United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Kearny, NJ, Employer**	**Docket No. 08-2502** **Issued: September 23, 2009**

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 September 22, 2008 appellant filed a timely appeal from the November 20, 2007 and June 3, 2008 schedule award decisions of the Office of Workers' Compensation Programs. 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 more than 13 percent impairment of her right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On January 1, 2000 appellant, then a 52-year-old clerk, sustained injury when her supervisor snatched a telephone from her right hand causing her right arm to be reinjured.[1] The Office accepted a right hand contusion and post-traumatic stress disorder. Appellant stopped work and received wage-loss compensation.

On July 20, 2005 appellant filed a claim for a schedule award. On October 1, 2005 she elected to receive retirement benefits and wage-loss compensation and was terminated on October 2, 2005.

By letter dated January 12, 2006, the Office asked appellant to submit a medical report in support of her claim for a schedule award. In a February 16, 2006 note, Dr. Alan Butler Clark, a neurologist, indicated that appellant had severe pain in the right upper extremity and right hand. He noted positive findings for thenar atrophy, difficulty with thumb movements, swelling, sensation and a surgical scar on the elbow. Dr. Clark also noted a decrease in grip. He listed his impressions as weakness in the right arm, wrist, hand and fingers. In a February 21, 2006 follow-up report, Dr. Clark gave measurements for loss of function, flexion and radial deviation and noted that appellant had pain and that her strength was impaired. He stated that she was "not yet maximally helped."

On March 10, 2006 the Office referred appellant's case to the Office medical adviser for an evaluation of impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th edition) (A.M.A., *Guides*). On March 16, 2006 the Office medical adviser noted that there was no range of motion findings in Dr. Clark's report. When asked to list the date of maximum medical improvement, he did not answer the question.

On April 21, 2006 the Office referred appellant to Dr. Daniel J. Feuer, a Board-certified neurologist, for an impartial medical examination. In a report dated June 7, 2006, Dr. Feuer found clinical evidence of bilateral carpal tunnel syndrome affecting the right greater than left side. He noted hypoactive reflexes and that appellant had a diffuse peripheral neuropathy syndrome consistent with diabetes mellitus. Dr. Feuer diagnosed superimposed bilateral median neuropathy. He advised that appellant's peripheral neuropathy and carpal tunnel syndrome preexisted the injury of January 1, 2000 and that there were no objective clinical deficits. Dr. Feuer did not address the issue of maximum medical improvement.

By decision dated January 4, 2007, the Office denied appellant's claim for a schedule award, finding that the evidence was not sufficient to establish that she sustained any permanent impairment due to the accepted work injury.

[1] Previously, appellant filed an occupational disease claim on January 19, 1995 which was accepted for right carpal tunnel syndrome. The Office also accepted that claim for ulnar nerve decompression and anterior transposition surgical procedures. Appropriate compensation and medical benefits were paid. By decision dated February 3, 1998, the Office terminated appellant's compensation and medical benefits. The Board affirmed the termination on June 19, 2001. Docket No. 99-1663 (issued June 19, 2001).

On January 19, 2007 appellant, through her attorney, requested an oral hearing. At the May 17, 2007 hearing, appellant noted that she commenced employment with the employing establishment on September 9, 1987 and had no prior trouble with either of her hands. She described her duties on the job and the injury of January 2000

By decision dated July 20, 2007, an hearing representative remanded the case for further development. The hearing representative found that the Office erred by considering Dr. Feuer to be an impartial medical examiner as the Office medical adviser's brief comments were insufficient to create a conflict in medical opinion. However, the hearing representative found that Dr. Feuer's opinion was sufficient to create a conflict with the opinion of Dr. Clark, who described impairment resulting from severe pain, numbness, weakness and swelling while Dr. Feuer found no impairment. The hearing representative instructed the Office to refer appellant for an impartial medical examination.

In a September 19, 2007 report, Dr. David Weiss, an osteopath, conducted a physical examination and reviewed appellant's medical reports. He diagnosed: cumulative and repetitive trauma disorder; ulnar nerve neuropathy at the cubital tunnel of the right elbow; chronic medial epicondylitis to the right elbow; status post right ulnar nerve decompression with anterior decompression, July 19, 1995 and right carpal tunnel syndrome. Dr. Weiss stated that appellant reached maximum medical improvement on September 19, 2007. He opined that appellant had a 61 percent impairment of the right upper extremity. Dr. Weiss based this on three to four motor strength deficit in the right biceps in which he found a 12 percent impairment pursuant to the A.M.A., *Guides*,[2] 30 percent impairment for right lateral pinch deficit,[3] 6 percent for a Grade 2 sensory deficit right ulnar nerve[4] and 32 percent for Grade 1 to 2 sensory deficit right median nerve.[5] He stated that he combined these impairments to total 61 percent.

By letter dated October 1, 2007, the Office referred appellant to Dr. Noel Rogers, a Board-certified orthopedic surgeon, for an impartial examination. On October 19, 2007 Dr. Rogers diagnosed carpal tunnel syndrome, for which appellant had not undergone surgery, and status post ulnar nerve transposition right. He advised that he could not answer any questions regarding an impairment rating until electrical studies have been obtained. Dr. Rogers noted that once he reviewed the results of such studies, he would complete his report. In a November 8, 2007 report, he noted that he had received the results of the electrical studies. Dr. Rogers indicated that appellant's electrical studies showed that she had bilateral carpal tunnel syndromes and should be considered for surgery. He indicated that appellant had not reached maximum medical improvement.

By letter dated November 14, 2007, the Office referred the record to Dr. Arnold T. Berman, an Office medical adviser, who found that appellant had 13 percent impairment to the right upper extremity. Dr. Berman advised that the date of maximum medical improvement

[2] A.M.A., *Guides* 484, Table 16-11; 492, Table 16-15.

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

[4] *Id*. at Table 16-10; 509, Table 16-34.

[5] *Id.*

"was the date that Dr. Rogers completed his forms on February 21, 2006." Under Table 16-15, Dr. Berman noted that the maximum upper extremity impairment allowed for sensory deficit or pain of the median nerve below mid forearm was 39 percent.[6] Under Table 16-10, appellant had a Grade 4 sensory deficit of 25 percent.[7] Dr. Berman multiplied the 25 percent deficit by 39 percent to find 9.75 percent impairment, which he rounded to 10 percent to the right upper extremity. As Dr. Rogers found no abnormality of the ulnar nerve, no impairment rating was recommended for the right ulnar nerve based upon decreased sensation. Dr. Berman noted that appellant was reported as having chronic pain in the area of the elbow as described by Dr. Rogers. Therefore, he recommended that an additional three percent impairment be granted for right elbow pain associated with the prior ulnar nerve transposition. The Office medical adviser found a total 13 percent right upper extremity impairment.

On November 20, 2007 the Office granted a schedule award for a 13 percent impairment of the right upper extremity.

By letter dated November 26, 2007, appellant, through her attorney, requested an oral hearing which was held on March 25, 2008. Counsel argued that the report of Dr. Weiss should be given the weight.

By decision dated June 3, 2008, an Office hearing representative affirmed the November 20, 2007 decision. He noted that a conflict in medical opinion did not exist between Dr. Clark and Dr. Feuer and determined that a conflict was not created between Dr. Clark and Dr. Feuer as neither physician addressed the issue of permanent impairment due to the accepted work injury. Therefore, Dr. Rogers was a second opinion physician. The hearing representative found that Dr. Rogers did not specifically address permanent impairment in his reports and concluded that the weight of the medical evidence was represented by the opinion of Dr. Berman. The hearing representative noted that the report of Dr. Weiss did not conform to the A.M.A., *Guides* and was of diminished probative value.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulations[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 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. Office procedures provide that to support a schedule award, the file must contain competent medical

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

[7] *Id*. at 482, Table 16-10.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

evidence which shows that the claimant has reached a permanent and fixed state and which establishes a date of maximum medical improvement.[10]

ANALYSIS

The Office granted appellant a schedule award for 13 percent impairment of the right upper extremity. The Board finds, however, that the medical evidence of record is insufficient to establish that she has reached maximum medical improvement.

It is well established that a schedule award cannot be paid until a claimant has reached maximum medical improvement.[11] The medical evidence of record does not support that appellant has reached maximum medical improvement. Dr. Clark, while listing some findings on examination, never addressed permanent impairment. Moreover, he specifically stated in a February 21, 2006 report that appellant had not yet reached maximum medical improvement. The Office medical adviser, upon review of Dr. Clark's report, noted deficiencies in this report including the fact that there was no range of motion information. He did not address the issue of maximum medical improvement. Rather, the Office medical adviser left the answer to the question with regard to appellant's date of maximum medical improvement blank. At the time that the Office referred appellant to Dr. Feuer there was no conflict between Dr. Clark and the Office medical adviser with regard to extent of impairment. In evaluating Dr. Feuer's opinion as a referral physician, he opined that appellant had no objective clinical deficits referable to the nervous system directly causally related to the work-related accident. He did not make any permanent partial impairment rating nor did address whether she had reached maximum medical improvement.

Dr. Weiss, is the only physician of record to state that appellant reached maximum medical improvement as of September 19, 2007. However, his impairment rating did not properly conform to the A.M.A., *Guides*. Dr. Weiss found that appellant had a Grade 1 to 2 sensory deficit of the right ulnar nerve for 6 percent impairment and a Grade 1 to 2 sensory deficit of the right median nerve for 32 percent impairment.[12] However, he provided no explanation as to how he determined the grade under the A.M.A., *Guides*. Dr. Weiss also improperly added a 12 percent impairment for motor strength deficit and a 30 percent impairment for right lateral pinch deficit to the impairment for the median and ulnar nerves when the A.M.A., *Guides* state that decreased strength can be combined with other impairments only if based on unrelated etiologic or paramechanical causes, otherwise the impairment ratings based on anatomic findings take precedence. Decreased strength cannot be rated in the presence of decreased motion, painful condition or deformities.[13] The A.M.A., *Guides* further state that in compression neuropathies, additional impairment values are not given for decreased grip

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(b) (August 2002).

[11] *See Joseph R. Waples*, 44 ECAB 936 (1993).

[12] *See* A.M.A., *Guides* 482, Table 16-10; 509, Table 16-34.

[13] *Id*. at 508.

strength.[14] As Dr. Weiss did not properly apply the A.M.A., *Guides*, his opinion is of diminished value.[15] There was a conflict in medical opinion at the time of referral to Dr. Rogers.

On examination, Dr. Rogers stated that appellant had not reached maximum medical improvement. He noted that diagnostic studies showed that she had bilateral carpal tunnel syndromes and should consider surgery. Dr. Rogers did not provide any specific findings on examination. This opinion does not establish a schedule award.

Thereafter, Dr. Berman reviewed the reports of record and concluded that appellant had 13 percent impairment of the right. He listed the date of maximum medical improvement as February 21, 2006, indicating that he obtained it from the report completed by Dr. Rogers. However, Dr. Rogers did not find that appellant reached maximum medical improvement on February 21, 2006. As noted, he stated that appellant had not reached maximum medical improvement. Moreover, the Board notes that the report of Dr. Rogers was not sufficiently detailed for the Office medical adviser to utilize in determining the extent of impairment.

The medical evidence of record is insufficient to establish that appellant reached maximum medical improvement. The Board finds that the Office erred by issuing a schedule award for 13 percent impairment to her right arm.[16] The case will be remanded for further development of the medical evidence in conformance with this decision. After such further development of the medical evidence as the Office deems necessary, it shall issue a *de novo* decision on appellant's eligibility for a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision as the medical evidence does not establish that appellant reached maximum medical improvement.

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[14] *Id*. at 494.

[15] *See Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

[16] *Joseph R. Waples, supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 3, 2008 and November 20, 2007 are set aside and the case is remanded for proceedings consistent with this opinion.

Issued: September 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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