical examination revealed negative Phalen's test. Dr. Fried diagnosed lateral epicondylitis of the right elbow secondary to repetitive activities, radial neuropathy of the right forearm and median neuritis of the left and right wrist. On June 20, 2005 he noted that appellant was progressing well with occasional stiffness and pain at the right radial forearm.

Appellant submitted a June 4, 2007 report from Dr. David Weiss, an osteopath, who advised that appellant, reached maximum medical improvement on that date. Right elbow examination revealed no tenderness over the lateral epicondyle, medial epicondyle or medial flexor mass and tenderness over the lateral extensor mechanism. Range of motion for the right elbow was normal for flexion, extension, pronation and supination. There was no tenderness over the radial tunnel and the Tinel tap and radial tap over the radial tunnel was negative. Right hand and wrist examination revealed no thenar of hypothenar atrophy, normal range of motion on dorsiflexion, palmar flexion, radial deviation, ulnar deviation, negative Tinel's sign, positive Phalen's sign and positive carpal compression. Grip strength testing on the right via Jamar Hand Dynamometer at Level III revealed 40 kilograms (kg) of force strength versus 52 kg of force strength on the left, which Dr. Weiss noted was "markedly abnormal," pinch key testing was normal bilaterally and Semmes-Weinstein Monofilament testing revealed diminished light touch sensibility over the median nerve distribution of the right hand. He diagnosed cumulative and repetitive trauma disorder, right carpal tunnel syndrome (CTS) and chronic lateral epicondylitis to the right elbow. Dr. Weiss noted that appellant's right elbow pain and stiffness on an intermittent basis, right wrist and hand pain and stiffness on an intermittent basis, weakness and numbness in the right wrist and hand with restrictions in his activities of daily life. Based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] (A.M.A., *Guides*) he found that appellant had 10 percent impairment for right lateral pinch deficit[2] and 10 percent for Grade 4 sensory deficit of the right median nerve,[3] for 19 percent impairment of the right arm using the Combined Values Chart.[4]

In a report dated September 7, 2007, an Office medical adviser determined that appellant had three percent impairment of the right upper extremity. While Dr. Weiss found impairment rating for right lateral pinch deficit and Grade 4 sensory deficit of the median nerve, the medical adviser noted that the A.M.A., *Guides*, at page 508, provide that decreased strength cannot be rated in the presence of painful conditions. Dr. Berman further noted that Dr. Weiss' opinion concerning impairment for sensory deficit was unsupported by the medical evidence and specifically noted appellant was examined for a work capacity evaluation on September 7, 2005,

[1] A.M.A., *Guides* (5th ed. 2001).

[2] *Id.* at 509, Table 16-34.

[3] *Id.* at 482, 492, Table 16-10, 16-15.

[4] *Id.* at 604.

which was performed by a physical therapist and interpreted and signed by Dr. Fried, who noted two point discrimination was normal bilaterally with normal sensation bilaterally. He referenced Dr. Hurley's report of January 8, 2001 which found no dysesthesias and Dr. Fried's report of June 21, 2001 which found negative Phalen's test bilaterally. The Office medical adviser further noted that magnetic resonance imaging (MRI) scan of the right elbow on January 10, 2001 demonstrated lateral epicondylitis, which "would not be expected to cause median nerve compression carpal tunnel picture." He opined that Dr. Weiss' report was not in conformance with the A.M.A., *Guides.* The Office medical adviser opined that the only "possible" rating for appellant was three percent impairment of the right upper extremity for pain based on the A.M.A., *Guides*.[5]

On September 18, 2007 appellant filed a claim for a schedule award.

In a decision dated October 2, 2007, the Office granted appellant a schedule award for three percent permanent impairment of the right upper extremity. The period of the award is from June 4 to August 8, 2007.

On October 5, 2007 appellant requested an oral hearing which was held on February 27, 2008.

In a decision dated May 6, 2008, the hearing representative affirmed the Office decision dated October 2, 2007.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

ANALYSIS

On appeal, appellant contends that he has more than three percent permanent impairment of the right upper extremity. The Office accepted his claim for right lateral epicondylitis.

The Board has carefully reviewed Dr. Weiss' June 4, 2007 report and notes that, while he determined that appellant had 19 percent permanent impairment of the right upper extremity due

[5] *Id.* at 574, Figure 18-1.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

to his employment injury, this rating was not in accordance with the standards of the A.M.A., *Guides*.[8]

Dr. Weiss calculated 10 percent impairment for the right upper extremity for right lateral grip deficit.[9] He noted grip strength testing on the right which he determined to be markedly abnormal pursuant to Table 16-34 of the A.M.A, *Guides*. However, the Board notes that the A.M.A., *Guides* does not assign a large role to measurements of weakness based on manual muscle testing because they are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* is based for the most part on anatomic impairment.[10] Accordingly, loss of strength may be rated separately in rare cases, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the A.M.A., *Guides*. The A.M.A., *Guides* caution that impairment ratings based on objective anatomic findings take precedence and that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated.[11] The Board notes that Dr. Weiss did not explain why a grip strength rating was appropriate for appellant in view of the limitation noted in the A.M.A., *Guides*. The Office medical adviser found no basis for rating impairment based on grip or pinch strength.

Additionally, Dr. Weiss noted that appellant developed carpal tunnel syndrome of the right upper extremity and calculated 10 percent impairment for the right upper extremity for Grade 4 sensory deficit of the right median nerve.[12] However, appellant's condition was not accepted for carpal tunnel syndrome or a median nerve injury.[13] Dr. Weiss failed to explain how median nerve impairment would be due to the accepted lateral epicondylitis. Under these circumstances, he did not provide adequate rationale for rating impairment due to a nonaccepted condition.[14] Moreover, Dr. Weiss did not provide a reasoned opinion explaining how carpal tunnel syndrome was caused by appellant's work duties nor did he explain how he applied the procedures in Table 16-10 for grading a sensory deficit.[15]

[8] *See Tonya R. Bell*, 43 ECAB 845, 849 (1992).

[9] A.M.A., *Guides* 509, Table 16-34.

[10] *K.W.*, 59 ECAB ___ (Docket No. 07-1547, issued December 19, 2007).

[11] *See id.;* A.M.A., *Guides*, 508.

[12] *Id.* at 482, 492, Table 16-10, 16-15.

[13] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (for conditions not accepted by the Office as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury).

[14] *See Veronica Williams*, 56 ECAB 367 (2005).

[15] *See Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

The Board also finds that the report of the Office medical adviser is also deficient insofar as it supports impairment due to pain under Chapter 18 of the A.M.A., *Guides*.[16] The Board has held that physicians should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[17] Moreover, Dr. Berman's references to Dr. Hurley's findings in 2001 are of limited relevance to appellant's condition in 2007. Therefore, the Office medical adviser did not explain why appellant's pain could only be rated under Chapter 18 instead of the provisions in Chapter 16 of the A.M.A., *Guides* pertaining to the upper extremities. Sensory loss should be rated in conformance to Table 16-15 and Table 16-10. The case will be remanded to the Office for further development on the extent of permanent impairment to appellant's right upper extremity.

CONCLUSION

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

[16] A.M.A., *Guides* 574 Figure 18-1.

[17] *See Frantz Ghassan*, 57 ECAB 349 (2006); *Linda Beale*, 57 ECAB 429 (2006).

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2008 and October 2, 2007 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded to the Office for further action in conformance with this decision.

Issued: May 14, 2009
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