United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 11-172**
	)	**Issued: September 29, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, Employer	)	

Appearances:
J. Steven Huffines, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 27, 2010 appellant filed a timely appeal from July 14 and October 26, 2010 Office of Workers' Compensation Programs' (OWCP) merit decisions regarding her schedule award claim. 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 the claim.

ISSUE

The issue is whether appellant has more than four percent impairment of the right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On April 7, 1999 appellant, then a 45-year-old mail processor, filed an occupational disease claim alleging injury while repetitively traying and stamping mail. OWCP accepted the claim for right neuropathy, right nerve decompression and right bicipital tendinitis and paid

[1] 5 U.S.C. §§ 8101-8193.

compensation benefits including authorizing a March 23, 2000 anterior transposition of the ulnar nerve, right elbow. By decision dated May 23, 2005, OWCP determined that appellant's modified mail processing clerk position effective March 21, 2005 fairly and reasonably represented her wage-earning capacity.

On June 28, 2008 appellant filed a claim for a schedule award. In a June 7, 2008 report, Dr. Robert Macht, a Board-certified surgeon, opined that appellant had 19 percent permanent impairment of the right arm under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). This was comprised of 6 percent for sensory loss, 12 percent for weakness and 3 percent for pain, for a total combined impairment of 19 percent.

In a November 11, 2008 report, Dr. David L. Gold, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed appellant's history, medical records and presented examination findings. Based on the fifth edition of the A.M.A., *Guides*, he opined that appellant had 10 percent right arm impairment due to entrapment neuropathy of the ulnar nerve.

On January 11, 2009 an OWCP medical adviser reviewed the medical record and opined that appellant had four percent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides*. He indicated that there was only evidence of a grade 3 sensory impairment without motor loss. The medical adviser indicated that, while Dr. Macht had found weakness, Dr. Gold did not.

By decision dated January 30, 2009, OWCP issued a schedule award for four percent right upper extremity impairment. The period of the award ran from November 11, 2008 to February 6, 2009 for a total of 12.48 weeks.

Appellant requested an oral hearing. By decision dated April 7, 2009, an OWCP hearing representative vacated the January 30, 2009 decision and remanded the case for referral to an impartial medical specialist to resolve a conflict between Dr. Macht and Dr. Gold and an OWCP medical adviser.

OWCP referred appellant to Dr. John C. Gordon, a Board-certified orthopedic surgeon, for an impartial medical examination. In a May 4, 2009 report, Dr. Gordon opined that appellant had 17 percent permanent impairment of the right upper extremity based on the fifth edition of the A.M.A., *Guides*. In letters dated May 28 and July 22, 2009, OWCP advised Dr. Gordon that the sixth edition of the A.M.A., *Guides* became effective on May 1, 2009 and requested that he provide a report with an impairment rating based on the sixth edition. An upper extremity worksheet was enclosed. On August 21, 2009 OWCP faxed a copy of its July 22, 2009 letter to Dr. Gordon and, on September 28, 2009, followed up on the status of the report. On October 5, 2009 it received another copy of Dr. Gordon's May 4, 2009 report. In an October 8, 2009 letter, OWCP again requested that Dr. Gordon submit a supplemental impairment report. Several times from November 3, 2009 to January 26, 2010, it telephoned Dr. Gordon's office to check on the status of the supplemental report. In February 4 and March 4, 2010 letters, OWCP repeated its request that Dr. Gordon provide a supplemental report. No supplemental report was received.

On April 5, 2010 OWCP referred appellant to Dr. Zia Zakai, a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 21, 2010 report, Dr. Zakai noted the history of injury, her review of the medical record and presented his examination findings. He diagnosed ulnar nerve neuropathy, right elbow, as confirmed by electromyogram, and status post anterior transposition of the ulnar nerve with residual, right elbow, which appellant underwent March 23, 2000. Dr. Zakai indicated that the date of maximum medical improvement was March 2001 and there was some persistent paresthesia with diminished sensation and some weakness in grip. Using the sixth edition of the A.M.A., *Guides*, he opined that appellant had five percent permanent impairment of the right upper extremity under Table 15-21, page 443. Dr. Zakai assigned a grade modifier 2 for ulnar peripheral nerve impairment history; grade modifier 3 for physical findings based on decreased sensation and nerve conduction block; and a *Quick*DASH score of 32 using the middle value for the grade.

In a May 11, 2010 report, an OWCP medical adviser reviewed Dr. Zakai's report and, using the examination findings, opined that appellant had four percent impairment under Table 15-23, page 449 of the sixth edition of the A.M.A., *Guides*. He stated that the physical examination findings did not support assignment of a grade modifier three. The medical adviser assigned a grade 2 physical findings modifier for sensory deficits only. He explained despite Dr. Zakai's finding of motor deficit based on grip strength deficit, there was no objective evidence of motor deficit and no documented objective findings relative to motor deficit to consider in rating impairment for the ulnar nerves.

In a May 11, 2010 letter, OWCP requested Dr. Zakai provide a supplemental report addressing the physical findings assignment of grade 3. It asked Dr. Zakai to comment on the OWCP medical adviser's assessment of physical findings under Table 15-23 and the type of testing that he performed and the manner in which he determined motor deficit. In a May 18, 2010 report, Dr. Zakai addressed appellant's motor deficit. He stated that appellant's grip was weak and intrinsic function of the hand. After manual testing and noticing weakness, Dr. Zakai measured her strength on dynameter, which was two kilograms (kgs) on the right and five kgs on the left. He stated that the weakness in appellant's hands was caused by musculature supplied by the ulnar nerve.

In a June 29, 2010 report, OWCP's medical adviser reviewed Dr. Zakai's May 18, 2010 report, and again opined that appellant had four percent permanent right arm impairment under Table 15-23 page 449 of the sixth edition of the A.M.A., *Guides*. He concluded that "if there was a grade modifier [three] for physical findings based on weakness this would not alter the final rating." The medical adviser explained that physical findings were based on observations of decreased strength or atrophy or weakness, not nerve conduction block. In defining grade modifier three for physical findings, Dr. Zakai did not make reference to atrophy or weakness. In his clinical report, there was no objective clinical documentation of motor deficit, rather only a single grip strength was reported. Grip strength is not used as a factor for rating or adjusting impairment in the sixth edition. Thus, the physical findings grade modifier would be grade 2 for sensory deficits. The medical adviser stated that, if there was weakness present, then there could be an assignment of grade modifier 3. The grade modifiers are added together for a total of 7, with an average of 2.33. Therefore, the final grade modifier class is two based on Table 15-23 criteria. The medical adviser agreed that a *Quick*DASH score of 32 was reasonable as it reflected a mild impairment consistent with appellant's complaints. Thus, the functional scale would be

used to decrease the default rating of five percent arm impairment to four percent arm impairment.

In a July 14, 2010 decision, reissued on October 26, 2010, OWCP denied appellant's claim for an additional schedule award in excess of that previously paid.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations[2] 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[3] 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.[4] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[5]

The sixth edition requires identifying 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).[6] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[7]

If there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician who shall make an examination.[8] When 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.[9]

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[2] 20 C.F.R. § 10.404.

[3] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

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

[5] 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).

[6] A.M.A., *Guides* 494-531.

[7] *Id.* at 521.

[8] 5 U.S.C. § 8123(a).

[9] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

When OWCP 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, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[10] However, when the impartial specialist is unable to clarify or elaborate on the original report or if a supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[11]

OWCP procedures indicate that referral to OWCP's medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained. Where a medical conflict is present, 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*.[12] OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical examiner.[13]

ANALYSIS

Appellant's claim was accepted for right neuropathy, right nerve decompression and right bicipital tendinitis and she underwent approved anterior transposition of the ulnar nerve of the right elbow March 23, 2000. She received a schedule award for four percent right upper extremity impairment. Appellant disagreed with the award and requested a hearing before an OWPC hearing representative, who found that a conflict in medical opinion existed between Dr. Macht and Dr. Gold and the OWCP medical adviser concerning her impairment. OWCP properly referred appellant to an impartial medical specialist to resolve the conflict in medical opinion.

Dr. Gordon, the first impartial medical specialist, provided an impairment rating under the fifth edition of the A.M.A., *Guides.* Because he did not apply the proper edition of the A.M.A., *Guides*, his report was insufficient to resolve the conflict. OWCP made multiple attempts to obtain a supplemental report from Dr. Gordon that applied the sixth edition of the A.M.A., *Guides*, but Dr. Gordon was not responsive. Consequently, it properly referred appellant to Dr. Zakai.[14] On appeal, appellant's attorney argues that it was unfair to calculate appellant's award under the sixth edition of the A.M.A., *Guides.* The sixth edition of the A.M.A., *Guides* became effective May 1, 2009. FECA Bulletin No. 09-3 provides that any

[10] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner* (*Jack D. Lackner*), 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[11] *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010), Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

[13] *See Thomas J. Fragale*, 55 ECAB 619 (2004).

[14] *See supra* notes 10, 11.

initial schedule award decision issued on or after May 1, 2009 will be based on the sixth edition of the A.M.A., *Guides* even if the amount of the award was calculated prior to that date.[15]

Dr. Zakai, the second impartial specialist, opined that appellant had five percent permanent partial impairment of the right upper extremity under Table 15-21, page 443, of the sixth edition of the A.M.A., *Guides*, which is for peripheral nerve impairments. OWCP's medical adviser reviewed Dr. Zakai's reports and opined that appellant had four percent impairment of the right upper extremity under Table 15-23, page 449, which is for entrapment/compression neuropathy impairment.

The Board finds this case is not in posture for decision. In his April 21, 2010 report, it is not clear whether Dr. Zakai properly used Table 15-21, page 443, to rate appellant's impairment as he did not fully explain why a peripheral nerve impairment diagnosis was appropriate, he did not specify the precise provision for the ulnar nerve that he used on page 443, and he did not fully explain how grade modifiers determined and used in reaching the impairment rating. On May 11, 2010 OWCP's medical adviser expressed reservation about the use of Table 15-21, finding that Table 15-23 was more appropriate, and also asserted that the physical examination grade modifier should be two instead of three as found by Dr. Zakai. On May 11, 2010 OWCP asked Dr. Zakai to comment on OWCP's medical adviser's assessment of physical findings under Table 15-23 and the type of testing that he performed and the manner in which he determined motor deficit. In his May 18, 2010 report, Dr. Zakai addressed the testing he performed, noting his findings that supported right arm weakness in musculature supplied by the ulnar nerve. He did not clarify whether Table 15-23 was appropriate or whether OWCP's medical adviser's finding of four percent right arm impairment was appropriate under Table 15-23. Thereafter, the medical adviser noted Dr. Zakai's findings and reiterated that appellant had no more than four percent right arm impairment. The Board finds that Dr. Zakai did not adequately explain his impairment rating in his initial or supplemental report. As noted, Dr. Zakai did not fully explain how he determined his impairment rating under specific provisions of the A.M.A., *Guides*. Furthermore, the Board finds that OWCP's medical adviser improperly substituted his own judgment for that of the impartial medical examiner as he changed the basis of and reduced Dr. Zakai's rating. The role of the medical adviser is to verify the correct application of the A.M.A., *Guides*. It is the impartial medical specialist, however, who must resolve the conflict on the degree of permanent impairment in accordance with the A.M.A., *Guides*.[16]

Consequently, the conflict in medical evidence is unresolved and the case will be remanded to OWCP to secure a supplemental report from Dr. Zakai further explaining his impairment rating consistent with the A.M.A., *Guides*. If Dr. Zakai is unable to provide an appropriate opinion, OWCP should refer the case to another impartial medical examiner.[17] After

[15] FECA Bulletin No. 09-03 (issued March 15, 2009); *see supra* note 5.

[16] *See Richard R. LeMay*, 56 ECAB 341 (2005); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

[17] *See Nancy Keenan*, *supra* note 11.

such further development as may become necessary, OWCP shall issue an appropriate final decision on the extent of appellant's permanent impairment of the right arm.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2010 decision of the Office of Workers' Compensation Programs reissued October 26, 2010 be set aside and the case remanded for further action consistent with this opinion.

Issued: September 29, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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