United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 13-29**
	)	**Issued: April 3, 2013**
GENERAL SERVICES ADMINISTRATION, Burlington, 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:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2012 appellant, through his attorney, filed a timely appeal from a June 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied an additional schedule award. 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 met his burden of proof to establish that he has more than five percent impairment of either upper extremity for which he received schedule awards.

FACTUAL HISTORY

On August 5, 1999 appellant, then a 40-year-old materials handler, filed an occupational disease claim alleging that he suffered from bilateral carpal tunnel syndrome as a result of operating a forklift, unloading trucks and taking pallets out at work. He stopped work on

[1] 5 U.S.C. § 8101 *et seq.*

August 3, 1999 and underwent authorized right and left carpal tunnel releases. Appellant sustained a left knee sprain on and a cervical sprain in the performance of duty.[2] On December 26, 2002 he returned to limited duty as a modified materials handler. On June 3, 2003 appellant sustained a recurrence of injury and stopped work again. He underwent vocational rehabilitation. On June 28, 2004 appellant returned to work as a part-time school bus driver for four hours per day, five days a week.

On June 4, 2003 appellant filed a schedule award claim. In a March 10, 2003 report, Dr. David Weiss, an osteopath, reviewed appellant's history and conducted an examination. He diagnosed bilateral carpal tunnel syndrome, bilateral radial nerve neuropathy and bilateral brachial plexus neuropathy. According to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), Dr. Weiss opined that appellant had 34 percent combined left upper extremity impairment, 17 percent total right upper extremity and 11 percent left lower extremity impairment. He reported that appellant reached maximum medical improvement on March 10, 2003. In an April 26, 2005 report, the district medical adviser (DMA) disagreed with Dr. Weiss's report and stated that appellant suffered no permanent impairment as a result of his accepted bilateral carpal tunnel condition. By decision dated April 26, 2005, OWCP denied appellant's schedule award claim finding insufficient medical evidence to establish that he sustained a permanent impairment as a result of his accepted conditions. On September 2, 2005 appellant submitted a request for reconsideration. By decision dated November 9, 2005, OWCP granted him a schedule award for five percent permanent impairment of each upper extremity. This award was based on the October 30, 2005 findings of the DMA.[3] The award ran for a total of 31.20 weeks from October 30, 2005 to June 5, 2006.

By decisions dated March 22, 2006, November 16, 2007 and July 29, 2008, an OWCP hearing representative remanded the case for referral to an impartial medical examination to resolve a conflict in medical opinion between Dr. Weiss and the medical adviser.

Following the March 22, 2006 decision, OWCP referred appellant's case to Dr. Harvey Baron, a Board-certified orthopedic surgeon and impartial medical examiner. In a May 9, 2007 report, Dr. Baron opined that appellant had no permanent partial loss of use of the upper right and left upper extremities. He noted that a January 30, 2007 electromyogram (EMG) study appeared normal in nature and that appellant demonstrated good range of motion and strength in the upper extremities.

Following the November 16, 2007 and July 29, 2008 decisions, OWCP referred appellant's case to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, selected as the impartial medical adviser. In a December 17, 2007 report, Dr. Krisiloff noted appellant's diagnosis of post bilateral carpal tunnel syndrome and that he suffered from degenerative

[2] The two claims were combined with File No. xxxxxx816 as the master file.

[3] In an October 30, 2005 report, the DMA stated that medical reports revealed that appellant's median nerve was two degrees to pain. He opined that, according to page 495 of the fifth edition of the A.M.A., *Guides*, appellant had five percent permanent impairment for each upper extremity. The DMA stated that appellant reached maximum medical improvement on August 11, 2005.

cervical disc syndrome unrelated to his former employment as a materials handler. He stated that physical examination revealed no objective findings to support permanent impairment. Dr. Krisiloff reported that according to the fifth edition of the A.M.A., *Guides* appellant's physical findings did not support any permanent impairment in addition to the five percent previously awarded. He noted a date of maximum medical improvement of February 2002, approximately 12 weeks after his second surgery. In a November 21, 2008 supplemental report, Dr. Krisiloff opined that there were no objective findings to support appellant's complaints of bilateral carpal tunnel and determined that he did not have bilateral upper extremity impairment greater than the five percent to each arm. He also reported that there were no physical examination findings to establish that appellant continued to suffer residuals from his cervical sprain and no permanent impairment was warranted. Dr. Krisiloff explained that appellant's current complaints resulted from his degenerative cervical disc disease, which was not work related.

By decision dated December 8, 2008, OWCP denied any additional schedule award based on the November 21, 2008 report of Dr. Krisiloff, who determined that the medical evidence did not support more than five percent permanent impairment of either upper extremity.

On December 12, 2008 appellant submitted a request for an oral hearing, which was held on June 25, 2010. He, through counsel, contended that Dr. Krisiloff's report was insufficient to resolve the conflict of medical opinion under the A.M.A., *Guides* and should have considered appellant's preexisting cervical condition in his impairment evaluation.

In a November 5, 2010 report, Dr. Weiss resubmitted his 2003 report undated to reflect the sixth edition of the A.M.A., *Guides*. He set forth findings from the 2003 examination of appellant. Dr. Weiss opined that according to the sixth edition of the A.M.A., *Guides* appellant sustained 5 percent impairment of each wrist for entrapment neuropathy of the median nerve,[4] 5 percent impairment for class 1 sensory deficit at the C5 and C6,[5] and 1 percent for class 1 sensory deficit right C7 nerve root[6] or a total of 11 percent for each upper extremity impairment. He also reported that appellant had three percent left lower extremity impairment.[7] Dr. Weiss stated that appellant reached maximum medical improvement on March 10, 2003.

By decision dated December 13, 2010, an OWCP hearing representative set aside the December 8, 2008 decision finding that Dr. Krisiloff's report was not well rationalized because he failed to consider appellant's preexisting degenerative cervical disc disease symptoms in his impairment rating despite objective EMG and nerve conduction study results. The case was remanded for a new referee physician to determine if appellant had additional impairment of the upper extremities according to the sixth edition of the A.M.A., *Guides*.

[4] A.M.A., *Guides* 406, Table 15-7.

[5] *Id*. at 434, Table 15-20.

[6] *Id.*

[7] *Id*. at 509, Table 16-3; *id*. at 516, Table 16-6.

OWCP referred appellant's claim to Dr. Michael Silverstein, a Board-certified orthopedic surgeon, for an impartial medical examination to determine the extent of appellant's permanent impairment for his accepted conditions in accordance with the sixth edition of the A.M.A., *Guides* (2008).

In a November 16, 2011 report, Dr. Silverstein reviewed appellant's history, including the statement of accepted facts and noted that his claim was accepted for bilateral carpal tunnel syndrome. He reported that he did not have the EMG results dated December 27, 1999 to February 28, 2008 or functional capacity evaluations dated August 26, 2002 to March 14, 2007. Examination of the cervical spine revealed symmetrical and full range of motion with a few scattered trigger points in the cervical paraspinal musculature. Adson maneuver was mildly positive bilaterally with subjective complaints. Upon examination of appellant's elbows, Dr. Silverstein observed full range of motion, normal manual motor testing, symmetrical grip strength and negative Tinel's sign over the ulnar nerve. Examination of his bilateral hand and wrist revealed full range of motion and a healed incision compatible with carpal tunnel surgery. Phalen's maneuver was negative and median nerve sensibility and palmar abduction was normal. Palmaris longus was also present. Dr. Silverstein noted that examination of the ulnar nerve revealed intact flexor profundus to ring and little finger. Allen test showed slow filling from the ulnar artery. Dr. Silverstein stated that x-rays of appellant's cervical spine revealed mild-to-moderate degenerative changes at C4-5 and C5-6 with anterior osteophyte formation at both levels. X-rays of appellant's left wrist demonstrated normal carpal alignment and minimal degenerative changes at the basal joint. X-rays of his right wrist revealed a small ossification/calcification in the area of the ulnar head and mild degenerative changes of the basal joint of the thumb.

Dr. Silverstein reported that range of motion and motor and sensory examinations showed no objective evidence to support appellant's subjective complaints of bilateral carpal tunnel syndrome. He agreed with the opinions of Dr. Baron and Dr. Krisiloff that the objective physical examination findings did not support appellant's subjective carpal tunnel syndrome complaints and noted that, even after successful carpal tunnel surgery, he had permanent subjective sensory complaints. Dr. Silverstein noted that the January 30, 2007 electrodiagnostic studies were benign. He opined that appellant's bilateral carpal tunnel syndrome was causally related to the repetitive nature of his employment, but concluded that his cervical spine symptoms were degenerative in origin and not caused or aggravated by appellant's December 2000 employment injury. Dr. Silverstein explained under the sixth edition of the A.M.A., *Guides* and the diagnosis-impairment method, appellant was classified as class 0 with no objective findings of his upper extremity or whole person. He concluded that appellant had no (zero percent) upper extremity or whole person impairment. Regarding Dr. Weiss's impairment evaluations, Dr. Silverstein explained that Dr. Weiss did not provide any objective findings to support his conclusions. He reported that the objective findings he noted during his evaluation most closely corroborated the findings of Drs. Baron and Krisiloff. Dr. Silverstein stated that appellant reached maximum medical improvement for his wrists on July 1, 1998 for the right wrist and January 1, 2002 for the left wrist.

In a December 22, 2011 report, a medical adviser reviewed Dr. Silverstein's impartial medical report. He noted that Dr. Silverstein based his zero percent impairment rating on normal testing of the thenar strength and lack of objective evidence. The medical adviser agreed with

Dr. Silverstein's conclusion that, according to Chapter 15 of the sixth edition of the A.M.A., *Guides,* appellant had (zero percent) upper extremity impairment. He stated that the date of maximum medical improvement would be November 21, 2008, the date of Dr. Krisiloff's report.

By decision dated January 9, 2012, OWCP denied appellant's claim for additional schedule award finding that the medical evidence did not establish more than five percent impairment of either upper extremity.

On January 13, 2012 appellant submitted a request for an oral hearing, which was held on April 12, 2012. Counsel contends that Dr. Silverstein's report was based on an incomplete history as he acknowledged that he did not review all the reports, particularly the results of EMG tests, which showed that appellant had carpal tunnel syndrome. He also pointed out that Dr. Silverstein failed to refer to specific tables or charts in the A.M.A., *Guides* (6th ed.) when he provided his impairment evaluation. Counsel further noted that Dr. Weiss submitted an updated November 5, 2010 report which opined that appellant had 11 percent impairment rating for each arm in accordance with the sixth edition of the A.M.A., *Guides.*

In a decision dated June 26, 2012, an OWCP hearing representative affirmed the January 9, 2012 decision denying appellant's request for increased schedule award. It determined that OWCP properly found that the weight of the medical opinion rested with Dr. Silverstein's report who found that appellant had no upper extremity impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[8] and its implementing regulations 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 of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition 2009), has been adopted by OWCP as the appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

Impairment due to carpal tunnel syndrome is evaluated under the schedule found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[11] In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories test

[8] 5 U.S.C. §§ 8101-8193.

[9] *R.D.,* 59 ECAB 127 (2007); *Bernard Babcock, Jr.,* 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

[10] FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] A.M.A., *Guides* 449 (6th ed. 2008).

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.[12]

If there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[13] In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

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, it must secure a supplemental report from the specialist to correct the defect of the original report.[15] 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, it must submit the case record and a detailed statement of accepted facts to a second impartial medical specialist for the purpose of obtaining a rationalized medical opinion on the issue.[16]

ANALYSIS

OWCP accepted that appellant sustained work-related bilateral carpal tunnel syndrome as a result of his employment as a materials handler, for which he underwent bilateral carpal tunnel releases.[17] Appellant also has an accepted cervical condition. In a November 9, 2005 decision, OWCP granted schedule awards for five percent permanent impairment to each upper extremity. The case was remanded for an impartial medical examination to resolve a conflict of medical opinion between Dr. Weiss, appellant's treating physician, and an OWCP medical adviser. Appellant was referred to Dr. Baron and Dr. Krisiloff, as impartial medical specialists, both their reports were found insufficient to resolve the conflict.

OWCP referred appellant for an impartial medical examination to Dr. Silverstein who determined that appellant did have upper extremity impairment. In a decision dated June 26, 2012, an OWCP hearing representative denied an additional schedule award. The Board finds

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

[13] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[14] *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[15] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[16] *R.C.*, 58 ECAB 238 (2006); *Bernadine P. Taylor*, 54 ECAB 342 (2003). *See* 5 U.S.C. § 8123(a).

[17] The record also reflects that appellant sustained a left knee sprain and a cervical sprain in the performance of duty and was diagnosed with degenerative cervical disc disease that was preexisting.

that Dr. Silverstein's report was insufficiently rationalized to resolve the conflict in medical opinion.

In a November 16, 2011 report, Dr. Silverstein stated that the objective examination findings did not support appellant's subjective complaints of bilateral carpal tunnel syndrome and found that he no longer had residuals from his employment-related cervical condition. He explained that appellant's manual motor testing revealed normal thenar strength and his sensory examination revealed symmetrical light touch. Dr. Silverstein noted that the January 30, 2007 EMG studies were benign. He determined that according to Chapter 15 of the sixth edition of the A.M.A., *Guides* and the diagnosis impairment method, appellant would be classified as class 0 with no objective findings of his upper extremity or whole person. Dr. Silverstein concluded that appellant suffered zero percent upper extremity and whole person impairment.

The Board finds, however, Dr. Silverstein provided a detailed history and indepth review of the medical file; however, he failed to properly explain why he concluded that appellant was entitled to no additional impairment according to the sixth edition of the A.M.A., *Guides.* He stated that appellant's January 2007 EMG studies were benign. Dr. Silverstein, however, failed to explain why he relied on a four-year-old EMG studies and did not obtain current neurological testing before he provided an impairment rating. He also stated that he did not have the EMG results dated December 27, 1999 to February 28, 2008 for review on the functional capacity evaluations dated August 26, 2002 to March 14, 2007. The Board has held that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of limited probative value.[18] Accordingly, the Board finds that Dr. Silverstein did not adequately support his rating of no (zero percent) impairment to appellant's arms.

Dr. Silverstein determined that according to Chapter 15 appellant was a class 0 for no permanent impairment. He did not fully explain his application of the A.M.A., *Guides* to his findings. Dr. Silverstein generally referred to Chapter 15 for determining appellant's permanent impairment, but did not refer to any specific tables or grade modifiers or otherwise explain how his findings on examination corresponded to the appropriate tables to determine an award of permanent impairment. As noted, impairment due to carpal tunnel syndrome is evaluated under Table 15-23 for Entrapment/Compression Neuropathy Impairment and accompanying relevant text.[19] Dr. Silverstein did not address whether he referred to Table 15-23 for rating appellant's impairment or how his examination findings corresponded to the appropriate grade modifiers in Table 15-23. To properly resolve a conflict in a schedule award claim, the impartial medical specialist should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides.*[20] The Board finds that Dr. Silverstein's report is insufficient to resolve the conflict in medical opinion.

[18] *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[19] *Supra* note 22.

[20] *See Richard R. LeMay*, 56 ECAB 341 (2005); *Thomas J. Fragale*, 55 ECAB 619 (2004).

The case will be remanded to OWCP to obtain the diagnostic tests and request a supplemental report from Dr. Silverstein.[21] After such further development as may be necessary, OWCP shall issue an appropriate decision on the issue of appellant's permanent impairment.

Appellant's counsel contends on appeal that Dr. Weiss's November 5, 2010 impairment rating should represent the weight of the medical evidence. Dr. Weiss was involved in the original conflict in medical opinion evidence, which remains unresolved. Moreover, his application of the sixth edition of the A.M.A., *Guides* and permanent impairment rating is of limited probative value as it was premised on a 2003 physical examination.

CONCLUSION

The Board finds that the case is not in posture for decision as there remains an outstanding conflict in medical evidence regarding the extent of appellant's permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 3, 2013
Washington, DC

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

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

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

[21] *Nancy Keenan*, 56 ECAB 687 (2005).