United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 12-1358**
	)	**Issued: April 11, 2013**
U.S. POSTAL SERVICE, POST OFFICE Jersey City, 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
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On June 12, 2012 appellant, through his attorney, filed a timely appeal from a March 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether appellant has more than a two percent impairment of his left upper extremity for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 18, 2006 appellant, a 52-year-old mail processor, injured his left thumb when he was struck by a mail cart in a congested area. He filed a claim for benefits, which OWCP accepted for left thumb contusion and left radial nerve injury.[2]

In a report dated November 27, 2006, Dr. Lewis J. Levine, Board-certified in orthopedic surgery, stated that appellant had a radial sensory neuritis in the left wrist secondary to a direct blow.

In a report dated January 9, 2008 Dr. David Weiss, an osteopath, found that appellant had a 27 percent impairment of the left upper extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition. He calculated this rating by deriving impairments from a left lateral pinch deficit and a partial sensory impairment of the left thumb.

In a Form CA-7 dated October 28, 2008, appellant requested a schedule award based on a partial loss of use of his left upper extremity.

In order to determine the degree of appellant's left upper extremity impairment stemming from his accepted left thumb contusion and left radial nerve conditions, OWCP referred him to Dr. Andrew Hutter, Board-certified in orthopedic surgery, for a second opinion examination. In reports dated January 7 and April 12, 2010, Dr. Hutter advised on examination that there was a decrease in light touch sensation on the radial aspect of the left index finger and noted Dr. Levine's finding of radial sensory neuritis in the left wrist. He stated that appellant had a minimal amount of impairment due to sensory neuritis, a one percent impairment of the left hand pursuant to Table 15-21 at page 429 of the sixth edition of the A.M.A., *Guides*.

In an April 19, 2010 report, an OWCP medical adviser reviewed Dr. Hutter's report and concurred with his rating of a one percent left upper extremity impairment based on a mild sensory neuritis in the median nerve distribution pursuant to Table 15-21 of the sixth edition of the A.M.A., *Guides*.

By decision dated May 5, 2010, OWCP granted appellant a schedule award for a one percent permanent impairment of the left upper extremity for the period December 21, 2006 to January 11, 2007, for a total of 3.1.2 weeks of compensation.

By letter dated May 14, 2010, appellant's attorney requested an oral hearing.

In a report received by OWCP on June 17, 2010, Dr. Weiss provided an amended copy of his January 9, 2008 report. He opined that appellant had a four percent left upper extremity

[2] The Form CA-1 indicates that appellant injured his right thumb. However, in a February 19, 2009 letter to his attorney, appellant clarified that he had injured his left thumb, not his right thumb, as a result of the September 18, 2006 work incident.

impairment based on left thumb partial radial digital nerve injury, pursuant to Table 15-16, page 427,[3] of the sixth edition of the A.M.A., *Guides*.

By decision dated December 27, 2010, an OWCP hearing representative affirmed the May 5, 2010 decision.

In a July 19, 2011 report, an OWCP's medical adviser found that there was a conflict in the medical evidence regarding the degree of left upper impairment stemming from appellant's accepted left thumb contusion and left radial nerve conditions. He recommended that OWCP refer appellant to an impartial medical evaluation to resolve the conflict in opinion.

Appellant was initially slated to undergo a referee examination with Dr. Cornelius Stover, Board-certified in orthopedic surgery. However, Dr. Stover was bypassed because he "does not examine DOL patients." On August 9, 2011 OWCP referred appellant to Dr. Edward Krisiloff, Board-certified in orthopedic surgery, for a referee examination.

By letter dated August 25, 2011, appellant's attorney requested modification of the December 27, 2010 OWCP decision.

In a report dated August 30, 2011, Dr. Krisiloff found that appellant had a two percent left lower extremity impairment under the A.M.A., *Guides*. He noted the history of injury, which indicated that following appellant's September 18, 2006 work injury he was seen by Dr. Levine, who diagnosed a contusion to the left arm with a radial sensory nerve injury and was prescribed a wrist brace for appellant's left wrist. Dr. Krisiloff noted that appellant provided a very clear history concerning the accident and his subsequent follow-up care; he related that appellant pointed to the radial aspect of the wrist joint as the source of his troubles. He stated that on examination appellant complained of pain and paresthesias in the left upper extremity. Appellant had a positive Tinel's sign over the radial sensory nerve with subjectively decreased sensation over the radial aspect of the hand, but not complete sensory loss. Dr. Krisiloff noted normal wrist extension and strength and stated that the remainder of the neurovascular examination was intact.

Dr. Krisiloff stated that the proper method for determining impairment for a peripheral nerve with a sensory component only would be to use Table 15-18 at page 429 of the A.M.A., *Guides*. He found that appellant had a mild impairment under Table 15-18 given that he had mild symptoms and not a complete sensory loss; this yielded a two percent impairment of the left upper extremity. Dr. Krisiloff stated his disagreement with the ratings of both Dr. Hutter and Dr. Weiss, asserting that his rating was more specific for the level of injury to the radial nerve. He stated that Dr. Hutter's choice of Table 15-21 was not applicable to appellant's injury because this table relates to the median nerve and rated injuries to the nerve at a level involving both motor and sensory component, which was not relevant to appellant's specific situation. Dr. Krisiloff advised that, as appellant's injury was at the wrist, it only involved a sensory nerve, which should be rated exclusively by Table 15-18, which bears the heading "Impairment for Sensory Only Peripheral Nerve Injury." He opined that Dr. Weiss' rating was not applicable

[3] A.M.A., *Guides* at 427.

because he used a table that was intended to rate conditions with a nerve laceration or a total transverse sensory loss, which are not relevant to appellant's specific case.

In a September 12, 2011 report, an OWCP medical adviser concurred with Dr. Krisiloff's two percent left upper extremity impairment rating.

By decision dated September 29, 2011, OWCP awarded appellant an additional schedule award for a one percent left upper extremity impairment for 3.12 weeks, covering the period January 12 to February 2, 2007, for a total of two percent left upper extremity impairment.

By letter dated October 4, 2011, appellant, through his attorney, requested an oral hearing, which was held on November 16, 2011.

In a statement received by OWCP on January 26, 2012, appellant alleged that Dr. Krisiloff's examination was perfunctory, lasting only five minutes and that he did not calibrate and measure the range of motion on his left thumb.

By decision dated March 20, 2012, an OWCP hearing representative affirmed the September 29, 2011 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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 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.[6]

ANALYSIS

OWCP accepted the conditions of left thumb contusion and left radial nerve injury, which resulted from appellant's September 18, 2006 employment injury. By decision dated May 5, 2010, it granted him a schedule award for a one percent impairment for the left upper extremity stemming from his accepted conditions. Appellant sought a greater award and OWCP's medical adviser found that there was a conflict in the medical evidence regarding the appropriate degree of impairment for appellant's accepted conditions. He was referred to Dr. Krisiloff, an impartial examiner, who rated a two percent left lower impairment under the sixth edition of the A.M.A., *Guides* in his August 30, 2011 report. Dr. Krisiloff stated that appellant's "very clear history" regarding the September 18, 2006 accident and his subsequent follow-up care indicated that his

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

[6] *Id.*

primary difficulties pertained to the radial aspect of the wrist joint. Appellant was seen in November 2006 by Dr. Levine, who diagnosed a contusion to the left arm with a radial sensory nerve injury and prescribed a wrist brace for appellant's left wrist. Given these effects from the accepted injury, Dr. Krisiloff opined that the proper method for determining impairment was set forth at Table 15-18, "Impairment for Sensory Only Peripheral Nerve Injury." He determined that appellant had a mild impairment under Table 15-18 based on his mild symptoms and a less than total sensory loss, which produced a two percent left upper extremity impairment.

The Board finds that OWCP properly relied on Dr. Krisiloff's opinion in its September 29, 2011 schedule award decision. Dr. Krisiloff provided a thorough, well-rationalized report based on his examination findings and on appellant's history which documented that his primary difficulties stemming from his September 2006 employment injury pertained to the radial aspect of the wrist joint; he then calculated an impairment pursuant to the applicable table of the A.M.A., *Guides*. His report therefore warrants the special weight of an impartial examiner.[7] Dr. Krisiloff also explained why his method of calculating appellant's impairment rating was more appropriate than those chosen by Drs. Hutter and Weiss; *i.e.*, that his rating was more specific for the level of injury to the radial nerve. He also properly determined that as appellant had mild sensory loss, he had a maximum permanent impairment of the upper extremity of two percent. OWCP properly found in its September 29, 2011 decision that appellant was not entitled to a schedule award for more than a two percent left upper extremity impairment.

On appeal, appellant's counsel contends that Dr. Krisiloff relied on the wrong tables and charts of the A.M.A., *Guides* in calculating his impairment rating. Counsel asserts that the physician did not adequately explain why he used Table 15-18 in rendering his rating, noting that appellant injured his left hand and thumb, not his left wrist. The Board is not persuaded by counsel's contentions. Dr. Krisiloff rendered his impairment rating on sensory loss in the left wrist based on the history appellant provided -- that his initial complaints subsequent to the September 2006 work injury pertained to symptoms in his left wrist -- and on the medical record which indicates that in November 2006 Dr. Levine diagnosed a radial sensory nerve injury, secondary to contusion to the left arm and prescribed a wrist brace for appellant's left wrist. For the reasons discussed above, OWCP properly found that Dr. Krisiloff's impartial medical opinion represented the weight of the medical evidence.

Appellant's attorney also argues that Dr. Krisiloff was not selected on a strict rotational basis pursuant to the medical management application, utilized by OWCP to select impartial medical examiners. Congress did not address the manner by which an impartial medical referee is to be selected. Rather, this was left to the discretion of the Director in administering the compensation program created under FECA.[8] Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the

[7] It is well established that the opinion of an impartial medical specialist is to be given special weight. *See Anna M. Delaney*, 53 ECAB 384 (2002).

[8] *See R.C.*, Docket No. 12-468 (issued October 5, 2012). *See also e.g., Harry D. Butler*, 43 ECAB 859, 866 (1992) (the Director delegated discretion in determining the manner by which permanent impairment is evaluated for schedule award purposes).

impartial medical referee.[9] In turn, the Director has delegated authority to each district OWCP for selection of the referee physician by use of the medical management application within the Integrated Federal Employees' Compensation System (iFECS).[10] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[11] The medical management application in iFECS replaces the prior Physician Directory System (PDS) method of appointment.[12] It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the A.M.A., *Guides* and those physicians Board-certified with the American Osteopathic Association.[13] Selection of the referee physician is made through use of the application by a medical scheduler. The claims examine may not dictate the physician to serve as the referee examiner.[14] The medical scheduler impute the claim number into the application, from which the claimant's home zip code is loaded.[15] The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed.[16] If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare a Form ME023, appointment notification report for imaging into the case file.[17] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[18]

Counsel contends that Dr. Stover, the initial choice for impartial medical examiner, was bypassed without adequate cause. He therefore argues that Dr. Krisiloff's report cannot carry the weight of the medical evidence. The record substantiates that Dr. Stover was properly bypassed because he "does not examine DOL patients." As an appropriate bypass reason was provided, OWCP properly selected the next physician, Dr. Krisiloff. Appellant has failed to establish that

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

[10] *Id.* at Chapter 3.500.4(b)(6).

[11] *Id*. at Chapter 3.500.4(b)(6)(a).

[12] *Id*. at Chapter 3.500.5.

[13] *Id* at Chapter 3.500.5(a).

[14] *Id*. at Chapter 3.500.5(b).

[15] *Id.* at Chapter 3.500 .5(c).

[16] *Id.* The roster of physicians is not made visible to the medical scheduler under the application. The medical scheduler may update information pertaining to whether the selected physician can schedule an appointment in a timely manner and, if not, will enter an appropriate bypass code. *Id.* at Chapter 3.500(e-f). Upon entry of a bypass code, the medical management application will present the next physician based on specialty and zip code.

[17] *Id*. at Chapter 3.500.5(g).

[18] *Id*. at Chapter 3.500.4(d).

the medical management application was improperly utilized to select Dr. Krisiloff as the impartial medical examiner.[19]

As appellant did not submit any medical evidence to support an additional schedule award greater than the two percent already awarded for the left upper extremity, the Board will affirm the March 20, 2012 decision of OWCP's hearing representative.

Appellant may request an increased schedule award, at any time, 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 a two percent permanent impairment of the left upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

[19] *Supra* note 9.