United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 10-2126**
	)	**Issued: July 5, 2011**
U.S. POSTAL SERVICE, ROSELAND POST OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 19, 2010 appellant filed a timely appeal from a March 22, 2010 decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established a ratable permanent impairment of the upper extremities.

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that an impartial specialist's report was flawed and that OWCP should have accorded appellant's attending physician the weight of the medical opinion.[2]

FACTUAL HISTORY

OWCP accepted that on or before October 23, 2005 appellant, then a 48-year-old schemed mail distribution clerk, sustained a right rotator cuff tear, herniated C5-6 disc with degenerative disc disease, bilateral carpal tunnel syndrome, de Quervain's tenosynovitis of the right wrist and right radial tenosynovitis.[3] Appellant stopped work on May 11, 2005 and did not return. She received compensation for total disability on the supplemental and periodic rolls.

Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon, performed a left median nerve release on April 20, 2006 and a right median nerve release on December 15, 2006. He submitted periodic reports through November 6, 2008 finding appellant totally disabled for work due to bilateral carpal tunnel syndrome, multiple tendinitis in the upper extremities and bilateral shoulder derangement.

On June 20, 2008 appellant claimed a schedule award for upper extremity impairment. She submitted a July 14, 2008 impairment evaluation from Dr. Chmell utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*") finding that she had attained maximum medical improvement. Dr. Chmell noted the following impairments of the right shoulder according to Table 16-40, Figure 16-43 and Figure 16-46[4]: five percent for flexion limited to 100 degrees, two percent for shoulder extension at 20 degrees, four percent for shoulder abduction at 100 degrees, one percent for shoulder adduction at 30 degrees, four percent for internal rotation at 30 degrees and one percent for external rotation at 40 degrees. He added 20 percent impairment for Grade 4 weakness. Regarding the right elbow, forearm, wrist and hand, Dr. Chmell found the following impairments due to C5-6 radiculopathy according to Table 16-14 and Table 16-35[5]: 20 percent

[2] Appellant submitted additional medical evidence accompanying her request for appeal. The Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit such evidence to OWCP in support of a valid request for reconsideration.

[3] Appellant's claim for a herniated C5-6 disc and right rotator cuff tear was initially denied by March 15, 2006 decision, vacated by August 14, 2006 decision. Effective November 6, 2009, OWCP combined appellant's claims under File No. xxxxxx055 for upper extremity injuries, File No. xxxxxx273 for upper and lower extremity injuries and File No. xxxxxx862 for lower extremity injuries under master File No. xxxxxx055.

[4] Table 16-40, page 476 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder." Figure 16-43, page 477 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of Shoulder." Figure 16-46, page 479 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Internal and External Rotation of Shoulder."

[5] Table 16-14, page 490 of the fifth edition of the A.M.A., *Guides* is entitled "Maximum Upper Extremity Impairments Due to Unilateral Sensory or Motor Deficits of Brachial Plexus or to *Combined* 100 percent Deficits." Table 16-35, page 510 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment of the Upper Extremity Due to Strength Deficit from Musculoskeletal Disorders Based on Manual Muscle Testing of Individual Units of Motion of the Shoulder and Elbow."

for diminished sensation; 15 percent for diminished strength; 5 percent for pain and dysesthesia. He added all of these impairments to equal 77 percent permanent impairment of the right upper extremity. Regarding the left arm, Dr. Chmell found 20 percent impairment due to diminished sensation in the hand and left thumb, 5 percent for pain and dysesthesia and 15 percent for diminished strength. He added these impairments to equal 40 percent impairment of the left upper extremity.

On October 8, 2008 OWCP obtained a second opinion from Dr. David H. Trotter, a Board-certified orthopedic surgeon, regarding the percentage of upper extremity impairment. On examination of the shoulders, Dr. Trotter found 90 degrees abduction, forward flexion and extension and 80 degrees internal rotation. He found bilateral limitation of the elbows to 100 degrees flexion and -5 degrees extension. Dr. Trotter found full strength in both arms. He opined that appellant had no permanent impairment of either upper extremity. OWCP's medical adviser reviewed Dr. Trotter's report on November 3, 2008 and concurred that appellant had no permanent impairment of the upper extremities.

By decision dated January 22, 2009, OWCP denied appellant's schedule award claim for upper extremity impairment on the grounds that the medical evidence did not establish a ratable impairment of either extremity. It accorded Dr. Trotter the weight of the medical evidence.

On February 20, 2009 appellant requested an oral hearing. She submitted progress reports from Dr. Chmell dated January through April 2009 noting no change in her condition.[6]

By decision dated and finalized May 13, 2009, OWCP's hearing representative set aside the January 22, 2009 decision finding a conflict of medical opinion between Dr. Trotter, for the government, and Dr. Chmell, for appellant, regarding the issue of upper extremity impairment. The hearing representative remanded the case to OWCP for appointment of an impartial medical examiner.[7]

OWCP selected Dr. Rodrigo M. Ubilluz, a Board-certified neurologist, as a second opinion specialist to examine appellant and provide an impairment evaluation. In a January 29, 2010 letter to appellant, OWCP advised appellant "that a SECOND OPINION EVALUATION [was] necessary in [her] case" and that a medical management company would schedule the "second opinion medical services." (Emphasis in the original.) A February 18, 2010 letter to appellant from the medical management company advised her of a March 3, 2010 appointment with Dr. Ubilluz.

In a March 3, 2010 report, Dr. Ubilluz noted normal strength and sensation in all extremities and negative Tinel's and Phalen's signs at both wrists. He diagnosed a right rotator cuff tear and herniated C5-6 disc. Dr. Ubilluz estimated that appellant reached maximum

[6] April 17, 2009 magnetic resonance imaging (MRI) scans of appellant's shoulders showed bilateral supraspinatus, infraspinatus and subscapularis tendinosis with a nodular lesion over the superior left shoulder. April 20, 2009 MRI scans of both wrists showed multiple tendinitis and tendinosis with small ganglion cysts.

[7] Appellant submitted additional progress notes from Dr. Chmell dated from July 2, 2009 to March 4, 2010 diagnosing cervical derangement and bilateral carpal tunnel syndrome.

medical improvement in 2006. He opined that appellant had a zero percent impairment of the upper extremities according to unspecified portions of the sixth edition of the A.M.A., *Guides*.

By decision dated March 22, 2010, OWCP denied a schedule award as the medical evidence did not establish any permanent impairment of the upper extremities related to the accepted injuries. It accorded Dr. Ubilluz the weight of the medical evidence as an impartial medical examiner, finding that his report was well rationalized and based on a thorough examination.

LEGAL PRECEDENT

The schedule award provisions of FECA provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE - DCX) + (GMCS- CDX).

Section 8123 of FECA 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.[12] In situations where there exist 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 upon a proper factual background, must be given special weight.[13]

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[8] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* 3, section 1.3 (6th ed. 2008).

[11] *Id.* at 494-531 (6th ed. 2008).

[12] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[13] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

ANALYSIS

OWCP accepted that appellant sustained a right rotator cuff tear, herniated C5-6 disc, degenerative disc disease, bilateral carpal tunnel syndrome, de Quervain's tenosynovitis of the right wrist and right radial tenosynovitis. Appellant claimed a schedule award on June 20, 2008. Dr. Chmell, an attending Board-certified orthopedic surgeon, found she had attained maximum medical improvement as of July 14, 2008. He provided a July 14, 2008 impairment rating utilizing the fifth edition of the A.M.A., *Guides*, finding 77 percent impairment of the right upper extremity and a 40 percent impairment of the left upper extremity.

A second opinion was obtained from Dr. Trotter, a Board-certified orthopedic surgeon, who found no permanent impairment of either upper extremity. OWCP denied appellant's schedule award claim in a January 22, 2009 decision based on Dr. Trotter's opinion. By decision dated May 13, 2009, OWCP vacated its January 22, 2009 decision and found a conflict of opinion between Dr. Chmell, for appellant, and Dr. Trotter, for the government, regarding the percentage of permanent impairment. It emphasized that "the case require[d] examination by an impartial medical specialist to resolve the conflict in medical opinion." However, on remand OWCP appointed a second opinion physician.

On December 29, 2009 OWCP selected Dr. Ubilluz, a Board-certified neurologist, as a second opinion specialist. Its January 29, 2010 referral letter advised appellant that a second opinion evaluation was needed in her case. Dr. Ubilluz submitted a March 3, 2010 report finding no permanent impairment of either arm. In its March 22, 2010 decision, OWCP accorded Dr. Ubilluz the weight of the medical evidence as impartial medical examiner.

The Board notes that Dr. Ubilluz served as a second opinion physician as demonstrated by OWCP's January 29, 2010 referral letter. The Board has found that there is no provision in FECA, OWCP's regulations or its procedures for designating a physician as an impartial medical evaluator on an after the fact basis.[14] Dr. Ubilluz was not an impartial medical specialist and his report is not entitled to special weight.

As the conflict between Dr. Chmell and Dr. Trotter remains unresolved, the case will be remanded to OWCP for selection of an impartial medical specialist to perform an impairment rating and schedule award calculation. Following this and any other development deemed necessary, OWCP will issue an appropriate decision in the case.

On appeal, appellant contends that Dr. Ubilluz's opinion was flawed and that OWCP should have accorded Dr. Chmell the weight of the medical evidence. As stated, Dr. Ubilluz's opinion cannot represent the weight of the medical evidence as he was not an impartial medical

[14] *See Joanne S. Rozell*e, 40 ECAB 931, 939 (1989). *See also David Alan Patrick*, 46 ECAB 1020, 1024 (1995); *Henry J. Smith, Jr.*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992) (when the Office does not notify a claimant of a physician's status as an impartial medical examiner, that physician may not serve as the impartial medical examiner. OWCP procedures are intended to assure a claimant's knowledge that a physician is an impartial medical examiner so that he or she may then choose to exercise the procedural right to participate in the selection of the impartial medical examiner).

examiner. The case will be returned to OWCP for further development to determine the appropriate percentage of upper extremity impairment.

CONCLUSION

The Board finds that the case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2010 is set aside, and the case remanded to OWCP for further development consistent with this decision.

Issued: July 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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