United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 12-1211**
	)	**Issued: November 15, 2012**
U.S. POSTAL SERVICE, POST OFFICE ANNEX, Egg Harbor Township, 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:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 9, 2012 appellant, through her counsel, timely appealed the January 10, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed a schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 (2011), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has greater than 13 percent impairment of the right upper extremity (RUE).

FACTUAL HISTORY

Appellant, a 57-year-old bulk mail technician, injured her right shoulder in the performance of duty on or about October 1, 2004. OWCP accepted her claim for right shoulder (sprain) joint disorder. On October 27, 2005 appellant underwent OWCP-approved arthroscopic surgery for a partial thickness tear of the right rotator cuff.[2] She previously sustained injury to

[1] 5 U.S.C. §§ 8101-8193.

[2] The procedure also included subacromial decompression and mini open resection of the distal clavicle.

her right wrist and thumb, which OWCP accepted for right carpal tunnel syndrome and right thumb tenosynovitis. This injury occurred on February 1, 1994. Medical treatment for appellant's accepted right wrist/thumb injury included a March 5, 1996 right carpal tunnel release and a right trigger thumb release on April 9, 2003. The records of both RUE injuries have been combined under case number xxxxxx035.

On June 25, 2007 appellant filed a claim for a schedule award (Form CA-7) with respect to her accepted right shoulder injury.

On October 24, 2008 OWCP granted a schedule award for four percent impairment of the RUE. The award was based on the March 14, 2008 report of Dr. Thomas J. O'Dowd, a Board-certified orthopedic surgeon and impartial medical examiner (IME),[3] who rated appellant's loss of motion and strength in the right shoulder under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2001). Dr. O'Dowd specifically noted that he had not rated any impairment associated with appellant's carpal tunnel syndrome.

It reissued the decision on January 19, 2010.

Appellant requested a hearing.[4] She also submitted a June 2, 2010 impairment rating from Dr. Weiss, an osteopath, who applied the latest edition of the A.M.A., *Guides* (6th ed. 2008) to his previous January 2, 2007 examination findings. Dr. Weiss found a combined RUE impairment of 18 percent. He attributed seven percent impairment to right wrist entrapment neuropathy.[5] Dr. Weiss also found 12 percent impairment based on right acromioclavicular (AC) joint arthropathy with distal clavicle resection.[6]

By decision dated July 23, 2010, the hearing representative set aside the January 19, 2010 decision. He directed that the statement of accepted facts (SOAF) be amended to include all of appellant's accepted conditions involving the RUE. The hearing representative also directed that the case be referred to the IME to address the full extent of appellant's RUE impairment.

OWCP prepared an amended SOAF dated August 26, 2010, which referenced appellant's right shoulder condition as well as her right wrist and thumb conditions. It also doubled the two case records.

Dr. O'Dowd reexamined appellant on October 25, 2010. Since his last examination in March 2008 she had changed jobs. Appellant was currently working as a modified window clerk, primarily selling stamps. Dr. O'Dowd also noted that her current duties required little, if any, lifting or repetitive work with the right arm. Appellant had been performing this job since

[3] OWCP declared a conflict in medical opinion based on the differing RUE impairment ratings provided by the district medical adviser (DMA), Dr. Henry J. Magliato (32 percent) and appellant's physician, Dr. David Weiss (40 percent). Both ratings included impairment of the right shoulder and right wrist/hand.

[4] Appellant's counsel argued, *inter alia*, that the case should be remanded because Dr. O'Dowd, the IME, did not account for appellant's accepted right wrist and thumb conditions.

[5] Table 15-23, A.M.A., *Guides* 449 (6th ed. 2008).

[6] *Id*. at 403 (6th ed. 2008).

October 2009. As to her right shoulder, Dr. O'Dowd noted that her current complaints and findings were similar to the prior examination. He also noted that appellant had not received any treatment for her right shoulder since the March 2008 evaluation. Dr. O'Dowd stated that she still had residual loss of motion in the right shoulder.

With respect to her right wrist, appellant reported that it continued to bother her. She stated that it gets "stiff." Appellant also reported that with overuse she had discomfort and tightness and occasional swelling in the dorsum of the wrist. Additionally, she did not experience any catching of the thumb and there was no numbness or paresthesias or any residual neurologic symptoms in the right hand. On physical examination, Dr. O'Dowd noted a well-healed incision and absolutely no residual evidence of an ongoing carpal tunnel syndrome.

Regarding the right thumb, Dr. O'Dowd noted a well-healed incision on the volar aspect of the right MP joint; but otherwise there was no discomfort, wasting or triggering and full range of motion. He concluded that there was no residual evidence of trigger finger.

Under Table 15-2, Digit Regional Grid, A.M.A., *Guides* 392 (6th ed. 2008), Dr. O'Dowd found zero percent impairment due to trigger finger. With respect to appellant's carpal tunnel syndrome, he found one percent RUE impairment under Table 15-23, A.M.A., *Guides* 449 (6th ed. 2008). For her right shoulder condition, Dr. O'Dowd found 1 percent impairment for impingement syndrome and 11 percent impairment for AC joint resection under Table 15-5, A.M.A., *Guides* 402-03 (6th ed. 2008). He found an overall RUE impairment of 13 percent.

On May 29, 2011 the DMA reviewed Dr. O'Dowd's impairment rating and concurred with his finding of 13 percent.

On July 25, 2011 OWCP found that appellant had 13 percent impairment of the RUE. As appellant had already received a four percent rating, OWCP awarded an additional nine percent for her RUE. The award covered 28.08 weeks from October 25, 2010 to May 9, 2011.

Appellant requested a review of the written record. Counsel challenged Dr. O'Dowd's selection as IME. In the alternative, he argued that Dr. Weiss' June 2, 2010 impairment rating under the A.M.A., *Guides* (6th ed. 2008) created a new conflict in medical opinion.

By decision dated January 10, 2012, the hearing representative affirmed the July 25, 2011 schedule award.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[7] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for

[7] For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

evaluating schedule losses.[8] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[9]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[10] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[11] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[12]

FECA and its implementing regulations provide for the reduction of compensation for subsequent injury to the same schedule member.[13] Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[14]

ANALYSIS

OWCP determined that a conflict arose between its DMA, Dr. Magliato, who found 32 percent RUE impairment and appellant's physician, Dr. Weiss, who initially found 40 percent RUE impairment under the fifth edition of the A.M.A., *Guides* (2001). Because of this conflict OWCP referred appellant to Dr. O'Dowd, the IME.

Contrary to counsel's argument, the record demonstrates that OWCP properly utilized the Physicians' Directory System (PDS) in selecting Dr. O'Dowd as IME. OWCP confirmed Dr. O'Dowd's availability on January 25, 2008 and scheduled appellant for a March 14, 2008 appointment. The record includes a RME Referral Form, iFECS Report: ME023 - Appointment Schedule Notification and iFECS screen shots which indicated two other physicians had been bypassed. One physician, Dr. Sidor, was bypassed because he was booked until April 2008 and the physician's April 2008 calendar was unavailable. The iFECS screen shot further indicated that there was Congressional interest in the case.[15] Under the circumstances, OWCP opted not to

[8] 20 C.F.R. § 10.404.

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[10] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

[11] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[12] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[13] 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

[14] 20 C.F.R. § 10.404(c)(1), (2).

[15] On November 29, 2007 OWCP received a Congressional inquiry regarding appellant's schedule award claim.

await further information regarding Dr. Sidor's availability. The other physician, Dr. Friedenthal, was bypassed because appellant had previously been treated at the same facility. OWCP properly bypassed both physicians and selected Dr. O'Dowd as IME.

In accordance with the hearing representative's directive, Dr. O'Dowd reexamined appellant on October 25, 2010. Based on his latest examination of appellant's right thumb and wrist, he found no residual evidence of trigger finger. Accordingly, Dr. O'Dowd found zero percent impairment due to trigger finger under Table 15-2, Digit Regional Grid, A.M.A., *Guides* 392 (6th ed. 2008).

Regarding appellant's right wrist, Dr. O'Dowd found no residual evidence of an ongoing carpal tunnel syndrome. Pursuant to Table 15-23, Entrapment/Compression Neuropathy Impairment, A.M.A., *Guides* 449 (6th ed. 2008), he found one percent RUE impairment. Dr. O'Dowd explained that, based on grade modifiers for Functional History (GMFH) (1), Physical Examination (GMPE) (0) and Clinical Studies (GMCS) (1), appellant had an average of 0.66. The default upper extremity rating for computerized tomography scan (CTS) was two percent. Dr. O'Dowd then adjusted the rating downward based on the average grade modifier (0.66), which demonstrated "minimal symptom complex." Accordingly, he found that appellant had one percent impairment of the RUE based on her CTS.

With respect to appellant's right shoulder condition, Dr. O'Dowd found 1 percent impairment for impingement syndrome and 11 percent impairment for AC joint resection under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402-03 (6th ed. 2008). He explained that the default rating for impingement syndrome was one percent and appellant's average grade modifier for functional history (1), physical examination (1) and clinical studies (1) was one and therefore no adjustment was required. The default rating for the AC joint distal clavicle resection was 10 percent. Dr. O'Dowd explained that appellant's clinical studies (grade modifier 2) warranted a +1 adjustment, thus resulting in an upper extremity rating of 11 percent.

The IME found that the individual ratings for the right shoulder (11 percent and 1 percent), right thumb (0 percent) and right wrist (1 percent) represented an overall RUE impairment of 13 percent. On May 29, 2011 the DMA reviewed the IME's findings and concurred with the 13 percent RUE rating.

Dr. O'Dowd, the IME, provided a well-reasoned report based on a proper factual and medical history. He accurately summarized the relevant medical evidence and relied on the latest statement of accepted facts which included all of appellant's accepted RUE impairments. Dr. O'Dowd's report included detailed findings and medical rationale supporting his opinion. As the IME, Dr. O'Dowd's October 25, 2010 opinion was entitled to determinative weight.[16]

Counsel argued that Dr. Weiss' June 2, 2010 impairment rating under the A.M.A., *Guides* (6th ed. 2008) created a new conflict. Subsequent reports from a physician who was on one side of a medical conflict that has since been resolved would generally be insufficient to overcome the weight accorded the IME's report and/or insufficient to create a new medical conflict.[17] In his June 2, 2010 report, Dr. Weiss merely applied the latest version of the A.M.A.,

[16] *Gary R. Sieber*, *supra* note 12.

[17] *I.J.*, 59 ECAB 408, 414 (2008).

Guides to his January 2, 2007 examination findings. His physical examination predated Dr. O'Dowd's October 25, 2010 examination by almost four years. Simply, rebranding Dr. Weiss' 2007 findings will not suffice for purposes of creating a new conflict with the IME's latest opinion which was based on considerably more recent examination findings.

The Board finds that the IME's October 25, 2010 impairment rating represents the weight of the medical evidence regarding the current extent of appellant's RUE impairment. Consequently, OWCP properly found that she had 13 percent impairment of the RUE. Because appellant already received an award of four percent based on loss of right shoulder motion and strength, OWCP appropriately reduced the July 25, 2011 schedule award to nine percent.[18]

CONCLUSION

Appellant has not established that she has greater than 13 percent impairment of the RUE.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed.[19]

Issued: November 15, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[18] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(c)(1), (2).

[19] Appellant may request a schedule award or 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.