United States Department of Labor
Employees' Compensation Appeals Board

S.D., Appellant	)	
and	)	**Docket No. 09-1828**
	)	**Issued: June 24, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, MO, Employer	)	

Appearances:
Alan J. Shapiro, 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 June 3, 2009 appellant filed a timely appeal from the December 16, 2008 and April 20, 2009 decisions of the Office of Workers' Compensation Programs which found no basis to modify the compensation rate used in granting a schedule award.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has more greater than 13 percent impairment to the right upper extremity or 16 percent impairment to the left upper extremity; and (2) whether appellant was entitled to an augmented compensation rate in the December 16, 2008 schedule award determination.

[1] After appellant filed his appeal on June 3, 2009, the Office issued a July 22, 2009 decision regarding the compensation rate used in the December 16, 2008 schedule award. As the issue is presently on appeal under *Douglas E. Billings*, 41 ECAB 880 (1990) the July 22, 2009 decision is null and void.

FACTUAL HISTORY

On April 28, 1993 appellant, then a 31-year-old bulk mail technician, filed a claim alleging that work factors caused tendinitis in his wrists. The Office accepted that he sustained bilateral wrist tendinitis, bilateral elbow tendinitis, bilateral medial epicondylitis, lesion of left ulnar nerve and bilateral carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on January 13, 1998 and a left carpal tunnel release on April 8, 1998. He underwent a left cubital tunnel release on January 10, 2006, a right radial tunnel release on August 25, 2006 and a left medial epicondylectomy and cubital tunnel release on May 22, 2007. The Office paid wage-loss compensation. Appellant returned to regular duty on September 17, 2007.

By decision dated December 21, 1999, the Office granted appellant schedule awards for 15 percent left upper extremity impairment and 12 percent right upper extremity impairment.

On February 26, 2008 appellant filed a claim for additional schedule awards. He reported that he had two daughters who were living with him, ages 18 and 20.

In a March 3, 2008 letter, the Office addressed the prior schedule awards and that a September 13, 2007 medical report from Dr. Dana R. Towle, a Board-certified plastic surgeon, specializing in hand surgery, was insufficient to establish greater impairment as the physician failed to address maximum medical improvement or provide a detailed description of permanent impairment. Appellant was advised to submit a medical report containing an impairment rating conforming to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] He was accorded 60 days to submit the required medical evidence from his treating physician.

In a January 31, 2008 report, Dr. Towle reported on the status of appellant's left medial epicondylectomy and cubital tunnel releases. He advised that appellant reached maximum medical improvement and could be rated and released. Dr. Towle did not provide any additional impairment rating.

On June 24, 2008 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. George Varghese, a Board-certified physiatrist, for a second opinion impairment evaluation. In a July 22, 2008 report, Dr. Varghese noted the history of injury, his review of appellant's medical records and findings on physical examination. He opined that maximum medical improvement was reached on July 21, 2008 for appellant's left elbow epicondylitis. Under the A.M.A., *Guides,* Dr. Varghese opined that appellant had six percent impairment to the left arm. Appellant's range of motion limitation of 60 degrees supination was to one percent impairment under Figure 16-37 of the A.M.A., *Guides*. Dr. Towle advised that appellant had Grade 4/5 muscle strength in the left flexor carpi ulnaris that under Table 16-11 constituted a 10 percent motor deficit for ulnar involvement above the mid-forearm. He stated that this represented five percent impairment under Table 16-15. Dr. Towle reported that appellant had no sensory symptoms.

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

In an August 1, 2008 report, the Office medical adviser agreed with the six percent left upper extremity impairment rating by Dr. Varghese. He noted that appellant's previous award of 15 percent permanent impairment to the left arm was comprised of 11 percent impairment at the wrist level and 4 percent impairment at the elbow level. The Office medical adviser advised that the prior impairment at the wrist level must be combined with the current six percent impairment for the elbow condition under the Combined Values Chart. This amounted to a combined total of 16 percent which, minus the 15 percent prior award, resulted in 1 percent impairment increase to the left arm. The Office medical adviser noted that Dr. Varghese did not provide an impairment rating for the right upper extremity. In a September 13, 2008 letter, he requested that Dr. Varghese provide an addendum report addressing the right upper extremity.

In a November 10, 2008 report, Dr. Varghese noted findings on examination of appellant's right elbow. Under Figure 16-34 of the A.M.A., *Guides*, no rating was offered for limitation of flexion but one percent impairment was assigned for extension of minus ten degrees. Under Figure 16-31, there was no impairment for 90 degrees pronation and 70 degrees supination. Under Tables 16-10 and 16-15, Dr. Varghese noted 1 percent impairment for a 20 percent grade loss of sensation in the superficial radial nerve distribution. He advised that the combined impairments resulted in two percent permanent impairment for the residual deficits from the right elbow injury and subsequent surgery.

On November 23, 2008 the Office medical adviser stated that Dr. Varghese considered range of motion, chronic pain or sensory changes and chronic weakness in finding two percent impairment to appellant's right arm. This was comprised of one percent impairment for range of motion and one percent impairment for loss of sensation in the radial sensory nerve. The Office medical adviser advised that appellant's previous schedule award of the right elbow on December 7, 1999 was exclusively for the residuals of the loss of sensation associated with the radial nerve and amounted to one percent impairment. He stated that, since one percent impairment for sensory loss of the right elbow was previously awarded, Dr. Varghese's one percent impairment rating for sensory change in the distribution of the same nerve could not be used as it had been already compensated for in the December 21, 1999 schedule award. The Office medical adviser advised that the one percent impairment for limitation in range of motion of the right elbow could be accepted. Combining the previous award of 12 percent right upper extremity impairment with the 1 percent range of motion limitation, he found that appellant had one percent increase in the impairment to the right upper extremity.

In a December 10, 2008 letter, the Office advised appellant that his schedule award would be 66 2/3 statutory based on the compensation rate without dependents. It advised that under the Federal Employees' Compensation Act, children between the ages of 18 and 23 are considered dependents only if unmarried and full-time students. The Office requested that appellant fill out Forms EN1617 if his children were unmarried, full-time students. It provided him with an EN1617 form and requested that it be returned to the Office within 30 days. Appellant was requested to complete Part A of the form and have an official at the school complete Part B of the form after reviewing Part A. He did not respond.

By decision dated December 16, 2008, the Office granted appellant schedule awards for 1 percent impairment of the right upper extremity and 1 percent impairment of the left upper extremity, or total impairments of 13 percent of the right upper extremity and 16 percent of the left

upper extremity. The period of the awards was 6.24 weeks from January 31 to March 14, 2008. The compensation rate was 66 2/3 of appellant's weekly pay rate.

In a February 8, 2009 letter, appellant's attorney contended that appellant's compensation rate should be based on the 75 percent augmented rate. He advised that appellant's two daughters were between the ages of 19 and 21 and were both full-time students. Counsel stated that, while appellant's daughters did not live with him, he paid for books and tuition. Appellant submitted December 16, 2008 letters from both daughters, who stated that they lived with their father and currently attended school. The younger daughter stated that she attended Maple Woods Community College and the older daughter stated that she was a full-time student at the University of Missouri Kansas City. Appellant's younger daughter provided a partial copy of a January 22, 2009 degree progress report from Metropolitan Community College -- Kansas City and a 2008 tuition statement, which indicated that she was a half-time student at the "Junior College District of Metropolitan Kansas City." His older daughter submitted a copy of a student class schedule for the weeks of August 31, 2008 and January 12, 2009.

By decision dated April 20, 2009, the Office denied modification of the compensation rate at which the December 16, 2008 schedule awards were paid.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[3] and its implementing regulations[4] 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. The Act, however, 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.[5]

It is well established that preexisting impairments to the scheduled member are to be included when determining entitlement to a schedule award.[6] Office procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.[7]

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.404.

[5] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] *Michael C. Milner*, 53 ECAB 446, 450 (2002); *Raymond E. Gwynn*, 35 ECAB 247 (1983).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.a(2) (November 1998).

ANALYSIS -- ISSUE 1

Appellant was previously granted schedule awards for 12 percent impairment to the right arm and 15 percent permanent impairment to the left arm. He filed a claim for increased impairment to both members. The Office had advised appellant to submit a medical report providing an impairment rating which conformed to the A.M.A., *Guides.* The progress reports from Dr. Towle do not contain any impairment rating pertaining to the accepted conditions. The Office properly determined that Dr. Towle's reports did not provide a basis for increased schedule awards under the Act.[8]

The Office referred appellant to Dr. Varghese for an evaluation of his permanent impairment. With respect to appellant's left upper extremity, Dr. Varghese found that appellant had six percent impairment under the A.M.A., *Guides,* which was comprised of one percent for range of motion deficit and five percent motor loss of the ulnar nerve above the midforearm. Under Figure 16-37, page 474, he correctly noted 60 degrees supination corresponded to one percent impairment. Under Table 16-11,[9] Dr. Varghese advised that appellant had Grade 4/5 muscle strength in the left flexor carpi ulnaris which was a 10 percent deficit. He advised that this involved the ulnar nerve above the midforearm, which has a 46 percent maximum impairment due to motor deficit under Table 16-15.[10] Under the grading procedure in Table 16-11, Dr. Varghese properly multiplied the 46 percent maximum impairment for motor loss of the ulnar nerve above the midforearm under Table 16-15 by the 10 percent deficit he found under Table 16-11. This yielded five percent impairment when rounded to the nearest whole number. Dr. Varghese opined that appellant had total left arm impairment of six percent. With respect to appellant's right upper extremity, he advised that appellant had two percent impairment. Under Figure 16-34 of the A.M.A., *Guides,* Dr. Varghese found one percent impairment for extension minus (-10) degrees. Under Tables 16-10 and 16-15, he rated one percent impairment for sensory deficit attributable to the radial sensory nerve. Dr. Varghese graded a 20 percent sensory deficit under Table 16-10[11] for loss of sensation in the superficial radial nerve distribution. Under Table 16-15, a five percent maximum sensory loss is allowed for sensory deficit of the radial nerve. Dr. Varghese multiplied the 5 percent maximum loss for the radial nerve by the 20 percent sensory deficit to total 1 percent sensory impairment. He combined the sensory impairment and range of motion impairment to arrive at two percent impairment of the right arm.

An Office medical adviser reviewed Dr. Varghese's findings. With respect to appellant's left upper extremity, the medical adviser noted that appellant received a prior 15 percent impairment rating comprised of 11 percent impairment at the wrist level and 4 percent impairment at the elbow level. He properly determined that the 11 percent impairment at the wrist level previously awarded must be combined with the current 6 percent impairment for the elbow

[8] The Board notes that a description of appellant's impairment must be obtained from appellant's physician, which must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. *See Peter C. Belkind*, 56 ECAB 580, 585 (2005).

[9] A.M.A., *Guides* 484.

[10] *Id*. at 492.

[11] *Id*. at 482.

condition, found by Dr. Varghese, which totaled 16 percent. The Office medical adviser subtracted the 15 percent previously awarded to find that appellant had an additional 1 percent impairment. With respect to appellant's right upper extremity, he noted that appellant's rating involved the elbow for residuals of loss of sensation affecting the radial nerve and amounted to one percent impairment. The Office medical adviser stated that, since one percent impairment for sensory loss of the right elbow was previously awarded, Dr. Varghese's one percent impairment rating for sensory loss in the same nerve distribution could not be used as it has been compensated for in the December 21, 1999 schedule award. He advised that the one percent impairment for limitation in range of motion of the right elbow could be accepted. Combining the previous award of 12 percent right upper extremity impairment with the 1 percent range of motion limitation, the Office medical adviser correctly found that appellant had 13 percent total right arm impairment or a 1 percent increase in right arm impairment.

The Board finds that Office medical adviser properly relied upon the findings in Dr. Varghese's reports in the extent of determining impairment to appellant's left and right arms. There is no other medical evidence of record to establish greater impairment than 16 percent of the left upper extremity and 13 percent of the right upper extremity.

LEGAL PRECEDENT -- ISSUE 2

The basic rate of compensation under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, he is entitled to have his basic compensation augmented at the rate of three-quarters of his monthly pay.[12] A child is considered a dependent if he or she is under 18 years of age, is over 18 years but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.[13]

ANALYSIS -- ISSUE 2

Appellant received a schedule award for an additional one percent impairment to each of his arms on December 16, 2008. Compensation was paid at the basic statutory rate of 66 2/3 of his monthly pay. On reconsideration, appellant's attorney contends that compensation should be paid at the augmented 75 percent rate under 5 U.S.C. § 8110(a) as his two daughters were eligible dependents. Although appellant was provided with the appropriate forms by the Office to determine whether his daughters were dependents, the forms were not completed or submitted by appellant.[14] No official of any school has verified the status of appellant's daughter's as full-time

[12] 5 U.S.C. § 8110(b); *see also William G. Dimick*, 38 ECAB 751 (1987). The compensation rate for schedule awards is the same as compensation for wage loss. *See* 5 U.S.C. § 8107; 20 C.F.R. § 10.404(b) (1999).

[13] 5 U.S.C. § 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405. *See Leon J. Mormann*, 51 ECAB 680 (2000). *See also* Federal (FECA) Procedure Manual, *supra* note 7, *Computing Compensation*, Chapter 2.901.5(a) (December 1995).

[14] Office procedures contemplate that the Office should obtain proof of student status using such a form. *See* Federal (FECA) Procedure Manual, *supra* note 7, *Early Management of Disability Claims*, Chapter 2.811.10(a) (February 2002).

students. The evidence submitted, copies of class schedules, an incomplete degree progress report from Metropolitan Community College -- Kansas City and a 2008 tuition statement, does not clearly establish whether appellant's daughter's were full-time students at the listed each educational institution. The documents were not certified or verified by an appropriate college or university official. Each daughter noted attending the college in question but neither asserted that she was a full-time student. Absent any evidence from officials at either educational facility which certifies to the specific periods their status was as full-time students, the Office properly correctly found that there was no basis to modify the basic compensation rate used in the December 16, 2008 schedule award.

CONCLUSION

The Board finds that appellant has no more than 16 percent left upper extremity impairment or 13 percent right upper extremity impairment, for which he received schedule awards. The Board further finds that he has not established he is entitled to augmented compensation under the schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2009 and December 16, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 24, 2010
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