

**United States Department of Labor
Employees' Compensation Appeals Board**

C.K., Appellant)

and)

U.S. POSTAL SERVICE, MANAGEMENT)
SECTION CENTER, Baltimore, MD, Employer)

**Docket No. 09-1140
Issued: June 9, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2009 appellant filed a timely appeal from a December 11, 2008 merit decision of the Office of Workers' Compensation Programs concerning her schedule award. She also timely appeals from a nonmerit decision dated January 7, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has her burden of proof to establish that she has more than five percent permanent impairment of her left upper extremity, for which she received a schedule award; and (2) whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

FACTUAL HISTORY

On October 6, 2002 appellant, a 46-year-old mail processor, filed an occupational disease claim alleging that on October 4, 2002 she first realized the tingling up and down both her arms,

wrists and hands were employment related. On January 14, 2003 the Office accepted her claim for left wrist tendinitis.¹

On May 15, 2003 appellant filed a claim for a schedule award. By decision dated February 17, 2005, the Office denied her schedule award claim on the grounds that the medical evidence was insufficient to establish that she sustained a permanent impairment.

On November 15, 2005 Dr. Robert F. Hanley, a second opinion Board-certified orthopedic surgeon, diagnosed mild left carpal tunnel syndrome. Using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) he determined that appellant had five percent permanent left upper extremity impairment. Dr. Hanley based his determination on a positive electrodiagnostic study.

In a November 21, 2005 report, Dr. Arnold T. Berman, an Office medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Hanley's report and agreed with his impairment determination. He stated that Dr. Hanley relied upon the quotation in notation number two on page 495 of the A.M.A., *Guides* relative to optimal recovery for carpal tunnel syndrome.

By decision dated May 31, 2006, the Office issued a schedule award for five percent permanent impairment of the left upper extremity. The period of the award was November 15, 2005 to March 4, 2006.

On June 20, 2006 appellant requested an oral hearing before an Office hearing representative and a telephonic hearing was held on October 3, 2006.

In a decision dated January 9, 2007, the Office hearing representative set aside the May 31, 2006 schedule award decision and remanded the case to the Office for further development. The hearing representative noted that the statement of accepted facts did not contain the condition of left carpal tunnel syndrome. He also found that the reports by Drs. Berman and Hanley failed to provide sufficient rationale to support the five percent impairment finding.

By decision dated March 15, 2007, the Office expanded the acceptance of appellant's claim to include left carpal tunnel syndrome. It authorized left carpal tunnel surgery, which was performed on May 9, 2007.

By letter dated September 4, 2007, appellant requested that the Office issue a schedule award for more than the five percent impairment previously awarded.

On June 4, 2007 and April 11, 2008 appellant filed claims for a schedule award.

By decision dated October 9, 2008, the Office denied appellant's request for a schedule award as the evidence was insufficient to establish that she sustained a permanent impairment.

¹ The Office assigned File No. xxxxxx025. The record contains evidence that the Office accepted the condition of bilateral shoulder bursitis under File No. xxxxxx768. Appellant noted that as of April 23, 2003 she was no longer employed by the employing establishment.

Subsequent to the issuance of the October 9, 2008 decision, the Office received an October 1, 2008 report from Dr. Robert W. Macht, an examining Board-certified surgeon, who diagnosed bilateral shoulder and wrist occupational illness with left carpal tunnel release. A physical examination revealed a left positive Tinel's sign, bilateral positive Phalen's test, decreased light touch sensation bilaterally in the thumb, index and middle fingers. Range of motion for both wrists was 50 degrees flexion and 15 degrees radial. Using Table 16-8B, page 459, Dr. Macht determined that appellant had three percent bilateral thumb impairment due to loss of adduction. Next, he concluded that appellant had a one percent impairment of each upper extremity using Table 16-1, page 438 and Table 16-2, page 439. Dr. Macht determined that she had a three percent impairment of each upper extremity due to loss of wrist range of motion using Figure 16-28, page 467 and Figure 16-31, page 469. Combining these amounts resulted in four percent impairment in each upper extremity. Dr. Macht then used Table 16-10, page 482 and Table 16-11, page 484, where he found a Grade 3 sensory deficit or pain affecting the right side median nerve, a Grade 2 sensory deficit or pain affecting the left median nerve and a Grade 4 weakness of the left median nerve. He then took these values using Table 16-15, page 492, to find a total 32 percent left upper extremity impairment and 23 percent right upper extremity impairment due to appellant's bilateral carpal tunnel syndrome. Dr. Macht then combined the impairment rating for her carpal tunnel syndrome with her impairment rating for her loss of range of wrist motion to find a total 35 percent left upper extremity permanent impairment and 26 percent right upper extremity permanent impairment. He also determined that appellant had 14 percent upper extremity impairment in each shoulder due to her loss of bilateral shoulder motion.

In an October 19, 2008 report, Dr. Berman, the Office medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Macht's report and disagreed with the impairment rating given by the physician. He noted that impairment rating for appellant's thumbs is not appropriate as thumbs are not considered part of her accepted carpal tunnel syndrome. Dr. Berman also found that the impairment ratings given for appellant's right carpal tunnel syndrome and left shoulder were not appropriate as these were not accepted conditions. As to Dr. Macht's determination of a Grade 2 left deficit of the left median nerve, he found that the physical findings reported by Dr. Macht did not support this conclusion. Dr. Berman noted that Dr. Macht's physical examination showed no abnormalities, "no loss of protective sensibility and sensation was intact to two-point discrimination" Thus, he concluded that not even a Grade 3 would be appropriate as this requires two-point discrimination abnormalities, which were not demonstrated. Dr. Berman indicated that Dr. Macht's Grade 4 deficit for left motor loss was inappropriate. Citing to section 16.8 on page 508 of the A.M.A., *Guides*, he advised "that strength evaluation cannot be made in the presence of painful conditions," which appellant had. Next, Dr. Berman opined that he agreed with the November 15, 2005 impairment rating by Dr. Hanley, which found five percent left upper extremity impairment. He noted that appellant did not submit any medical evidence showing that she was entitled to an increased schedule award.

On October 20, 2008 the Office received appellant's undated request for reconsideration.

By decision dated December 11, 2008, the Office found that appellant was not entitled to an increased schedule award. It found that the medical evidence established a five percent left upper extremity impairment, for which she had previously been issued a schedule award.

On December 16 and 18, 2008 appellant requested reconsideration of the denial of her request for an additional schedule award. In a letter dated December 18, 2008, she requested referral to an impartial medical examiner due to the conflict in the medical opinion evidence regarding her upper extremity impairment between Drs. Macht and Berman.

By decision dated January 7, 2009, the Office denied appellant's request for a merit review.²

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulations⁴ 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 percentage of loss of use.⁵ 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.⁶

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁷

ANALYSIS -- ISSUE 1

Appellant argues that there is an unresolved conflict in medical opinion between Drs. Macht and Berman regarding the extent of her left upper extremity permanent impairment. She noted that Dr. Berman did not consider her bilateral hand tendinitis, which exists with her bilateral carpal tunnel syndrome, which is why she believes that she is entitled to an additional schedule award. The Board notes that the Office has not accepted either bilateral hand tendinitis or bilateral carpal tunnel syndrome. The only conditions accepted by the Office are left wrist tendinitis and left carpal tunnel syndrome. Thus, the issue to be resolved is whether appellant has established that she is entitled to an additional schedule award for these accepted conditions.

² The Board notes that, following the October 6, 2008 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

³ 5 U.S.C. §§ 8101-8193; see 5 U.S.C. § 8107(c).

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 8107(c)(19).

⁶ *Id.* at § 10.404; see *I.F.*, 60 ECAB ___ (Docket No. 08-2321, issued May 21, 2009); *A.A.*, 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008).

⁷ *Veronica Williams*, 56 ECAB 367 (2005).

Dr. Macht concluded that appellant had a total 35 percent left upper extremity permanent impairment and 26 percent right upper extremity permanent impairment. He also determined that she had 14 percent upper extremity impairment in each shoulder due to her loss of bilateral shoulder motion. Initially, the Board notes that Dr. Macht's impairment rating was also based on appellant's bilateral thumb impairment, her bilateral shoulder conditions and right carpal tunnel syndrome. The Board notes that her claim has not been accepted for a right or left thumb condition. Moreover, Dr. Macht has not explained how these conditions are causally related to appellant's accepted employment-related injuries or whether they were preexisting. With respect to his remaining impairment rating for her left upper extremity, the Board finds that it does not properly conform to the A.M.A., *Guides*. Dr. Macht found that appellant had a Grade 2 sensory deficit of the left median nerve and a Grade 4 weakness of the left median nerve for a total 32 percent left upper extremity impairment.⁸ However, he provided no explanation as to how he determined the grade under the A.M.A., *Guides*. Dr. Macht improperly included weakness when he calculated appellant's 32 percent left upper extremity impairment. The A.M.A., *Guides* state that decreased strength cannot be rated in the presence of decreased motion, painful condition or deformities.⁹ As Dr. Macht did not properly apply the A.M.A., *Guides*, his opinion is of diminished value.¹⁰

Dr. Berman reviewed Dr. Macht's report and disagreed with the impairment rating given. He noted that impairment rating for appellant's thumbs is not appropriate as they are not considered part of her accepted left carpal tunnel syndrome. Dr. Berman also found that the impairment ratings given for her right carpal tunnel syndrome and left shoulder were not appropriate as these were not accepted conditions. He indicated that Dr. Macht's Grade 4 deficit for left median nerve motor loss and Grade 2 deficit for left sensory median nerve loss were inappropriate. Citing to section 16.8a on page 508 of the A.M.A., *Guides*, Dr. Berman explained that decreased strength cannot be rated in the presence of decreased motion or painful conditions. As to the sensory loss deficit, he explained that Dr. Macht's physical findings did not support his sensory loss determination. Dr. Berman concurred in Dr. Hanley's finding of five percent lower upper extremity impairment and added that appellant did not submit any evidence showing a greater impairment.

The record is unclear, however, as to whether appellant's left shoulder bursitis and left thumb condition are preexisting conditions or occurred following her injury. It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments are to be included.¹¹ When impairment extends into an adjoining area, the schedule award should be

⁸ See A.M.A., *Guides*, Table 16-10 at 482 and Table 16-11 at 484.

⁹ *Id.* at 508.

¹⁰ *Joseph R. Waples*, 44 ECAB 936 (1993).

¹¹ *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009); *Thomas P. Lavin*, 57 ECAB 353 (2006) (where the claimant did not demonstrate any permanent impairment caused by the accepted occupational exposure, the claim was not ripe for consideration of any preexisting impairment); *Beatrice L. High*, 57 ECAB 329 (2006) (in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included).

made for the larger member.¹² The Office medical adviser provided no explanation as to why these conditions should be excluded from the left upper extremity impairment rating, other than noting that these conditions were not accepted employment-related conditions, when he rendered his opinion on Dr. Macht's impairment rating. Since the record is unclear as to whether these conditions were preexisting and the Office medical adviser did not render a sufficiently reasoned medical opinion as he failed to mention whether these conditions were preexisting or not, the probative value of his report is limited. Accordingly, the Board finds that the case must be remanded for further medical development.¹³

CONCLUSION

The Board finds that the case is not in posture for decision to determine whether appellant is entitled to an additional schedule award for permanent impairment of the left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 7, 2009 and December 11, 2008 are set aside; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 9, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹² *Janet L. Adamson*, 52 ECAB 431 (2001).

¹³ In view of the disposition of the first issue, the Board finds that it is unnecessary to address the second issue in this case.