United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 11-387**
	)	**Issued: September 29, 2011**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kansas City, MO, Employer	)	

Appearances:
Appellant, pro se
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 December 7, 2010 appellant filed a timely appeal from the August 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of her 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. The Board also has jurisdiction to review OWCP's October 25, 2010 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether appellant has more than five percent impairment of her right upper extremity; and (2) whether OWCP properly denied her September 20, 2010 request for reconsideration.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 28, 2008 appellant, a 59-year-old flat sorter clerk, filed a claim for workers' compensation benefits alleging that she developed carpal tunnel syndrome as a result of the physical demands of her duties.

On August 18, 2008 appellant saw her family physician, Dr. William Soper. She complained of right hand pain and stated that her fingers had been going numb for the past five months. The history of appellant's present illness was one of persistent numbness and tingling in the thumb, index and long fingers of her right hand. On physical examination, she showed full range of motion, no weakness and no demonstrable sensory deficit. Dr. Soper ordered clinical studies.

On August 25, 2008 nerve conduction studies of the right median nerve revealed marked prolongation of the distal motor latency and an unrecorded sensory response. Needle examination of the right upper extremity revealed decreased recruitment in the abductor pollicis brevis. The impression was severe right median neuropathy with compression at the wrist, consistent with carpal tunnel syndrome.

OWCP accepted appellant's claim for right carpal tunnel syndrome.

On October 27, 2008 appellant advised Dr. Soper that she was reluctant to have surgery. She was on vacation and her hand and wrist felt fine. An examination showed a moderately positive Tinel's sign. On November 17, 2008 this sign was markedly positive.

Dr. Paul F. Nassab, an orthopedic surgeon, examined appellant on February 16, 2009. He noted that she had pain in her hands and numbness in her index and middle finger for years. Appellant stated that a change in equipment at work had lessened her symptoms. She no longer woke up with numbness or tingling. Dr. Nassab found no significant atrophy of the thenar eminence or hypothenar eminence. Appellant could abduct and adduct all of her digits. She could oppose her thumb to her small finger. Appellant had no carpal tunnel compression but a slight Tinel's sign at her wrist. She had two-point discrimination of seven to eight millimeters in all digits, radial and ulnar side, that were innervated by the median nerve. The ulnar two digits had two-point discrimination in the four-to-five-millimeter range. Dr. Nassab diagnosed severe carpal tunnel syndrome, by electromyogram and less so by symptoms.

Appellant underwent a surgical release on May 18, 2009. On July 1, 2009 Dr. Nassab found that she was actually doing very well but showed no significant improvement in her numbness and tingling. He stated: "I think it is going to get better regularly. I am going to release her to full duties and we will see her back on [an as needed] basis. [Appellant] is put at her [maximum medical improvement]."

Appellant filed a claim for a schedule award. On November 17, 2009 Dr. Nassab rated her impairment: "The permanent partial disability of the patient listed above is 20 percent of the right wrist based on the [sixth] [e]dition of the A[merican] M[edical] A[ssociation,] *Guides* [*to the Evaluation of Permanent Impairment*]."

An OWCP medical adviser noted that appellant had no clinical testing following her operation, so her impairment could not be rated under Table 15-23, page 449 of the A.M.A., *Guides* (6th ed. 2009). So he turned to Table 15-21, page 438, to rate peripheral nerve impairment of the median nerve "below the midforearm -- entire nerve." As Dr. Nassab had reported no motor deficit but only mild sensory deficit, the medical adviser considered the default impairment value of five percent of the right upper extremity applying a reasonable exercise of medical judgment.

On February 19, 2010 OWCP issued a schedule award for five percent impairment of appellant's right upper extremity.

Appellant requested reconsideration, asking why there was such a discrepancy between her surgeon's rating of 20 percent and OWCP's medical adviser's rating of 5 percent.

In a decision dated August 19, 2010, OWCP reviewed the merits of appellant's case and denied modification of her schedule award. It found that evidence submitted after the February 19, 2010 schedule award offered no basis for modification.

On September 20, 2010 appellant again requested reconsideration. She stated that there was still a discrepancy in her case. Both doctors used the sixth edition of the A.M.A., *Guides*, but one found 20 percent impairment, the other found 5 percent impairment. Appellant added that she still had numbness in her right thumb, index and middle fingers and once in a while there was tingling in her right hand.

On October 25, 2010 OWCP denied appellant's request for reconsideration. It found that her latest request for reconsideration did not meet one of the standards for reopening her case for a merit review of the most recent OWCP decision.

On appeal, appellant argues that Dr. Nassab performed her surgery, while OWCP medical adviser, who never saw her, simply looked in a book. She noted that there was quite a discrepancy in their ratings.

LEGAL PRECEDENT -- ISSUE 1

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.[2] Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[3] As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition of the A.M.A., *Guides*.[4]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

ANALYSIS -- ISSUE 1

FECA authorizes the payment of schedule awards for the loss or permanent impairment of specified members, functions or organs of the body, but neither FECA nor its regulations specify how the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP has adopted the A.M.A., *Guides* as the standard for determining the percentage of impairment, and the Board has concurred in such adoption.[5]

The use of this book is necessary to treat all claimants fairly. Dr. Nassab, the orthopedic surgeon, stated that appellant had 20 percent impairment based on the sixth edition of the A.M.A., *Guides*. A physician is required to explain how he reaches a rating. Dr. Nassab's single declaratory sentence that appellant's impairment was 20 percent falls far short of the information needed to demonstrate how he determined his rating under the A.M.A., *Guides*.

Entrapment or compression neuropathies such as carpal tunnel syndrome are rated under section 15.4f of the A.M.A., *Guides*, specifically, using Table 15-23 and the rating process described on page 448.[6] It is important to note that the highest impairment rating a claimant may receive for carpal tunnel syndrome is nine percent, a rating reserved for axon loss on electrodiagnostic studies, a history of constant significant symptoms, atrophy or weakness on physical examination, and a subjective assessment of the severest functional symptoms. Dr. Nassab's rating of 20 percent is simply not possible under the A.M.A., *Guides*.

OWCP's medical adviser did not rely on Table 15-23 because there were no postoperative electrodiagnostic studies, but postoperative studies are not required to rate impairment for focal nerve compromise syndromes. The A.M.A., *Guides* explains that the most recent preoperative electrodiagnostic test should be used in the impairment rating.[7] The medical adviser relied on Table 15-21, but the A.M.A., *Guides* prohibits rating nerve entrapments under that section.[8]

Appellant's preoperation studies are not, however, sufficient to establish more than a Grade 1 or mild impairment under Table 15-23. As the record does not support constant or significant intermittent symptoms (her hand and wrist felt fine while on vacation, she no longer woke up with numbness and tingling, she still had numbness and once in while had tingling), her history appears to fall in the Grade 1 or mild category. Physical findings did not establish atrophy or weakness but did show decreased sensation, indicating a Grade 2 or moderate

[5] *E.g., J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[6] If no preoperative nerve conduction testing has been performed, or it does not meet the diagnostic criteria for carpal tunnel syndrome, there is no ratable impairment under section 15.4f. Such cases, however, may still be rated under section 15.2, Diagnosis-Based Impairment, and with the appropriate regional grid, using the diagnosis of nonspecific hand, wrist or elbow pain, depending on the affected region. A.M.A., *Guides* 433, 445.

[7] *Id*. at 448 (unless postoperative studies were done for a clinical indication of failure to improve with surgery and the postoperative study is clearly worse than the preoperative, in which rare instance the postoperative study is used).

[8] Section 15.4e, including Table 15-21, is not used for nerve entrapments since nerve entrapments are not isolated traumatic events. *Id*. at 429.

impairment. The average of these three grades (1, 1, 2), rounded to the nearest integer, is a Grade 1 or mild impairment. The default value for such an impairment is two percent.[9] This is the best estimate of appellant's impairment from the information available in her record.

If preoperative studies did establish a motor conduction block (Grade 2) or axon loss (Grade 3), appellant's impairment would rise to the moderate level with a default value of 5 percent, which is what the medical adviser recommended (by other means) and what appellant ultimately received. This may be a little more than the record strictly allows; nonetheless, it can be stated that, having received a schedule award for a five percent impairment, she is entitled to nothing more.

Accordingly, the Board finds that the evidence fails to establish more than a five percent impairment of appellant's right upper extremity. The Board will affirm OWCP's August 19, 2010 decision denying modification of her schedule award.

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 permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.[10] An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[11]

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.[12] A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[13]

[9] As Dr. Nassab did not administer a *Quick*DASH questionnaire to obtain a functional scale score, default impairment values are not adjusted.

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606.

[12] *Id*. at § 10.607(a).

[13] *Id*. at § 10.608.

ANALYSIS -- ISSUE 2

Appellant made her request for reconsideration within one year of OWCP's August 19, 2010 schedule award, so the request is timely. The question is whether this request met at least one of the standards for obtaining a merit review of her case.

In her September 20, 2010 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that OWCP erroneously applied or interpreted it. Appellant did not advance a new and relevant legal argument. She argued that there was still a discrepancy in her case, that one of the doctors was wrong, that she was not a statistic, and that she still had numbness and sometimes tingling, but she did not present OWCP with a new and relevant legal argument. Appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. The issue in her case was the extent of her impairment under the sixth edition of the A.M.A., *Guides*, and she submitted no further medical evaluation of that impairment.

Accordingly, the Board finds that appellant's September 20, 2010 request for reconsideration met none of the standards for obtaining a merit review of her case. As OWCP properly denied her request, the Board will affirm OWCP's October 25, 2010 decision.

CONCLUSION

The Board finds that the evidence fails to support more than a five percent impairment of appellant's right upper extremity. The Board also finds that OWCP properly denied appellant's September 20, 2010 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the October 25 and August 19, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

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