United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 08-1464**
	)	**Issued: September 29, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Princeton, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2008 appellant, through his attorney, filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated May 4 and December 12, 2007 finding that he was not entitled to a schedule award of greater than 10 percent to each upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has established that he is entitled to a schedule award of greater than 10 percent to each upper extremity.

FACTUAL HISTORY

This case has been before this Board before. The facts and the circumstances of the case as set forth in prior decisions and orders are hereby incorporated by reference.[1] The relevant facts are summarized below.

On March 14, 2003 appellant, then a 40-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome as a result of his federal employment. The Office accepted his claim for bilateral carpal tunnel syndrome. Appellant underwent a left carpal tunnel release on December 2, 2003 and a right carpal tunnel release on January 9, 2004. He filed a claim for a schedule award. In a report dated May 27, 2004, Dr. Nicholas Diamond, appellant's treating physician, a Board-certified osteopath, found that appellant had an impairment of 34 percent for the right arm and 55 percent for the left arm. The Office medical adviser reviewed the case and found that appellant had a 10 percent impairment of each arm. By decision dated February 1, 2005, the Office issued a schedule award for 10 percent impairment to each upper extremity. By decision dated February 14, 2006, the hearing representative affirmed the decision. However, the Board, noting the conflicting opinions of Dr. Diamond and the Office medical adviser, remanded the case for referral to an impartial medical examiner.[2]

On remand, appellant's attorney stated by letter dated November 14, 2006 that appellant would like to participate in the selection of an impartial specialist should referral become necessary. He indicated, "The reason for this request is to attempt to assure that [appellant] receives an impartial evaluation."

By letter dated February 27, 2007, the Office referred appellant to Dr. James Taitsman, a Board-certified orthopedic surgeon, for an impartial medical examination. In an "RME [referee medical examination] Referral Form" it indicated that the referral source was "PDS [Physician Directory System]."

By letter dated March 8, 2007, appellant's attorney noted that he received the February 27, 2007 letter scheduling a referee examination, and asking the Office to send him the letter sent to Dr. Taitsman, the statement of accepted facts and a copy of the report.

In a medical opinion dated March 19, 2007, Dr. Taitsman diagnosed appellant with bilateral carpal tunnel syndrome. He noted that there were some sequelae in terms of strength and sensation in both hands following carpal tunnel release. However, Dr. Taitsman indicated that the "examination is not completely objective due to the fact that the examination results depend upon a subjective response. It would be advisable to consider a functional capacity evaluation by a hand physical therapist or a physical therapist that includes psychological testing...." Dr. Taitsman further stated: "It is noteworthy that pain is not a component of

[1] Docket No. 06-1535 (issued November 7, 2006); Docket No. 05-1869 (issued March 17, 2006); Docket No. 03-1382 (issued November 28, 2003) (Order Dismissing Appeal); Docket No. 03-1276 (issued October 23, 2003); Docket No. 00-2068 (issued June 3, 2002).

[2] Docket No. 06-1535 (issued November 7, 2006).

[appellant's] symptoms in terms of activities of daily living and normal use, only in terms of forced extension of his right wrist. It is also noteworthy that he is able to perform activities of daily living as well as the normal duties of his job." Dr. Taitsman also discussed the impairment rating given by appellant's physician, Dr. Diamond.[3] He stated that things had changed since the evaluation by Dr. Diamond as he found a total right upper extremity impairment of 34 percent and a left upper extremity impairment of 55 percent as of May 27, 2004, but now that the left hand is more significantly improved and the right hand is now the more significantly involved hand. Dr. Taitsman also noted that Dr. Weiss improperly calculated a separate impairment for pain. He noted that giving appellant the benefit of the doubt there is a 39 percent sensory deficit, which the abductor strength is good although, he appeared to have decreased pinch and hand grasp for which a functional component cannot be ruled out. Dr. Taitsman noted that he concurred with the Office medical adviser, and that appellant had 10 percent right upper extremity impairment and a 10 percent left upper extremity impairment based on carpal tunnel syndrome. This finding was based on a Grade 4 impairment of the median due to sensory deficit or pain.[4] Dr. Taitsman noted that, as an alternative, one could apply the A.M.A., *Guides* (5th edition), especially Table 16-15 on page 492 regarding the impairment due to deficits of the major peripheral nerves and Table 16-10 on page 482 regarding the gradation of pain caused by peripheral nerve disorders, he concluded that appellant sustained 11 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity.

On April 5, 2007 the Office forwarded Dr. Taitsman's report and the remainder of the file to the Office medical adviser, who responded to questions on April 10, 2007. The Office medical adviser indicated that Dr. Taitsman did a complete upper extremity examination although; he did not include the trigger finger in his calculations. He noted that pursuant to Table 16-10 appellant had 30 percent sensory deficit multiplied by 25 percent would equal 7.5 percent right upper extremity, not the 10 percent indicated. The Office medical adviser agreed with Dr. Taitsman's calculations on the left upper extremity as 39 percent multiplied by 25 percent which equaled 9.75 percent impairment which was rounded to 10 percent impairment.

In a decision dated May 4, 2007, the Office found that the reason given by appellant's attorney for desiring to participate in the selection process for the impartial medical examiner, *i.e.*, "to help assure that appellant undergoes a truly impartial examination," was not a valid reason. It found that the impartial medical examiner was properly chosen by a rotational system among qualified and willing medical specialists. The Office then determined that appellant was not entitled to a schedule award greater than the 10 percent award he had been given for each upper extremity.

By letter dated May 10, 2007, appellant, through his attorney, requested an oral hearing. At the hearing held on September 26, 2007, counsel argued that there was no proof in the record that Dr. Taitsman was selected pursuant to a strict rotation system. He further argued that Dr. Taitsman's report should not carry the weight of the evidence as he failed to give rating for

[3] Dr. Taitsman mistakenly refers to the opinion of Dr. Diamond by the name of Dr. Diamond's partner, Dr. David Weiss, Board-certified in internal medicine.

[4] *See* A.M.A., *Guides* 492, Table 16-15; 482, Table 16-10.

loss of grip and loss of strength. Finally, counsel argued that Dr. Taitsman did not conduct a truly independent examination as he simply agreed with what the Office medical adviser stated.

By decision dated December 12, 2007, the hearing representative affirmed the Office's May 4, 2007 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulations[6] 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

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 (known as a referee physician or impartial medical specialist) who shall make an examination.[9]

A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. The claims examiner is responsible for evaluating the explanation offered. If the reason is considered acceptable, the medical management assistant (MMA) will prepare a list of three specialists, including a candidate from a minority group if indicated, and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested.[10] The procedural opportunity of a claimant to participate in the selection of an impartial medical specialist is not an unqualified right as the Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical specialist.[11]

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] *Id.; see also Thomas D. Lavin*, 57 ECAB 353 (2006).

[9] 5 U.S.C. § 8123.

[10] *Id*. at § 8123(a); *see also M.A.*, 59 ECAB ___ (Docket No. 07-1344, issued February 19, 2008).

[11] *See David Alan Patrick*, 46 ECAB 1020, 1025 (1995). Although there is no set standard for the timeliness of a request to participate in selection of an impartial medical examiner, it is logical that such a request should be made prior to the selection process. *Id.* at 1025.

Unlike the selection of second opinion examining physicians, the selection of referee physician is made by a strict rotational system using appropriate medical directories. The PDS, including physicians listed in the American Board of Medical Specialties (ABMS) Directory and specialists certified by the American Osteopathic Association, should be used for this purpose.[12] The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted.[13]

The MMA should maintain a card file or other record of physicians accepting impartial referral from the Office. The district Office shall maintain a referral log or a chronological file of referral letters and CA-110s to demonstrate that rotation procedures were satisfied.[14]

The PDS was originally developed to ensure that referee medical specialists would be chosen in a fair and unbiased manner, and this goal remains as vital as ever to the integrity of the federal employees' compensation program.[15] The Board has placed great importance on the appearance as well as the fact of impartiality, and only if the selection procedures which were designed to achieve this result are scrupulously followed by the selected physician carries the special weight accorded to an impartial specialist.[16]

ANALYSIS

In the instant case, the Office found that appellant was not entitled to a schedule award greater than 10 percent to each upper extremity based on the opinion of the impartial medical examiner.

Appellant contends that the impartial medical examiner was not properly chosen and that the Office did not properly consider his objections to the impartial medical examiner. Office procedures allow a claimant to raise objections to the selected physician and provide reasons, and the claims examiner is responsible for evaluating the explanation offered.[17] If the reasons

[12] The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations. PDS is designed to reduce the amount of time needed to schedule examinations, ensure consistent rotation among referee physicians and record the information needed to make prompt payment to physicians. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(1) (May 2003).

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).

[14] *See supra* note 13 at Chapter 3.500.4(b)(7) (October 1995).

[15] *Supra* note 13 at Chapter 3.500.4(b)(1) (May 2003).

[16] *See, e.g., Leonard W. Waggoner*, 37 ECAB 676, 682 (1986) (where the claimant was not afforded the opportunity to participate in the selection of the impartial specialist and where the examining physician's opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists).

[17] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008).

are considered acceptable, a list of three specialists is prepared and the claimant may choose one. This is the extent of any participation in the process of medical selection.

The Board notes initially that counsel did not raise a timely objection to the impartial medical examiner. Appellant was first put on notice of the intention to refer his case to an impartial medical examiner by the Board's decision, issued November 7, 2006, remanding his case for referral to an impartial medical examiner for a resolution of a conflict in medical opinion. The record reflects that his representative notified the Office on November 14, 2006 that appellant wished to participate in the selection of the impartial medical examiner, stating as the reason, "this request is to attempt to assure that he receives an impartial evaluation." By letter dated February 27, 2007, appellant was referred to Dr. Taitsman for an impartial medical examination. The "RME Referral Form" indicated that the source of the referral was PDS. A copy of this letter was sent to appellant's attorney. By letter dated March 8, 2007, counsel noted that he received the correspondence indicating that Dr. Taitsman was the impartial medical examiner, and asked for a copy of the letter to him and the statement of accepted facts. He also asked for a copy of the report when it became available. At that time, counsel did not note any problem with how Dr. Taitsman was selected. The first time that he raised this issue was at the hearing held on September 26, 2007, seven months after appellant was referred to Dr. Taitsman.

The Board finds that it is evident that appellant did not file a timely objection to the selection of the Dr. Taitsman as the impartial medial examiner. In *G.T.*, the Board found that the objection was untimely when appellant did not raise any objection to the selection of the particular physician until several months after the notification of the selection and examination by the physician.[18] In the instant case, appellant did not object to Dr. Taitsman until after he was referred to him, after he issued his medical opinion and after the Office made a schedule award finding based on his opinion. This was clearly too late to object to the selection of Dr. Taitsman. Therefore, the Board finds that the evidence did not establish an error in the selection of Dr. Taitsman as impartial medical examiner.[19]

Moreover, appellant's representative did not set forth a valid reason for why he wished to participate in the selection process or raise a specific objection to the appointment of Dr. Taitsman. Under Office procedures, a claimant who asks to participate in the selection of an impartial medical specialist or who objects to the selected physician must provide a valid reason. The procedural opportunity of a claimant to participate in the selection of an impartial medical specialist is not an unqualified right as the Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical examiner.[20] In his November 14, 2006 letter, counsel requested to participate in the selection process for the reason "to attempt to assure that claimant receives an impartial examination." As he did not state to the Office a valid reason why he wished to participate in the selection of the impartial medical examiner or otherwise raise a specific

[18] *Id.*

[19] *See Willie M. Miller*, 53 ECAB 697 (2002) (appellant did not raise an objection to selection of referee physician until after claim was denied and raised only general allegations).

[20] *Richard Coonradt*, 50 ECAB 360 (1999).

objection the selection of Dr. Taitsman, his request does not conform to the Office's procedural requirements for participating in the selection of an impartial examiner.

The Board notes that this case is on point with *Miguel A. Muniz*.[21] In that case, counsel also submitted a request prior to the appointment of the impartial medical examiner wherein he asked to participate in the selection of the physician in an "attempt to assure that claimant receives an impartial evaluation concerning this schedule award claim." In *Muniz*, this Board found that this was not a valid reason for participating in the selection of an impartial medical examiner. In the instant case, counsel also requested to participate in the selection process for a similar reason, *i.e.*, "to help assure that claimant receives an impartial examination." As in *Muniz*, this reason is not valid. Furthermore, the Board notes that in both *Muniz* and the instant case, neither attorney presented a specific objection to the selected impartial medical examiner until after the examiner issued his opinion. As in *Muniz*, neither attorney raised a specific timely objection to the particular impartial examiner. More recent cases also detail other invalid reasons for participating in the selection process, including indicating that one has a legal right to participate,[22] general allegations that the PDS was not properly utilized[23] or a simple preference that appellant see a physician in a particular area.[24] Furthermore, in *John J. Seremet*[25] counsel for the claimant gave the identical reason for participation in the selection process as in this case, *i.e.*, "in order to make sure appellant received an impartial examination." This Board rejected this argument as no a valid reason for participation in this selection. Accordingly, the Board finds that appellant did not provide a valid reason for objecting to the impartial medical examiner.

When a claimant is referred to an impartial medical examiner to resolve a conflict, the opinion of the impartial medical examiner shall be given special weight.[26] In the instant case, this Board remanded this case for referral to an impartial medical examiner to resolve the conflict between appellant's treating physician, Dr. Diamond, who found that appellant had 34 percent impairment of the right arm and 55 percent impairment of the left arm, and that of the Office medical adviser, who found that he had 10 percent impairment to each arm. The impartial medical examiner, Dr. Taitsman, reviewed all of appellant's medical records and conducted a physical examination. He diagnosed appellant with bilateral carpal tunnel syndrome and noted that there were some sequelae in terms of strength and sensation in both hands following his carpal tunnel release surgery. Dr. Taitsman noted that his examination was not completely objective as it depended on appellant's subjective response, and noted that it would be advisable to consider a functional capacity evaluation from a hand physical therapist or a physical therapist

[21] 54 ECAB 217 (2002).

[22] *See J.R.*, Docket No. 09-73 (issued April 22, 2009); *E.R.*, Docket No. 06-704 (August 7, 2006).

[23] *M.S.*, Docket No. 09-727 (issued July 23, 2009).

[24] *Steve Espinoza*, Docket No. 05-635 (issued September 16, 2005).

[25] Docket No. 02-1457 (issued March 3, 2003).

[26] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

that includes psychological testing. He noted that appellant was able to perform activities of daily living as well as normal duties of his job.

In evaluating the impairment to appellant's left upper extremity, Dr. Taitsman properly evaluated the medical evidence and applied the A.M.A., *Guides* and determined that appellant had 10 percent impairment of the left upper extremity. He noted that appellant had a Grade 4[27] sensory deficit to his left upper extremity based on sensory deficit or pain in the left median nerve[28] which amounted to 10 percent impairment (25 percent multiplied by 39 is approximately 10 percent impairment.) The well-rationalized opinion of the impartial medical specialist is entitled to special weight.[29]

The Board also notes that the Office medical adviser agreed that appellant had 10 percent impairment of the left upper extremity. The Board finds that counsel's arguments that appellant is entitled to a greater award for his left upper extremity are without merit. Counsel contends that Dr. Taitsman did not provide testing to confirm the loss of pinch or grip strength. However, the Board notes that the A.M.A., *Guides* do not encourage the use of grip or pinch strength as impairment factor because strength measurements are functional tests influenced by subjective factors that are difficult to control. The A.M.A., *Guides* for the most part is based on anatomic impairment. Only in rare cases should grip strength be used and only when it represents an impairing factor that has not been otherwise considered adequately. The A.M.A., *Guides* state that, otherwise, the impairment rating based on objective anatomic findings take precedence.[30] Finally, the Board disagrees with counsel's assertion that the impartial medical examiner simply agreed with the Office medical adviser relative to impairment ratings. Although there is some agreement between these two physicians, Dr. Taitsman conducted a thorough examination and gave a well-rationalized explanation for his finding that appellant had 10 percent impairment of the left upper extremity. Accordingly, this Board finds that the Office properly issued a schedule award for a 10 percent impairment of the left upper extremity.

With regard to appellant's right upper extremity, Dr. Taitsman initially concurred with the Office medical adviser's assessment that he had 10 percent right upper extremity impairment. However, Dr. Taitsman also stated that one could take and use the combined sensory and motor deficit of 45 percent pursuant to the A.M.A., *Guides*[31] which would yield 11 percent impairment of the right upper extremity (45 percent multiplied by 25 percent for Grade 4 impairment). The hearing representative found that the weight of the evidence was represented by Dr. Taitsman's well-rationalized opinion. However, as correctly argued by counsel, the Office never addressed

[27] A.M.A., *Guides* 482, Table 16-10.

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

[29] *Darlene R. Kennedy, supra* note 26.

[30] *See* A.M.A., *Guides*, 507-08, 16.8 Strength Evaluation, Principles; *Phillip H. Conte*, 56 ECAB 213 (2004). *See also T.A.*, 59 ECAB ___ (Docket No. 07-1836, issued November 20, 2007) (the Board has found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome is rated on motor and sensory deficits only).

[31] A.M.A., *Guides* 492, Table 16-15.

Dr. Taitman's finding that appellant may be entitled to an additional one percent impairment to his right upper extremity.

When evaluating a case for a schedule award, the examining physician must determine which method best describes the impairment of a specific individual based on the patient's history and physical examination. When uncertain about which method to use, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating. If more than one method can be used, the method that provides the higher impairment rating should be adopted.[32] In the instant case, Dr. Taitsman made a well-rationalized and well-reasoned finding that appellant had an 11 percent impairment of the right upper extremity pursuant to the A.M.A., *Guides*, when evaluated based on his combined sensory and motor deficit. As this 11 percent rating based on combined motor and sensory deficit is more beneficial to appellant than the 10 percent rating based on sensory deficit or pain, and as the well-reasoned opinion an impartial medical examiner is entitled to greater weight the opinion of the Office medical adviser, the Office should issue appellant a schedule award in the amount of 11 percent for his right upper extremity, less the 10 percent previously awarded.

CONCLUSION

The Board finds that appellant has not established that he is entitled to a schedule award of greater than 10 percent of the left upper extremity. The Board further finds that appellant has established entitlement to a schedule award based on an 11 percent impairment of the right upper extremity.

[32] *L.C.*, Docket No. 08-2292 (issued June 5, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 12 and May 4, 2007 are affirmed with regard to the finding that appellant has 10 percent impairment of his left upper extremity. With regard to the impairment of appellant's right upper extremity, these decisions are modified, and the case is remanded for the Office to issue a schedule award for an 11 percent impairment of his right upper extremity, less the 10 percent previously awarded.

Issued: September 29, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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