United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 11-181**
	)	**Issued: October 19, 2011**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, 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:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 29, 2010 appellant, through counsel, filed a timely appeal from the July 16, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 and nonmerit of this case.

ISSUE

The issue is whether appellant has established that he has more than four percent impairment of his left upper extremity, for which he received a schedule award.

On appeal, appellant's counsel contends OWCP erred in failing to secure a supplemental report from the independent medical examiner using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. Appellant, then a 57-year-old distribution clerk, filed an occupational disease claim alleging that he developed carpal tunnel syndrome due to his employment duties. OWCP accepted the claim for bilateral carpal tunnel syndrome and right cubital tunnel syndrome and authorized surgery which was performed on November 24, 2003. A schedule award was granted by OWCP for 20 percent impairment of the right upper extremity and no permanent impairment of the left upper extremity. That decision was affirmed on December 8, 2006 by an OWCP hearing representative.

In a November 15, 2007 decision, the Board set aside OWCP's December 8, 2006 decision finding that a conflict in medical opinion evidence had not properly been resolved.[2] Dr. David Weiss, a Board-certified orthopedic surgeon and appellant's treating physician, had calculated a 39 percent impairment of the right upper extremity and 35 percent impairment of the left upper extremity. Dr. Henry J. Magliato, an OWCP medical adviser, had found 15 percent impairment of the right and 15 percent of the left upper extremity. Dr. David A. Bundens, the impartial Board-certified orthopedic surgeon, found that appellant had a 24 percent permanent impairment of the right upper extremity and 0 percent impairment of the left upper extremity.[3] The Board found that Dr. Bundens had not adequately explained how he arrived at his impairment ratings and remanded the case to OWCP for further development. The facts and the circumstances of the case as set out in the Board's prior decision are incorporated herein by reference.

On return of the case record, OWCP requested clarification from Dr. Bundens as to how he arrived at his impairment rating and as to which specific tables he used from the fifth edition of the A.M.A., *Guides* in that determination. Dr. Bundens replied that his previous report clearly reflected how he had arrived at 24 percent impairment (not 20 percent), but provided no further explanation.

On October 1, 2008 OWCP found that a referral to a second impartial medical examiner was warranted due to Dr. Bundens failure to provide the requisite clarification on how he arrived at his impairment rating. It referred appellant to Dr. Thomas J. O'Dowd, a Board-certified orthopedic surgeon for resolution of the conflict between Dr. Weiss and OWCP's medical adviser, on the issue of appellant's upper extremity permanent impairment. In an October 21, 2008 report, Dr. O'Dowd, using the fifth edition of the A.M.A., *Guides*, found a 4.9 percent left upper extremity impairment and a 3.5 percent right upper extremity impairment using Tables 16-11, page 484 and 16-115, page 492.

On March 13, 2009 Dr. Morley Slutsky, a second OWCP medical adviser, reviewed Dr. O'Dowd's report and concurred with the impairment determinations for the left and right upper extremities but advised that, under OWCP procedures, impairment ratings were rounded to

[2] Docket No. 07-1531 (issued November 15, 2007).

[3] OWCP found that, although Dr. Bundens had found 24 percent impairment of the right upper extremity, when it added together the impairments used by Dr. Bundens to reach 24 percent the total was 20.4 percent. Accordingly, OWCP had granted 20 percent impairment to the right upper extremity.

the next highest percent. He therefore found a five percent impairment rating of the left upper extremity and four percent of the right. No schedule award was issued by OWCP at that time.

In a January 29, 2010 report, Dr. Weiss provided findings on physical examination and diagnosed bilateral carpal tunnel syndrome, right ulnar neuropathy and cumulative and repetitive trauma disorder. He determined that appellant had four percent left upper extremity impairment[4] using Table 15-23, page 449 for his bilateral carpal tunnel syndrome. In reaching the four percent, Dr. Weiss found a grade modifier of one for clinical studies, a grade modifier of two for functional history, a grade modifier of three for physical examination based on decreased pinch and a *Quick*DASH of 17. Combining the grade modifier results and averaging them resulted in two rendering a five percent rating of the left upper extremity. The *Quick*DASH score of 17, however, decreased the impairment to four percent.

On March 1, 2010 Dr. Magliata, the previous OWCP medical adviser, reviewed the impairment ratings from Dr. Weiss and concurred with the impairment determinations for appellant's right and left upper extremities.

By decision dated April 1, 2010, OWCP found appellant had no more than a 20 percent right upper extremity impairment and by decision dated April 5, 2010, OWCP granted appellant a schedule award for a four percent impairment of his left upper extremity.

In a letter dated April 9, 2010 appellant's counsel requested a written review of the record by an OWCP hearing representative concerning OWCP's April 5, 2010 left upper extremity schedule award.

By decision dated July 16, 2010, an OWCP hearing representative affirmed the April 5, 2010 schedule award determination for the left upper extremity.

LEGAL PRECEDENT

Under section 8107 of FECA[5] and section 10.404 of the implementing federal regulations,[6] schedule awards are payable for permanent impairment of specified body members,

[4] Dr. Weiss also found a nine percent right upper extremity impairment applying Table 15-23, page 449. Based on appellant's right median nerve wrist entrapment, he found a grade modifier of 1 for his test findings, a grade modifier of two for his history, a grade modifier of three for his physical examination findings due to decreased pinch and thumb abduction and a *Quick*DASH of 17. Combining the grade modifier resulted in a total of six. This is then averaged to result in two rendering a five percent rating. The *Quick*DASH score of 17 would decrease the impairment to four percent. Because the second compression neuropathy was in the same hand, the impairment rating was decreased by 50 percent resulting in two percent impairment. For appellant's right ulnar nerve entrapment neuropathy of the elbow, Dr. Weiss found a grade modifier of three for his test findings, a grade modifier of three for his history, a grade modifier of two for his physical examination findings due to decreased sensory and a *Quick*DASH of 17. Combining the grade modifiers resulted in a total of eight, which equated to an average of three or eight percent. The *Quick*DASH of 17 would decrease the impairment to seven percent. Combining the impairment ratings for the right wrist and right elbow resulted in a total nine percent right upper extremity impairment.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404

functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 permanent impairment.[7]

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).[8] 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).[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[10]

Section 8123(a) of FECA[11] 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] When 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.[13]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.[14] The Board has held that, to properly resolve a conflict in medical opinion, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*.[15]

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[7] *D.J.*, 59 ECAB 620 2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[8] A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] A.M.A., *Guides* (6th ed.), pp. 383-419.

[10] *Id.* at page 411.

[11] 5 U.S.C. §§ 8101-8193

[12] *Id.* at § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003); *J.J.*, Docket No. 09-27 (issued February 10, 2009).

[13] *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002); *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[15] *See V.G.*, 59 ECAB 635 (2008); *Richard R. LeMay*, 56 ECAB 341 (2005).

ANALYSIS

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and right cubital tunnel syndrome. The Board previously remanded the case as the conflict in the medical opinion evidence regarding the percentage of employment-related impairment had not been properly resolved. On remand OWCP requested clarification from Dr. Bundens, a Board-certified orthopedic surgeon, as to how he arrived at his determination that appellant had a 20 percent right upper extremity impairment. When Dr. Bundens failed to explain his impairment determination, OWCP properly referred appellant to Dr. O'Dowd for a second impartial medical examination.[16]

In his October 21, 2008 report, Dr. O'Dowd, using the fifth edition of the A.M.A., *Guides* found a 4.9 percent impairment to the left upper extremity and a 3.5 percent of the right upper extremity. On March 13, 2009 Dr. Slutsky reviewed Dr. O'Dowd's opinion and concurred with his impairment determination, but rounded the impairment ratings up to five percent for the left and four percent for the right respectively. Subsequently OWCP received a January 29, 2010 report from Dr. Weiss who found a four percent left upper extremity impairment using the sixth edition of the A.M.A., *Guides*. In the March 1, 2010 report, Dr. Magliato, another OWCP medical adviser concurred with Dr. Weiss' impairment determination. By decision dated April 5, 2010, OWCP granted appellant a schedule award for four percent impairment of his left upper extremity, which was affirmed by an OWCP hearing representative on July 16, 2010.

Appellant's attorney contends that OWCP erred in failing to request that Dr. O'Dowd provide a supplemental report using the sixth edition of the A.M.A., *Guides*. In *Harry D. Butler*,[17] the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[18] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.[19] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.

No effort was made by OWCP to obtain a supplemental report from the previously designated independent medical examiner, Dr. O'Dowd, using the sixth edition. As Dr. O'Dowd had been selected to resolve the conflict in the medical opinion evidence, OWCP should have requested him to provide a supplemental report using the sixth edition of the A.M.A., *Guides*. Moreover, Drs. Weiss and Dr. Magliata were both involved in the original conflict in medical

[16] *See L.R. (E.R.)*, 58 ECAB 369 (2007); *Charles Feldman*, 28 ECAB 314 (1977).

[17] 43 ECAB 859 (1992).

[18] *Id*. at 866.

[19] FECA Bulletin No. 09-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

opinion evidence. Additional reports from physicians who had been on one side of the original conflict in medical opinion are insufficient to resolve the conflict.[20] The case accordingly will be remanded to the Office to obtain a supplemental report from Dr. O'Dowd using the correct version of the A.M.A, *Guides*.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 16, 2010 be set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: October 19, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[20] *Harrison Combs, Jr*., 45 ECAB 716 (1994); *see Richard R. LeMay, supra* note 15