United States Department of Labor
Employees' Compensation Appeals Board

F.D., Appellant	)	
and	)	**Docket No. 09-1346**
	)	**Issued: July 19, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, 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:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 30, 2009 appellant filed a timely appeal from a February 13, 2009 merit decision of the Office of Workers' Compensation Programs concerning her schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that she has more than nine percent impairment of her left upper extremity for which she received a schedule award.

FACTUAL HISTORY

On January 2, 2002 appellant, then a 52-year-old clerk, injured her left wrist when she was struck by a tow motor and knocked down. The Office accepted the claim for scaphoid fracture of the left wrist. Appellant stopped work on February 5, 2002. She returned to limited duty for four hours a day on October 7, 2002 and the Office paid periods of wage-loss compensation. Appellant returned to full-duty work.

On September 29, 2003 appellant filed a schedule award claim. In a February 4, 2003 report, Dr. David Weiss, an osteopath, specializing in orthopedic medicine, found that appellant had 17 percent left upper extremity impairment pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). This was comprised of 4 percent impairment for lost range of motion for left wrist ulnar deviation, 10 percent for left grip strength deficit and 3 percent pain-related impairment.

On April 7, 2005 an Office medial adviser reviewed the medical record and rated nine percent impairment of the left upper extremity. This was comprised of two percent impairment for loss of flexion and seven percent impairment for constrictive tenosynovitis of the thumb. The Office medical adviser stated the findings from appellant's physician from April 2003 were used as opposed to those of Dr. Weiss because the treating physician's report "is the last one in the file and is more probative than just one exam[ination] physician's report."[1]

By decision dated July 10, 2007, the Office granted appellant a schedule award for nine percent impairment to the left arm. The award ran for the period April 18 to October 31, 2003, or 28.08 weeks of compensation.

On July 19, 2007 appellant's attorney requested a hearing. By decision dated October 22, 2007, an Office hearing representative found the case not in posture for a hearing and remanded it for further medical development. The hearing representative noted the Office medical adviser did not consider Dr. Weiss' report and the report relied upon contained a different assessment of appellant's impairment. As such, the varying assessments of appellant's permanent impairment necessitated referral to a second opinion evaluation.

In a December 11, 2007 report, Dr. Zohar Stark, a Board-certified orthopedic surgeon and Office referral physician, reviewed the medical reports of record, a statement of accepted facts and set forth findings on examination. He found no swelling, no local tenderness on palpation and no atrophy of the hand musculature. Range of motion of the left wrist was not restricted with full dorsiflexion, volar flexion, radial deviation and ulnar deviation. No weakness in grip or in pinch was noted, Tinel's and Phalen's tests were negative and Finkelstein's test was positive. Dr. Stark opined that appellant reached maximum medical improvement and there was no permanent impairment related to the January 2, 2002 work injury.

On January 18, 2008 an Office medical adviser reviewed the medical reports of record and found that appellant reached maximum medical improvement on April 22, 2003. He advised appellant's treating physician, Dr. Monaghan, found an essentially normal examination in late 2002, which was comparable to Dr. Stark's recent examination. The Office medical adviser recommended that Dr. Stark's opinion that appellant had no permanent impairment from her work injury should be accepted.

In a February 8, 2008 decision, the Office denied appellant's claim for an increased schedule award.

[1] Reports from treating physician, Dr. Bruce A. Monaghan, an orthopedic surgeon, from October 10, 2002 and April 22, 2003, advised that appellant lacked five degrees of left wrist flexion. The April 22, 2003 report noted evidence of de Quervain's stenosing synovitis and a ganglion in the tendon sheath of the first dorsal compartment.

On February 20, 2008 appellant's attorney requested a hearing. On April 24, 2008 a hearing representative set aside the February 8, 2008 decision finding a conflict in medical opinion between Dr. Weiss and Dr. Stark necessitating referral to an impartial medical examiner.

The Office referred appellant to Dr. Howard Zeidman, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Zeidman was provided with a statement of accepted facts, the medical record and a list of questions.

In a June 19, 2008 report, Dr. Zeidman noted the history of injury, reviewed the medical evidence and listed examination findings. He found no impairment that could be specifically related to the January 2, 2002 work injury as the fracture had healed and there was no specific problem related to the fracture. Dr. Zeidman advised that de Quervain's constrictive tendinitis was present and had been present for several months since the injury and was related to the work injury as a post-traumatic event. He advised there was some impairment because of limitation of motion with regard to this at the interphalangeal (IP) joint of the thumb. Under Figure 16-12, page 456 of the A.M.A., *Guides*, he found 55 degrees of flexion equated to two percent impairment of the thumb which was equivalent to one percent impairment of the hand under Table 16-1, page 438. Dr. Zeidman noted that, while carpometacarpal arthritis was noted on x-ray, this was not included in his impairment evaluation as it did not appear to be related to the work injury. He also opined that appellant reached maximum medical improvement.

In an August 12, 2008 report, an Office medical adviser concurred with Dr. Zeidman's opinion. He found two percent left thumb digit impairment was consistent with Dr. Zeidman's rating calculations and the development of chronic de Quervain's tenosynovitis that developed as a result of the accepted scaphoid fracture. The Office medical adviser further opined that the date of maximum medical improvement was June 19, 2008.

By decision dated August 22, 2008, the Office denied an additional schedule award.

On August 25, 2008 appellant's attorney requested an oral hearing, which was held by video conference on December 16, 2008. He questioned the manner in which the Office selected the impartial medical evaluator and argued that Dr. Zeidman's report did not constitute the weight of the medical evidence.

In a February 13, 2009 decision, an Office hearing representative affirmed the August 22, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

percentage of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

Section 8123(a) provides that, 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 who shall make an examination.[6] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[7] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8]

It is well established that Office procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.[9] The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.[10] These procedures contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and the Office.[11] Moreover, the reasons for the selection made must be documented in the case record.[12]

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[4] 5 U.S.C. § 8107(c)(19).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8123(a).

[7] 20 C.F.R. § 10.321.

[8] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[9] *See LaDonna M. Andrews*, 55 ECAB 301 (2004).

[10] *See Raymond J. Brown*, 52 ECAB 192 (2001).

[11] *Id. See also Miguel A. Muniz*, 54 ECAB 217 (2002).

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). A claimant may ask to participate in the selection of the impartial medical specialist under certain conditions; however, no request was made in this case.

It is also well established that, in determining the amount of a schedule award for a given member of the body that sustained an employment-related permanent impairment, preexisting impairments of that scheduled member of the body are to be included.[13]

ANALYSIS

The Office found a conflict in medical opinion between Dr. Weiss, appellant's treating physician, and Dr. Stark, an Office referral physician, with regard to appellant's permanent impairment for schedule award purposes. Accordingly, it referred appellant to Dr. Zeidman for an impartial medical examination.[14]

On appeal, counsel contends that the Office improperly selected Dr. Zeidman as the impartial medical specialist and his report is insufficient to constitute the weight of the medical opinion evidence. Counsel contended that Dr. Zeidman was not appropriately selected from the Physician's Desk Reference as the Office bypassed three physicians in the directory system prior to selecting Dr. Zeidman. The record reflects that on May 27, 2008 the Office bypassed three physicians in the directory system for the reason that they were busy and unable to provide an appointment in a reasonable amount of time. The evidence establishes that Dr. Zeidman was the next physician on the rotation list after Dr. Brian Zell, the last physician bypassed. The evidence of record does not establish error in the selection of Dr. Zeidman as the impartial specialist. Appellant has not submitted evidence that the system for selecting the impartial medical specialists was compromised in this case.[15]

Counsel further contends that Dr. Zeidman's report does not carry the weight of the medical opinion evidence. Dr. Zeidman indicated that appellant did not sustain any permanent impairment due to the accepted employment-related fracture, but did, as a result of post-traumatic tendinitis, experience loss of motion at the IP joint of the thumb. Under the A.M.A., *Guides*, appellant sustained a two percent permanent impairment of the left thumb or one percent permanent impairment of the left hand. Dr. Zeidman advised that carpometacarpal arthritis was not included in his rating determination as it did not appear to be related to the work injury. The Board notes that in determining the degree of impairment for a member of the body that sustained an employment-related injury, preexisting impairments are to be included in the evaluation of the permanent impairment.[16] While counsel argues the carpometacarpal arthritis is a preexisting condition, the medical evidence is not clear as to whether such arthritis was a

[13] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, Schedule Awards, Chapter 3.700.3.b (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[14] *See Talmadge Miller*, 47 ECAB 673 (1996).

[15] *Compare D.A.*, 61 ECAB ___ (Docket No. 09-936, issued January 13, 2010) (the evidence supported appellant's contentions that the Office did not follow its procedures in selecting an impartial specialist where there were no notes in the Physician's Directory System explaining the referral to the designated physician and where it appeared that another physician was actually selected to perform the examination).

[16] *See D.F.*, 59 ECAB ___ (Docket No. 07-1607, issued December 21, 2007); *Carol A. Smart*, 57 ECAB 340 (2006).

preexisting or subsequently acquired condition.[17] The statement of accepted facts and questions to be addressed did not inform the impartial medical specialist regarding any preexisting impairment.

The case is not in posture for decision on this aspect of the claim. When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[18] Dr. Zeidman should be requested to provide a record review of the medical evidence and further opinion on whether appellant's arthritis was a preexisting condition.

The Board will set aside the Office's August 22, 2008 and February 13, 2009 decisions and remand the case for such further development as may be required, followed by a final decision on appellant's claim for a schedule award for the left upper extremity.

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant has more than nine percent impairment of the left arm.

[17] Dr. Zeidman noted that the x-ray report from January 9, 2002 noted some calcifications in the first metacarpal articulation presumably old.

[18] *L.R. (E.R.),* 58 ECAB 369 (2007).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2009 and August 22, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action consistent with this opinion.

Issued: July 19, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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