

**United States Department of Labor
Employees' Compensation Appeals Board**

L.J., Appellant)	
)	
and)	Docket No. 13-1654
)	Issued: December 4, 2013
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, New Castle, DE, Employer)	
)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2013 appellant, through counsel, filed a timely appeal from a March 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 an eight percent right arm or two percent left arm permanent impairment.

FACTUAL HISTORY

On February 1, 2011 appellant, then a 50-year-old clerk, filed an occupational claim (Form CA-2) alleging right shoulder and arm conditions as a result of repetitive activity in her

¹ 5 U.S.C. § 8101 *et seq.*

federal employment. She previously had filed an occupational claim for a left hand condition on March 19, 2011 due to work on a flat sorting machine. The cases were administratively combined. The statement of accepted facts (SOAF) notes that the claims were accepted for right shoulder rotator cuff tear; bilateral carpal tunnel syndrome; bilateral hand sprains; and right trigger finger. Appellant received compensation for intermittent disability from May 16 to September 30, 2011.

On April 10, 2012 appellant filed a claim for a schedule award. She submitted an April 18, 2012 report from Dr. Damian Andrisani, a Board-certified orthopedic surgeon, who stated that she was one year status post right rotator cuff repair.

By decision dated May 17, 2012, OWCP denied appellant's claim for a schedule award.

Appellant requested a hearing before an OWCP hearing representative. In a report dated June 5, 2012, Dr. Nicholas Diamond, an osteopath, reviewed a history of treatment and provided results on examination. Dr. Diamond noted that a February 5, 2003 electromyogram (EMG)/nerve conduction study revealed mild left carpal tunnel syndrome, the right was within normal limits. With respect to the right arm under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition, hereinafter the A.M.A., *Guides*), appellant had a six percent permanent impairment based on loss of range of flexion and abduction motion in the right shoulder. Dr. Diamond found that under Table 15-23 appellant also had a 4 percent impairment to the right arm for entrapment neuropathy of the median nerve, resulting in a 10 percent right arm impairment. As to the left arm, Dr. Diamond opined that appellant had a two percent impairment due to entrapment neuropathy.

A hearing was held on September 20, 2012.

By decision dated September 26, 2012, the hearing representative remanded the case to combine the records of the upper extremity claims and to refer the case to an OWCP medical adviser for an opinion as to permanent impairment.

The case was referred to an OWCP medical adviser for review. In a report dated October 22, 2012, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and medical adviser, concurred with determination of a six percent right arm impairment based on right shoulder loss of range of motion and a two percent left arm impairment. As to the impairment for the right arm based on entrapment neuropathy, Dr. Berman applied Table 15-23 to rate a two percent impairment. The medical adviser opined that the grade modifier for test findings was zero because test findings were normal.

By decision dated November 14, 2012, OWCP granted schedule awards for an eight percent right arm impairment and a two percent left arm impairment. The period of the awards was 31.20 weeks from June 5, 2012.

Appellant requested a hearing before an OWCP hearing representative, which was held on February 5, 2013. Her representative contended that the opinion of an OWCP medical adviser could not be the weight of the medical evidence.

By decision dated March 14, 2013, the hearing representative affirmed the November 14, 2012 schedule award decision. The hearing representative found that OWCP's medical adviser's opinion represented the weight of the medical evidence.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.² Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.³ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁴

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.⁵ In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories test 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.⁶

ANALYSIS

In the present case, appellant submitted a June 5, 2012 report from Dr. Diamond, rating a 10 percent right arm impairment, based on 6 percent for shoulder loss of motion, and 4 percent for entrapment neuropathy under Table 15-23. As to the left arm Dr. Diamond opined that appellant had a two percent impairment under Table 15-23. By report dated October 22, 2012, Dr. Berman agreed with Dr. Diamond as to loss of shoulder range of motion and the left arm impairment based on entrapment neuropathy, of two percent. He disagreed with respect to the entrapment neuropathy impairment on the right, rating eight percent impairment.

The impairment based on loss of shoulder motion is determined under Table 15-34. Dr. Diamond reported 165 degrees of flexion, which is a three percent arm impairment, and 150 degrees of abduction, which is also a three percent impairment.⁷ An adjustment may be made

² 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

³ A. *George Lampo*, 45 ECAB 441 (1994).

⁴ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁵ A.M.A., *Guides* 448-50.

⁶ *Id.*

⁷ *Id.* at 475, Table 15-34.

under Table 15-35 and Table 15-36 if the functional history grade modifier is higher than the grade modifier based on the degree of shoulder impairment.⁸ In this case, the six percent total impairment based on loss of range of motion is a grade modifier one under Table 15-35. Dr. Diamond found the functional history grade modifier was also one, and therefore no adjustment was made. OWCP's medical adviser concurred and there is no evidence of a greater impairment in this regard.

As to the left arm impairment under Table 15-23, Dr. Diamond assigned grade modifiers of one for test findings (conduction delay), history (mild intermittent symptoms) and physical findings (normal). The average is therefore one, resulting in a default impairment of two percent under Table 15-23. Dr. Diamond found that the functional scale was also one (mild) and there was no adjustment from the default value. Dr. Berman agreed and the Board finds no evidence of left arm impairment greater than two percent.

The disagreement between Dr. Berman and Dr. Diamond pertains to the right side entrapment neuropathy impairment rating as to the grade modifier for test findings. Dr. Diamond assigned a grade modifier of one, which according to Table 15-23 is for test findings that show a "conduction delay (sensory and/or motor)." Dr. Berman pointed out that the only relevant test findings addressed by Dr. Diamond were 2003 EMG/nerve conduction tests that were "within normal limits" for the right wrist. Dr. Diamond did not explain the basis for assigning grade modifier one for test findings and his opinion is of diminished probative value.

The medical adviser found that grade modifier zero was appropriate for test findings which he then applied under Table 15-23.⁹ The opinion of Dr. Berman, however, is also of diminished probative value. The Board notes that the A.M.A., *Guides* clearly stated, with respect to application of Table 15-23 and other tables under section 15.4, "If test findings are grade modifier zero (*i.e.*, electrodiagnostic testing is normal or does not meet standards,) *do not use this section.*"¹⁰ (Emphasis added.) According to the A.M.A., *Guides*, when conduction testing has not been performed or does not meet this section's (15.4) diagnostic criteria, the case should be evaluated under the diagnosis-based impairments with the appropriate regional grid.¹¹

Neither Dr. Diamond nor Dr. Berman addressed this aspect of the A.M.A., *Guides*. The case will be remanded to OWCP to obtain a medical report that adequately evaluates appellant's right arm impairment based on an entrapment neuropathy.¹² After such further development as it deems necessary, an appropriate decision should issue as to appellant's right arm permanent impairment.

⁸ *See id.* at 477.

⁹ The medical adviser also applied a grade modifier of zero for history, even though he acknowledged mild intermittent symptoms and under Table 15-23 this is grade modifier one.

¹⁰ A.M.A., *Guides* 448.

¹¹ *Id.* at 445-46.

¹² When the attending physician and OWCP's medical adviser provide reports of diminished probative value regarding the application of the A.M.A., *Guides*, the case is remanded for further development. *See T.B.*, Docket No. 10-1985 (issued June 3, 2011); *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

On appeal, appellant argued that a conflict under 5 U.S.C. § 8123(a) was created between Dr. Diamond and OWCP's medical adviser. For the reasons noted above, the medical reports were of diminished probative value with respect to the right arm entrapment neuropathy impairment and not sufficient to create a conflict.¹³

CONCLUSION

The Board finds that appellant has no more than two percent left arm impairment. The case is not in posture for decision with respect to the right arm impairment due to entrapment neuropathy.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: December 4, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹³ See *Mary L. Henninger*, 52 ECAB 408 (2001).