United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 12-437**
	)	**Issued: October 23, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Deptford, 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
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 27, 2011 appellant, through his attorney, filed a timely appeal from an October 5, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his schedule award claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 a four percent permanent impairment of the right upper extremity and more than two percent permanent impairment of the left upper extremity, for which he received schedule awards.

FACTUAL HISTORY

On December 5, 2003 appellant, then a 53-year-old clerk, filed an occupational disease claim alleging that his carpel tunnel syndrome was due to repetitive motion at work. OWCP

[1] 5 U.S.C. §§ 8101-8193.

accepted the claim for bilateral carpal tunnel syndrome and paid all appropriate benefits. Appellant underwent left carpal tunnel release on December 18, 2006 and right carpal tunnel release on February 27, 2007. In an April 26, 2007 report, Dr. Robert Draper, Jr., a Board-certified orthopedic surgeon and OWCP referral physician, documented improved examination findings.

On January 21, 2008 appellant claimed a schedule award. In an October 2, 2007 report, Dr. Steven M. Allon, an orthopedic surgeon, performed an impairment rating under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He opined that maximum medical improvement was reached and that appellant had 38 percent right arm impairment and 31 percent left arm impairment. On April 14, 2008 an OWCP medical adviser opined that Dr. Allon's findings were inconsistent with the findings of appellant's treating physician. He noted that Dr. Draper found essentially normal findings on both hands postoperatively and advised that postoperative improvement and not a worsening was expected.

In a June 17, 2008 report, Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and OWCP referral physician, reported normal two-point discrimination in the median distribution of the hands, no clear sensory loss, full range of motion and normal grip strength. He reported some numbness and tingling in the thumb of the right hand. Under the fifth edition of the A.M.A., *Guides*, Dr. Hanley opined that appellant had four percent impairment of the right upper extremity based on sensory loss and no ratable impairment for the left upper extremity.

OWCP determined a conflict in medical opinion existed between Dr. Allon and Dr. Hanley regarding appellant's permanent impairment and referred him to Dr. Ronald L. Gerson, a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 15, 2008 report, Dr. Gerson noted the history of injury, his review of the medical records and statement of accepted facts and set forth his examination findings. For the right upper extremity, he found sensory deficit of the median nerve and no motor deficit on objective evaluation. For the left upper extremity, Dr. Gerson reported a normal objective motor examination with no significant symptoms or limitations. Under the fifth edition of the A.M.A., *Guides*, he opined that appellant had four percent impairment of the right arm based on sensory defect and no impairment of the left as the objective examination was normal. In a December 23, 2008 report, an OWCP medical adviser concurred with Dr. Gerson's findings and stated the fifth edition of the A.M.A., *Guides* were correctly used.

By decision dated April 3, 2009, OWCP granted appellant four percent permanent impairment of the right upper extremity and zero percent of the left upper extremity. Determinative weight was accorded to Dr. Gerson's impartial medical opinion.

On April 9, 2009 appellant requested an oral hearing, which was held August 20, 2009. By decision dated November 18, 2009, an OWCP hearing representative set aside the April 3, 2009 decision. OWCP was directed to obtain a supplemental report from Dr. Gerson providing his medical rationale in support of an impairment rating under the sixth edition of the A.M.A., *Guides*.

On January 21, 2010 Dr. Gerson reevaluated appellant. He set forth the history of injury, his review of the medical records and statement of accepted facts and set forth findings for the

right and left upper extremities. Under the sixth edition, page 449, Table 15-23 and page 487, Appendix 15-B, Dr. Gerson advised that for the accepted right carpal tunnel syndrome, test results supported a grade modifier of 1, the history supported a grade modifier of 1, physical findings of abnormal two point discrimination supported a grade modifier of 2 and the functional scale was mild for a grade modifier of 1. Using the criteria on page 450, he added test findings (1) plus history (1) plus physical findings (2) and divided by 3 to find 1.33, which rounded to the nearest whole number, equated grade modifier of 1. Since the functional scale was a grade modifier of 1, Dr. Gerson found the impairment rating for the right arm would be two percent. For the accepted left carpal tunnel syndrome, he found the same grade modifier with the exception of a grade modifier of 1 for physical findings. Using page 450, Dr. Gerson calculated that test findings (1) plus history (1) plus physical findings (1) divided by 3 equaled 1. Therefore, he opined that appellant had two percent impairment of the left arm.

On March 30, 2010 an OWCP medical adviser reviewed Dr. Gerson's January 21, 2010 report and opined that maximum medical improvement was reached January 21, 2010. He found Dr. Gerson properly applied the A.M.A., *Guides* and concurred with Dr. Gerson's impairment findings.

By decision dated May 27, 2010, OWCP issued a schedule award for two percent impairment for the left arm and found that there was no increased impairment for the right arm.

On June 3, 2010 appellant requested an oral hearing which was held September 21, 2010. Following the hearing, he received a September 17, 2010 impairment report from Dr. Allon based on his October 2, 2007 examination findings. Dr. Allon opined that, under the sixth edition of the A.M.A., *Guides,* appellant had five percent impairment for the right upper extremity and five percent for the left upper extremity based on combined impairment for the accepted carpal tunnel syndrome condition and medial epicondylitis.

By decision dated November 30, 2010, an OWCP hearing representative directed OWCP to have Dr. Allon's September 17, 2010 report reviewed by its medical adviser.

In a December 8, 2010 report, the medical adviser applied Dr. Allon's findings to the sixth edition of the A.M.A., *Guides* and opined that appellant had five percent impairment to the right upper extremity and five percent impairment to the left upper extremity based on combined impairment for the accepted carpal tunnel syndrome and medial epicondylitis conditions. He stated that Dr. Allon's sixth edition calculation was based on his 2007 examination findings and that the 2008 examination findings of Dr. Gerson were more current and, thus, more accurate for impairment purposes.

By decision dated March 30, 2011, OWCP denied entitlement to an additional schedule award.

On April 7, 2011 appellant requested an oral hearing, which was held July 19, 2011. By decision dated October 5, 2011, an OWCP hearing representative affirmed OWCP's March 30, 2011 decision.

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]

Section 8123(a) provides that if there is a 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.[6] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[7]

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.[8] 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.[9]

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

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[2] 20 C.F.R. § 10.404; 5 U.S.C. § 8107.

[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); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[6] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[7] *Regina T. Pellecchia*, 53 ECAB 155 (2001).

[8] *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).

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

and Health (ICF).[10] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical adviser providing rationale for the percentage of impairment specified.[13]

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and paid appropriate benefits, including surgical releases of both wrists. Appellant requested a schedule award in January 2008. OWCP found a conflict in medical opinion between Dr. Allon and Dr. Hanley regarding appellant's permanent impairment and properly referred him to Dr. Gerson to resolve the conflict. In his December 15, 2008 report, Dr. Gerson opined that, under the fifth edition of the A.M.A., *Guides*, appellant had four percent impairment of the right upper extremity based on sensory defect and no impairment of the left upper extremity as the objective examination was normal.

By decision dated November 18, 2009, an OWCP hearing representative found Dr. Gerson's opinion lacking rationale and properly directed OWCP to obtain a supplemental report from Dr. Gerson providing his medical rationale in support of an impairment rating under the sixth edition of the A.M.A., *Guides*. Dr. Gerson reevaluated appellant on January 21, 2010 and opined, under the sixth edition of the A.M.A., *Guides*, that appellant had two percent impairment of right upper extremity and two percent impairment of the left upper extremity. OWCP subsequently awarded appellant two percent impairment for the left upper extremity with no increase for the right upper extremity, as he had previously been awarded four percent.

By decision dated October 5, 2011, an OWCP hearing representative affirmed a March 30, 2011 decision denying entitlement to an additional schedule award.

The Board finds that OWCP properly determined that the weight of the medical opinion evidence regarding the extent of appellant's permanent impairment to his upper extremities rested with the well-rationalized opinion of Dr. Gerson.

In his January 21, 2010 report, Dr. Gerson reviewed the record, presented findings and opined, under the sixth edition of the A.M.A., *Guides* that appellant had two percent impairment of the right upper extremity and two percent impairment of the left upper extremity. He used Table 15-23, page 449 and Appendix 15-B, page 487 to calculate the impairment for the right

[10] A.M.A., *Guide*s (6th ed. 2008), page 3, section 1.3, The ICF: A Contemporary Model of Disablement.

[11] *Id.* at 494-531.

[12] *Id.* at 521.

[13] *See* Federal (FECA) Procedure Manual, *supra* note 5, Chapter 2.808.6(d) (August 2002).

and left arms. For the right arm, Dr. Gerson found the grade modifier for clinical studies was 1, the grade modifier for history was 1 and the grade modifier for physical examination was 2. Using the criteria on page 448, he added the grade modifiers for clinical studies (1) and history (1) and physical examination (2) for a total of 4 and divided by 3 to find 1.33 or 1, for a final rating category of grade modifier of 1 which has a two percent impairment rating. As the grade modifier of 1 for functional studies equaled the final rating category of grade modifier of 1 for the entrapment/compression neuropathy impairment under Table 15-23, appropriate impairment rating remained two percent arm impairment. For the left arm, Dr. Gerson found grade modifiers for clinical studies was 1, the grade modifier for history was 1 and the grade modifier for physical examination was 1. He again used the criteria on page 448 and added the grade modifiers for clinical studies (1) and history (1) and physical examination (1) for a total of 3 and divided by 3 to find 1, for a final rating category of grade modifier of 1 under Table 15-23 which has a two percent impairment rating. As the grade modifier of 1 for functional studies equaled the grade modifier of 1 for the entrapment/compression neuropathy impairment under Table 15-23, Dr. Gerson properly found two percent left arm impairment. On March 30, 2010 an OWCP medical adviser reviewed Dr. Gerson's January 21, 2010 report and impairment calculation and concurred with the result.

OWCP properly found that Dr. Gerson's January 21, 2010 opinion regarding the extent of permanent impairment and OWCP's medical adviser's concurrence in the result showed that appellant had two percent impairment for the left upper extremity and that he did not have more than four percent permanent impairment of his right upper extremity, for which he received a schedule award. Dr. Allon subsequently submitted a September 17, 2010 report to comport with the sixth edition of the A.M.A., *Guides*. He opined that appellant had five percent impairment for both the left and right upper extremities. Dr. Allon did not reexamine appellant and based his physical findings on his October 2, 2007 examination. His October 2, 2007 examination findings constitute stale medical evidence and therefore his September 17, 2010 impairment calculation does not create a conflict in the medical opinion evidence or show that appellant has more than a two percent impairment of his left upper extremity and no increase from the previously awarded four percent impairment of the right upper extremity.[14]

On appeal, appellant's attorney argues that Dr. Allon's September 17, 2010 report, wherein he provides an impairment rating under the sixth edition of the A.M.A., *Guides*, should create a new conflict in medical evidence with Dr. Gerson. Dr. Allon, however, was involved in the original conflict in medical opinion evidence. Additional reports from physician who had been on one side of the original conflict in medical opinion are typically insufficient to resolve the conflict.[15] As noted, Dr. Allon did not perform a current evaluation or provide current examination findings. Thus, his application of the October 2, 2007 findings to the sixth edition of the A.M.A., *Guides* is of limited probative value. Appellant's attorney incorrectly contends

[14] *H.C.*, Docket No. 11-1407 (issued May 11, 2012) (and updated impairment rating by the claimant's physician, based on six-year old findings, represented stale evidence); *see J.C.*, Docket No. 11-241 (issued September 22, 2011) (eight-and-a-half-year-old physical examination findings considered stale with respect to impairment rating evaluation). *See also Keith Hanselman*, 42 ECAB 680 (1991) (two-year-old medical report was not reasonably current for wage-earning capacity determination); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (two-year-old work tolerance limitation report was outdated).

[15] *See Daniel F. O Donnell, Jr.*, 54 ECAB 456 (2003).

that Dr. Gerson modified his December 15, 2008 report to give a sixth edition impairment and simply agreed with the second opinion physician, Dr. Hanley, relative to the impairment. Dr. Gerson reevaluated appellant on January 21, 2010 and provided sixth edition impairment findings. An OWCP medical adviser reviewed this and found that Dr. Gerson's application of the sixth edition to be correct. Thus, this contention lacks any merit.

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.

CONCLUSION

The Board finds that appellant has no more than two percent left upper extremity impairment and no more than four percent right upper extremity impairment, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board