United States Department of Labor
Employees' Compensation Appeals Board

Y.S., Appellant	)	
and	)	**Docket No. 13-1436**
	)	**Issued: December 9, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2013 appellant filed a timely appeal from a May 1, 2013 merit decision and a December 31, 2012 nonmerit 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 the claim.

ISSUES

The issues are: (1) whether appellant has greater than 34 percent right upper extremity impairment, for which she received a schedule award; and (2) whether OWCP properly denied her November 20, 2012 request for an oral hearing as untimely.

FACTUAL HISTORY

Appellant, then a 40-year-old mail processing clerk, has an occupational disease claim for right medial epicondylitis and right lesion of the ulnar nerve. On October 19, 2011 she

[1] 5 U.S.C. §§ 8101-8193.

underwent a medial epicondylectomy and release/decompression of the ulnar nerve. Under case number xxxxxx385, appellant was granted a schedule awards for 31 percent right upper extremity impairment and 26 percent left upper extremity impairment for residual effects of carpal tunnel syndrome and impingement syndrome.

On June 4, 2012 appellant filed a Form CA-7 claim for an additional schedule award. In a July 9, 2012 report, Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, noted that OWCP accepted a right lesion of ulnar nerve, right medial epicondylitis, and other right median nerve lesion, for which appellant underwent surgery. He set forth examination findings and found that appellant achieved maximum medical improvement. Under the sixth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) found that appellant had 33 percent impairment of the right upper extremity. In an July 9, 2012 upper extremity worksheet, Dr. Chmell set forth his calculations under the A.M.A., *Guides*. Under Table 15-33, he found flexion of 100 degrees equaled eight percent impairment and 25 degrees extension equaled two percent impairment. Under Table 15-23 for the right ulnar nerve, Dr. Chmell found eight percent impairment. Under Table 15-23 for the right median nerve, he found seven percent impairment. Dr. Chmell also noted that the loss of strength in the right elbow equaled four percent impairment and loss of strength in the right wrist equaled four percent impairment. He totaled the above percentages at 33 percent.

In an August 20, 2012 report, Dr. David H. Garelick, an OWCP medical adviser, reviewed Dr. Chmell's impairment rating and opined that it was not consistent with the A.M.A., *Guides.* Dr. Chmell combined range of motion loss with a diagnosis-based impairment, which was not allowed under the A.M.A., *Guides.* He also rated impairment for both carpal tunnel syndrome and cubital tunnel syndrome, but A.M.A., *Guides* provide that in rating impairment for compression neuropathies, the second affected nerve is awarded at 50 percent of the impairment value. Dr. Chmell also recommended impairment for weakness in the wrist and elbow, but an award for both a diagnoses-based impairment and strength loss was duplicative. The medical adviser opined that maximum medical improvement was reached in the right upper extremity March 15, 2012. Based on Dr. Chmell's examination findings, Dr. Garelick used Table 15-23, page 449 to find a grade 2 modifier for significant intermittent symptoms and a grade 3 modifier for weakness. A grade modifier for clinical studies was not applicable for the electrical studies. Dr. Chmell found an average 2.5 grade modifier, which was rounded up to 3 for an overall award of eight percent. As appellant had also rated impairment for carpal tunnel syndrome, the eight percent value was halved to four percent. Under the Combined Values Chart at page 604, Dr. Garelick combined 4 percent with 31 percent previously awarded right upper extremity impairment to total 34 percent right upper extremity.

By decision dated October 16, 2012, OWCP granted appellant an additional schedule award of three percent impairment to the right upper extremity. As she previously received an award for 31 percent right upper extremity impairment under case number xxxxxx385, appellant was entitled to an additional 3 percent. The award ran 9.36 weeks for the period March 15 to May 19, 2012.

In an appeal request form dated and postmarked November 20, 2012, appellant requested an oral hearing before an OWCP hearing representative.

In a November 21, 2012 report, Dr. Chmell stated that, while appellant was previously rated at 31 percent impairment to the right arm, her impairment was also due to other conditions, including her right elbow medial epicondylitis and ulnar nerve entrapment, which the physician did not include in his previous rating. He stated that the total impairment determination should not be accomplished by subtracting 31 percent from 33 percent but rather the two values should be added to total 64 percent right upper extremity impairment. Dr. Chmell opined that appellant was due an additional 33 percent impairment to her right arm. A progress report dated December 13, 2012 was also submitted.

By decision dated December 31, 2012, OWCP's hearing representative denied appellant's request for an oral hearing as untimely. The hearing representative found that the most recent OWCP decision was issued on October 16, 2012 but appellant's request was postmarked on November 20, 2012, more than 30 days after the October 16, 2012 decision. OWCP indicated that it had exercised its discretion and further denied appellant's request finding that the relevant issue of the case could be equally addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

On March 4, 2013 appellant requested reconsideration. She resubmitted Dr. Chmell's November 21, 2012 report.

By decision dated May 1, 2013, OWCP denied modification of its October 16, 2012 decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[2] and its implementing regulations[3] 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.[4] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[5]

In determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.[6] Any previous impairment to the member under consideration is

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

[4] *Id.*

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

[6] *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446 (2002).

included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.[7]

The A.M.A., *Guides* provide a specific rating process for entrapment neuropathies such as carpal tunnel.[8] This rating process requires that the diagnosis of a focal neuropathy syndrome be documented by sensory or motor nerve conduction studies or electromyogram. The A.M.A., *Guides* do not allow additional impairment values for decreased grip strength, loss of motion or pain.[9] Table 15-23 provides a compilation of the grade modifiers for test findings, history, physical findings which are averaged and rounded to the nearest whole number. This table also provides the range of impairment values as well as the function scale modifier which determines the impairment value within the impairment scale.[10]

OWCP 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.[11]

ANALYSIS -- ISSUE 1

OWCP accepted the conditions of cubital tunnel syndrome and medial epicondylitis. On October 19, 2011 appellant underwent a medial epicondylectomy and release with decompression of the ulnar nerve. She received a schedule award for 31 percent right upper extremity impairment for residual effects of carpal tunnel syndrome and impingement syndrome under claim number xxxxxx385.[12] Appellant claimed a schedule award and OWCP granted an additional award for 3 percent right upper extremity impairment, for a total of 34 percent.

Dr. Chmell recommended an additional 33 percent right upper extremity impairment, separate from the 31 percent right upper extremity impairment previously received; but he provided no reference to the sixth edition of the A.M.A., *Guides* or explanation in support of his opinion. Additionally, Dr. Chmell's impairment rating of 33 percent is of diminished probative value as it is not in conformance with the A.M.A., *Guides*.[13] He opined that appellant had 33

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (January 2010).

[8] A.M.A., *Guides* 432-50.

[9] *Id*. at 433.

[10] *Id.*

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[12] Appellant also received 26 percent left upper extremity impairment under claim number xxxxxx385. However, the present claim pertains only to impairment of the right upper extremity.

[13] *See Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment.

percent right upper extremity impairment based on loss of elbow/forearm range of motion, entrapment/compression neuropathy of ulnar and median nerves, and loss of strength of the elbow and wrist. The A.M.A., *Guides* provide that, when rating impairment for focal nerve compromise, Table 15-23, Entrapment/Compression Neuropathy Impairment, is to be used. The A.M.A., *Guides* do not allow additional impairment values for decreased grip strength, loss of motion or pain.[14] Appellant was previously rated for both residual carpal tunnel syndromes and cubital tunnel syndromes. The A.M.A., *Guides* state that for multiple simultaneous neuropathies in the same limb, the nerve qualifying for the larger impairment is given the full impairment while the nerve qualifying for the small impairment is rated at 50 percent (one-half) of the impairment listed in Table 15-23, Entrapment/Compression Neuropathy Impairment. The impairments are then combined.[15] Dr. Chmell's rating under Table 15-23 for the right ulnar nerve and right median nerve are not in conformance with the A.M.A., *Guides*. He failed to take into account appellant's simultaneous carpal tunnel syndrome. Dr. Chmell's final impairment rating is of diminished probative value.

It is well established that when an attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides,* his or her opinion is of diminished probative value to establish the degree of permanent impairment. OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.[16] Dr. Garelick, the medical adviser, found that appellant had 34 percent right upper extremity impairment and reached maximum medical impairment on March 15, 2012. Under Table 15-23, the medical adviser advised that appellant had grade 2 modifier for significant intermittent symptoms, a grade 3 modifier for weakness, and the modifier for diagnostic test findings was not applicable. He averaged the modifiers to a grade 2.5 and rounded it to the nearest whole number of 3 to find 8 percent impairment. Dr. Garelick noted that, as appellant has already received a schedule award for carpel tunnel syndrome, the 8 percent value was to be rated at 50 percent under Table 15-23 or 4 percent. Under the Combined Values Chart on page 604, he combined the 4 percent with the 33 percent previously awarded to total 34 percent impairment of the right arm.

The medical adviser's August 2012 impairment rating is in accordance with the A.M.A., *Guides*. It represents the weight of the medical evidence with respect to appellant's permanent impairment. As appellant previously received an award for 31 percent impairment, OWCP properly granted an award of additional impairment of 3 percent.

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.

[14] *Id*. at 433.

[15] *Id.* at 448.

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

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[17] Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[18] A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.[19] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[20] OWCP procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[21]

ANALYSIS -- ISSUE 2

By decision dated October 16, 2012, OWCP awarded appellant an additional 3 percent impairment for the right upper extremity, for a total of 34 percent right upper extremity impairment. Appellant had 30 calendar days from this decision to request an oral hearing, that is until Thursday, November 15, 2012. Because her request for oral hearing was dated and postmarked November 20, 2012, her request was untimely. The Board finds that appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA. In its December 31, 2012 decision, OWCP further exercised its discretion to grant an oral hearing and denied her request on the grounds that she could equally well address the relevant issue in her case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issue raised by OWCP's October 16, 2012 decision, the Board finds that it did not abuse its discretion in denying appellant's untimely request for an oral hearing.[22]

CONCLUSION

The Board finds that appellant has no greater than 34 percent right upper extremity impairment, for which she received a schedule award. The Board further finds that OWCP properly denied her request for an oral hearing as untimely filed.

---

[17] 5 U.S.C. § 8124(b)(1).

[18] 20 C.F.R. §§ 10.616, 10.617.

[19] *Id.* at § 10.616(a).

[20] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[21] *See R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

[22] *See Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2013 and December 31, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 9, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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