United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 11-330**
	)	**Issued: September 27, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 23, 2010 appellant filed a timely appeal from a September 16, 2010 schedule award 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 of the schedule award decision.

ISSUES

The issues are: (1) whether appellant established that he has more than an eight percent impairment of the right arm or an eight percent impairment of the left arm for which he received schedule awards; and (2) whether OWCP properly determined the date of maximum medical improvement and his rate of pay.

On appeal appellant's attorney asserts that OWCP should have adjudicated appellant's schedule award under the fifth edition of the American Medical Association, *Guides to the*

[1] 5 U.S.C. §§ 8101-8193.

Evaluation of Permanent Impairment (hereinafter A.M.A., *Guides*),[2] rather than the sixth edition of the A.M.A., *Guides*.[3] He further contended that cost-of-living adjustments should have been applied to appellant's schedule award since the adjustments went through 2000 but the date of the schedule award decision was in September 2010.

FACTUAL HISTORY

On May 8, 1998 appellant then a 48-year-old letter carrier, filed an occupational disease claim for bilateral carpal tunnel syndrome. A May 6, 1998 electromyographic (EMG) study demonstrated bilateral carpal tunnel syndrome affecting both motor and sensory fibers with no evidence of diffuse peripheral polyneuropathy in the upper extremities and no evidence of C8-T1 radiculopathy on either side. By decision dated April 8, 1999, an OWCP hearing representative accepted bilateral carpal tunnel syndrome. On March 23, 1999 Dr. Abram E. Kirschenbaum, Board-certified in orthopedic and hand surgery, performed a right carpal tunnel release. On May 18, 1999 he performed a surgical release on the left. Appellant returned to modified duty.

Appellant filed a schedule award claim on May 14, 2002. On June 5, 2002 OWCP advised him of the medical evidence needed to support an impairment rating and asked that he provide a recent evaluation. In a November 5, 2002 report, Dr. Arthur H. Tiger, a Board-certified orthopedic surgeon, provided physical examination findings. He noted that appellant had a positive Phalen's sign, persistent bilateral thumb numbness, diminished grip strength, bilateral thenar atrophy and sensory loss in the median nerve distribution in each hand. He advised that, in accordance with the A.M.A., *Guides*, appellant had 30 percent impairment of both the right and left upper extremities.

In a July 17, 2005 report, an OWCP medical adviser stated that no objective hand data was provided by Dr. Tiger for an impairment rating. By report dated May 24, 2006, Dr. Kirschenbaum noted appellant's report that he had some triggering in his right index, middle and ring fingers over the past year, no numbness or tingling and that he recently began a desk job because of ankle problems. He provided physical examination findings of the upper extremities, noting no significant swelling or scar tenderness. Sensory and motor examination of each hand was normal with minimal triggering in the right middle finger solely. Tinel's and Phalen's signs were negative. Dr. Kirschenbaum diagnosed favorable outcome following bilateral carpal tunnel releases with minimal triggering in the right middle finger which did not require treatment.

On November 13, 2007 appellant filed a second schedule award claim and submitted an August 28, 2007 report from Dr. David Weiss, an osteopath, who advised that in accordance with the fifth edition of the A.M.A., *Guides*, appellant had a grade 2 sensory deficit of the right median nerve of 31 percent, an III/V motor strength deficit of right thumb abduction of 18 percent, a right lateral pinch deficit of 20 percent, for a combined right upper extremity impairment of 55 percent. Dr. D. Weiss found that appellant had a grade 2 sensory deficit of the left median nerve of 31 percent, an IV/V motor strength deficit of left thumb abduction of 9 percent, a left lateral pinch deficit of 20 percent, for a total 50 percent left upper extremity

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

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

impairment. He provided *Quick*DASH scores of 76 percent impairment on the right and 72 percent on the left and advised that maximum medical improvement was reached on August 28, 2007.

On December 28, 2007 Dr. Henry J. Magliato, an OWCP medical adviser Board-certified in orthopedic surgery, reviewed the medical record including Dr. D. Weiss' August 28, 2007 report. He noted that Dr. Kirschenbaum, the treating orthopedic surgeon, who performed both hand surgeries, advised on May 22, 2006 that appellant's sensory and motor examination were normal. Dr. Magliato found that it was hard to believe that appellant's extremities could have deteriorated to the degree found by Dr. D. Weiss. He stated that maximum medical improvement was probably reached on May 22, 2006 and recommended a second opinion evaluation.

OWCP referred appellant to Dr. Andrew B. Weiss, a Board-certified orthopedic surgeon, for an impairment evaluation. In a February 11, 2008 report, Dr. A. Weiss noted the history of injury, reviewed the medical record, and listed appellant's complaint of right wrist pain with no complaints of left wrist pain or numbness, tingling or burning in either wrist or hand. He provided upper extremity examination findings noting negative median nerve compression tests, negative Phalen's tests, and negative Tinel's signs bilaterally. Dr. A. Weiss found normal range of motion of the fingers and thumbs, and no evidence of de Quervain's disease in either wrist or thumb with negative Finkelstein's tests and no evidence of finger or thumb locking or triggering in either hand. He diagnosed status post surgical release, bilateral carpal tunnel syndrome, with no clinical symptomatology of active carpal tunnel syndrome in either wrist or hand. Dr. A. Weiss advised that, although maximum medical improvement had been reached, he was unable to determine a date, and concluded that appellant had no impairment, based on the fifth edition of the A.M.A., *Guides*.

In a March 14, 2008, Dr. Arnold T. Berman, an OWCP medical adviser and Board-certified orthopedic surgeon, reviewed the medical record, including Dr. A. Weiss' February 11, 2008 report. Dr. Berman advised that, in accordance with the fifth edition of the A.M.A., *Guides*, appellant had a 10 percent right impairment of each upper extremity due to residual pain.

In letters dated December 10, 2009 and January 25, 2010, OWCP informed appellant that, effective May 1, 2009, impairment evaluations were to be completed in accordance with the sixth edition of the A.M.A., *Guides*, and asked that his physician provide an appropriate report.

On April 22, 2010 Dr. D. Weiss updated his August 28, 2007 report.[4] He diagnosed cumulative and repetitive trauma disorder and bilateral carpal tunnel syndrome with surgical releases. Dr. D. Weiss advised that maximum medical improvement was achieved on August 28, 2007 and that, in accordance with Table 15-23 of the sixth edition of the A.M.A., *Guides*, appellant had entrapment neuropathy of the right and left median nerves at the wrist. He determined that appellant had a grade 3 modifier for test findings, a grade 3 modifier for history, and a grade 3 modifier for physical examination on the right due to decreased thumb abduction and physical examination, and a grade 3 modifier on the left due to atrophy, for a total of 9. Dr. D. Weiss then found an average of three or an eight percent impairment of each upper

[4] Dr. D. Weiss did not reexamine appellant.

extremity. He also noted that a *Quick*DASH score of 76 and 72 on the right and left respectively also yielded an eight percent impairment of each upper extremity.

On May 7, 2010 Dr. Robert Y. Pick, an OWCP medical adviser Board-certified in orthopedic surgery, reviewed the record, including the April 22, 2010 report of Dr. D. Weiss. He advised that maximum medical improvement was reached within six months of appellant's May 23, 1999 carpal tunnel release, or no later than December 31, 1999. Dr. Pick agreed that under Table 15-23, grade 3 modifiers were appropriate for history and physical findings. He used a grade 2 modifier for test results, based on the May 6, 1998 EMG study, rather than the grade 3 found by Dr. Weiss. OWCP's medical adviser then totaled the modifiers and found an average of 2.67, which he rounded up to 3, and concluded that this also resulted in an eight percent impairment of each upper extremity.

In letters dated June 22 and August 16, 2010, OWCP forwarded Dr. Pick's report to Dr. D. Weiss and asked that he respond to Dr. Pick's conclusion that maximum medical improvement was reached on December 31, 1999. By letter dated August 13, 2010, Dr. D. Weiss advised that he agreed with Dr. Pick's assessment that appellant reached maximum medical improvement on December 31, 1999.

By decision dated September 16, 2010, appellant was granted a schedule award for an eight percent impairment of the right upper extremity and an eight percent impairment on the left. The award was for 49.92 weeks, to run from December 31, 1999 to December 14, 2000.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] 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. However, FECA 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 for all claimants, OWCP adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] For decisions issued after May 1, 2009, the sixth edition will be used.[9]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[10] In Table 15-23, grade modifiers levels (ranging from zero to four) are described for the categories

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[9] FECA Bulletin No. 09-03 (issued March 15, 2009).

[10] A.M.A., *Guides*, *supra* note 3 at 449.

test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[11]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[12]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. On May 14, 2002 appellant filed a schedule award, and by decision dated September 16, 2010, he was granted a schedule award for an eight percent impairment of the right upper extremity and an eight percent impairment on the left.

Regarding appellant's argument on appeal that the fifth edition of the A.M.A., *Guides* should be used in assessing his impairment, the Board notes that the method used in rating impairment for purposes of a schedule award is a matter which rests in the sound discretion of the Director. In the case *Harry D. Butler*,[13] the Board addressed OWCP's use of the A.M.A., *Guides* to evaluate impairment since the first edition single volume published in 1971. The Director has adopted the subsequent editions of the A.M.A., *Guides* and stated the specific date when use of each edition should be made applicable to claims under FECA. Appellant has not established that the Director abused the discretion delegated under section 8107 or the implementing federal regulations to make the sixth edition of the A.M.A., *Guides* applicable to all claimants as of May 1, 2009. The fact that the sixth edition revises the evaluation methods used in previous editions does not establish an abuse of discretion. As noted in FECA Bulletin No. 09-03,[14] the American Medical Association periodically revises the A.M.A., *Guides* to incorporate current scientific clinical knowledge and judgment and to establish standardized methodologies for calculating permanent impairment.

The sixth edition of the A.M.A., *Guides* became effective on May 1, 2009.[15] The only medical reports of record that comport with an impairment analysis in accordance with the sixth edition are those of Dr. D. Weiss, appellant's physician, dated April 22, 2010, and that of Dr. Pick, an OWCP medical adviser, dated May 7, 2010. Both physicians properly applied the standards of the sixth edition and utilized Table 15-23 and addressed the appropriate grade

[11] *Id*. at 448-50.

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

[13] 43 ECAB 859 (1992).

[14] *Supra* note 10.

[15] *Id*.

modifiers. While their individual analyses may have differed to a minor extent regarding the modifier for test results, this did not result in a different impairment rating. Each concluded that appellant had an eight percent impairment of the right upper extremity and an eight percent impairment on the left.

As there is no additional probative medical evidence regarding appellant's entitlement to a schedule award under the sixth edition of the A.M.A., *Guides*, OWCP properly found that he was entitled to an eight percent impairment for each upper extremity.[16]

LEGAL PRECEDENT -- ISSUE 2

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to the date of the evaluation by the attending physician which is accepted as definitive by OWCP.[17] The Board has noted a reluctance to find a date of maximum medical improvement, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board requires persuasive proof of maximum medical improvement of the selection of a retroactive date of maximum medical improvement.[18]

ANALYSIS -- ISSUE 2

Regarding appellant's argument on appeal that he is entitled to cost-of-living adjustments to his schedule award pay rate through 2010, as noted above, the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury.[19] The Board has noted a reluctance to find a date of maximum medical improvement which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits.[20] In this case, the record contains persuasive evidence of maximum medical improvement reached in 1999. OWCP's medical adviser, Dr. Pick, advised that maximum medical improvement was reached within six months of appellant's May 23, 1999 carpal tunnel release, or no later than December 31, 1999. Dr. D. Weiss, an attending physician, agreed with this conclusion on August 13, 2010.

The determination of maximum medical improvement rests with the medical evidence. As the two physicians, who provided impairment ratings in accordance with the sixth edition of

[16] *See B.C.*, Docket No. 10-2061 (issued May 19, 2011).

[17] *Mark A. Holloway*, 55 ECAB 321 (2004).

[18] *P.C.*, 58 ECAB 529 (2007).

[19] *Mark A. Holloway*, *supra* note 17.

[20] *P.C.*, *supra* note 18.

the A.M.A., *Guides*, advised that maximum medical improvement was reached on December 31, 1999, the Board finds this evidence clear and convincing such that it was proper for OWCP to begin payment for his schedule award at that time.[21]

Appellant may request an increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in an increased impairment.

CONCLUSION

The Board finds that appellant has no more than an eight percent permanent impairment of the each upper extremity, and that OWCP properly determined the date of maximum medical improvement.

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 27, 2011
Washington, DC

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

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

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

[21] *L.H.*, 58 ECAB 561 (2007).