United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 12-1443**
	)	**Issued: January 15, 2013**
DEPARTMENT OF THE ARMY, U.S. ARMY MATERIEL COMMAND, Pine Bluff, AR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2012 appellant filed a timely appeal from a February 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed a schedule award. The February 14, 2012 decision also denied his request to subpoena witnesses. 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.

ISSUES

The issues are: (1) whether appellant sustained more than a six percent permanent impairment of the right upper extremity for which he received schedule awards; (2) whether OWCP properly determined the period of the August 31, 2011 schedule award; and (3) whether it properly denied appellant's request for subpoenas.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 22, 2010 appellant, then a 63-year-old motor vehicle operator, filed an occupational disease claim (Form CA-2) alleging bilateral carpal tunnel syndrome and a pinched nerve on the right side of his neck as a result of his federal employment. His job duties included hauling, loading, unloading, opening tractor trailer doors and opening and closing building doors.

By decision dated July 8, 2010, OWCP accepted appellant's claim for bilateral carpal tunnel syndrome, authorizing bilateral carpal tunnel repair surgery and physical therapy.

On October 14, 2010 appellant underwent right carpal tunnel release. In an October 14, 2010 surgical report, Dr. Kirk Reynolds, a treating surgeon, reported that appellant's right carpal tunnel release showed no significant pathology involving the median nerve once the procedure had been completed.

In a February 14, 2011 medical report, Dr. Theresa O. Wyrick reviewed appellant's February 4, 2011 electromyogram study and opined that because the latency had increased since a test performed on April 6, 2010. This indicated a possible inadequate carpal tunnel release. Dr. Wyrick noted that appellant was hesitant about revisiting surgery and provided him with a carpal tunnel injection as an alternative.

On April 4, 2011 appellant again filed a schedule award claim.[2]

In a March 7, 2011 medical report, Dr. Wyrick stated that appellant complained of continued pain and swelling of the right hand, noting that the prior carpal tunnel injection provided virtually no relief. She did not believe that he would benefit much from a repeat surgery. Dr. Wyrick opined that over time, appellant's symptoms would resolve and that he had reached maximum medical improvement. She noted that appellant would undergo a functional capacity evaluation to obtain an impairment rating.

In an April 18, 2011 medical report, Dr. Wyrick reviewed appellant's functional capacity evaluation, stating that his hand demonstrated full digital range of motion in flexion and extension with a trace amount of swelling in the right hand. She stated that he was neurovascularly intact and that his subjective pain rating was a seven. Despite the findings on functional capacity evaluation, appellant's work duties caused him discomfort. In a work capacity evaluation form (Form OWCP-5c), Dr. Wyrick stated that he was not capable of performing his usual duties and could return to work with permanent restrictions.

OWCP referred the medical evidence, a statement of accepted facts and the case file to an OWCP district medical adviser (DMA). In a July 3, 2011 report, the DMA stated that appellant reached MMI of the right carpal tunnel syndrome on April 18, 2011 when he provided him with

[2] The Board notes that appellant had previously filed schedule award claims on July 14 and October 20, 2010. In development letters dated September 29 and November 2, 2010, OWCP informed appellant that there was no medical evidence to indicate that he had reached maximum medical improvement (MMI) to support his claim for a schedule award of permanent impairment. It noted that once he reached MMI, to resubmit his schedule award claim along with supporting medical evidence from his treating physician.

permanent work restrictions through the work capacity evaluation form. The DMA also noted that, although the April 6, 2010 electromyography and nerve conduction studies (EMG/NCS) revealed a mild left carpal tunnel syndrome, there would be no rating provided for a left carpal tunnel condition as the medical records never once indicated that appellant had reported left upper extremity symptoms compatible with a left carpal tunnel syndrome. Appellant stated that an impairment rating for the left upper extremity at the same time as MMI is being declared for the right upper extremity would not be appropriate. A carpal tunnel syndrome diagnosis is not based solely on the findings of EMG/NCS and must be supported by the medical history and examination findings. In this instance, the medical adviser noted that appellant did not have examination findings or history consistent with left carpal tunnel syndrome and thus, there could be no impairment rating or schedule award for the left upper extremity.

The DMA reviewed appellant's medical records pertaining to the right upper extremity and stated that the EMG/NCS performed on February 4, 2011 showed more significant motor dysfunction than the April 6, 2010 EMG/NCS. He further noted that, as of April 18, 2011, appellant's subjective pain scale rating was described as a seven. In an April 18, 2011 attending physician's note, Dr. Wyrick stated that appellant was neurovascularly intact. Using the postoperative history, examination findings and the EMG/NCS reports, the impairment rating for permanent residuals of the right carpal tunnel syndrome was processed using Table 15-23 in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] According to Table 15-23 of the A.M.A., *Guides,* test findings were determined to be a grade modifier 2 as shown by the motor block from the February 4, 2011 EMG/NCS tests. History was processed as a grade modifier 3 because it was implied that appellant had constant symptoms. Physical findings were a grade modifier 1 in that he was found to be neurovascularly intact on the date of MMI. Using the instructions for the rating process on page 448, the DMA added the corresponding numerical values: 2 + 3 + 1 for a total of 6. He then divided the sum of 6 by 3, totaling 2.[4] Thus, grade 2 was determined to be the final rating category. Using Table 15-23, the medical adviser noted that grade modifier 2 consisted of a four to six percent upper extremity rating. Giving weight to appellant's subjective symptoms, the DMA found a 6 percent upper extremity impairment rating.[5]

By decision dated August 31, 2011, OWCP granted appellant a schedule award claim for six percent permanent impairment of the right upper extremity. The date of MMI was noted as April 18, 2011. The award covered a period of 18.72 weeks from July 3 to November 11, 2011. OWCP noted that because appellant had been receiving wage-loss compensation through July 2, 2011, the date of the schedule award was administratively changed to July 3, 2011.

On September 9, 2011 appellant requested a hearing before the Branch of Hearings and Review.

[3] A.M.A., *Guides* 448-49, Table 15-23 (2009).

[4] *Id.* at 448.

[5] *Id.* at 449, Table 15-23.

By letter dated November 6, 2011, appellant requested subpoenas for his wife and his OWCP registered nurse, stating that they were present at all of his physician's appointments and that their testimony was directly relevant to the issues at hand.

On November 21, 2011 the hearing representative denied appellant's request for subpoenas stating that he was appealing an August 31, 2011 schedule award determination which primarily involved a medical issue for permanent partial impairment ratings. The hearing representative informed him that if he disagreed with the evidence contained in the file, he could point out the discrepancies during his testimony at the hearing.

At the December 2, 2011 hearing, appellant argued that he would like OWCP to issue witness subpoenas so that his wife and his OWCP nurse could testify because they were present with him at his medical appointments. The hearing representative informed him that a schedule award determination was based on medical evidence from a physician and not testimony. Appellant further argued that his schedule award should have been paid beginning April 18, 2011, the date of his MMI. The hearing representative informed him that he could not receive a schedule award and wage-loss compensation for the same date and thus, his award was adjusted to July 3, 2011 because he had been paid compensation benefits from May 22 to July 2, 2011. Appellant continued to insist that his schedule award should reflect the date of MMI. He further testified that he continued to face difficulties with his carpal tunnel syndrome and that he disagreed with the DMA's schedule award rating.

By decision dated February 14, 2010, the hearing representative affirmed OWCP's August 31, 2011 decision finding that appellant was entitled to an award of no more than six percent permanent impairment of the upper right extremity for the period July 3 to November 11, 2011. It further denied his requests for subpoenas finding that the schedule award determination is based on medical evidence and the testimony of his wife and his OWCP nurse did not provide relevant information which could not be obtained by other means.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA 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.[6] 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.[7]

[6] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[7] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[8] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[11] In Table 15-23, grade modifier 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.[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 the medical adviser providing rationale for the percentage of impairment specified.[13]

ANALYSIS

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. By decision dated August 31, 2011, it granted him a schedule award for a six percent permanent impairment of the upper right extremity, using the applicable table of the sixth edition of the A.M.A., *Guides*.[14] In a February 14, 2012 decision, an OWCP hearing representative found that appellant was not entitled to an increased schedule award. The Board finds that he has not met his burden of proof to establish that he has impairment of the upper right extremity greater than the six percent already awarded.

In her April 18, 2011 medical report, Dr. Wyrick provided appellant with permanent work restrictions, stated that he was neurovascularly intact and noted his subjective pain rating as a seven. She stated that he had reached MMI but failed to provide an impairment rating for his

[8] A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id.* at 385-419.

[10] *Id.* at 411.

[11] *Id.* at 449.

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

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

[14] *Supra* note 5.

right carpal tunnel syndrome. OWCP properly referred the case file to a DMA for review and determination regarding whether appellant sustained a permanent partial impairment.

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23, Entrapment/Compression Neuropathy Impairment and accompanying relevant text.[15] In Table 15-23, grade modifiers are described for the categories test findings, history and physical findings which 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.[16]

In a July 3, 2011 report, the DMA used appellant's postoperative history, examination findings and the EMG/NCS reports to calculate an impairment rating for permanent residuals of the right carpal tunnel syndrome. Using Table 15-23 of the A.M.A., *Guides*, the DMA identified a grade modifier 2 for test findings due to a motor block from the February 4, 2011 EMG/NCS tests. History was determined to be a grade modifier 3 due to appellant's constant symptoms. Physical findings were determined to be a grade modifier 1 because he was found to be neurovascularly intact on the date of MMI. Per the A.M.A. *Guides* rating process, the DMA added the values of the grade modifiers: $2 + 3 + 1 = 6$. The sum of 6 was then divided by 3 to obtain an average value for these three modifiers which equaled 2. This placed appellant in grade 2 as the final rating category. The DMA noted that, according to Table 15-23, a grade modifier 2 has an upper extremity impairment rating of four to six percent. Appellant concluded that appellant had six percent upper right extremity impairment due to carpal tunnel syndrome, giving weight to appellant's subjective symptoms.[17] The date of MMI was noted as April 18, 2011, the date appellant was placed on permanent work restrictions by Dr. Wyrick.

The Board finds that the DMA properly applied the appropriate tables and grading schemes of the A.M.A., *Guides* in determining that appellant had no more than a six percent right upper extremity impairment for which he received a schedule award. Appellant did not submit any additional medical evidence on appeal which would establish that he has more than six percent impairment to the upper right extremity.

On appeal, appellant stated that OWCP had relevant medical records pertaining to his left hand. The Board notes that, in his July 3, 2011 report, the DMA stated that, though the April 6, 2010 EMG/NCS revealed a mild left carpal tunnel syndrome, there would be no rating provided for a left carpal tunnel condition as the medical records never once indicated that he had reported left upper extremity symptoms compatible with a left carpal tunnel syndrome. The medical adviser noted that carpal tunnel syndrome diagnosis was not based solely on the findings of EMG/NCS and must be supported by medical history and examination findings. In this instance, appellant did not have examination findings or history consistent with left carpal tunnel syndrome. He has the burden of proof to submit the medical evidence necessary to support his

[15] *Supra* note 11.

[16] *Supra* note 12.

[17] A.M.A., *Guides.* at 448-449, Table 15-23.

claim of permanent impairment of a scheduled member or function of the body.[18] As appellant's medical records, complaints and symptoms focused on the right upper extremity, OWCP has not determined an impairment rating or schedule award for the left upper extremity.

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.

LEGAL PRECEDENT -- ISSUE 2

It is well established that the period covered by a schedule award commences on the date that the employee reaches MMI from residuals of the employment injury.[19] This is a medical issue and is determined by the medical evidence.[20] With respect to the period of a schedule award, an employee cannot concurrently receive compensation under a schedule award and compensation for disability for work.[21]

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For the arm, the maximum number of weeks of compensation is 312.

ANALYSIS -- ISSUE 2

In its August 31, 2011 decision, OWCP granted appellant a schedule award for a six percent permanent impairment of the upper right extremity for the period of July 3 to November 11, 2011 for a period of 18.72 weeks. It noted that, though the date of MMI was April 18, 2011, he had been receiving wage-loss compensation through July 2, 2011 and thus, the date of the schedule award was administratively changed to July 3, 2011.

The determination that appellant had a six percent left arm impairment was based on the DMA's July 3, 2011 report. As noted above, his entitlement to impairment is six percent for the upper right extremity. The maximum number of weeks for arm impairment is 312 weeks. Therefore, appellant is entitled to six percent of 312 weeks or 18.72 weeks of compensation. The Board finds that OWCP properly found that he was entitled to 18.72 weeks of compensation.

With respect to the specific period for payment of the 18.72 weeks of compensation, this is based on the date of MMI which occurred on April 18, 2011. The determination of the date for MMI ultimately rests with the medical evidence[22] and is usually considered to be the date of

[18] *See D.H.*, 58 ECAB 358 (2007); *Tammy L. Meehan*, 53 ECAB 229 (2001); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[19] *Albert Valverde*, 36 ECAB 233, 237 (1984).

[20] *Adela Hernandez-Piris*, 35 ECAB 839 (1984); *James T. Rogers*, 33 ECAB 347 (1981).

[21] *James A. Earle*, 51 ECAB 567 (2000); *Andrew B. Poe*, 27 ECAB 510 (1976).

[22] *L.H.*, 58 ECAB 561 (2007).

the evaluation by the physician which is accepted as definitive by OWCP.[23] OWCP did not begin the schedule award on April 18, 2011 because appellant was still receiving compensation for wage-loss compensation at that time. While appellant refers to a delay in the schedule award, this was not adverse to him because if the schedule award had begun on April 18, 2011 he would not have been entitled to wage-loss compensation at the same time.[24]

On appeal, appellant argues that he should have received his schedule award beginning April 18, 2011, the date of MMI. He argued that it was unfair that his schedule award did not commence until July 3, 2011 and that he should have been given the option to choose whether he received wage-loss compensation or a schedule award during that period. The Board notes that appellant would be entitled to 18.72 weeks of compensation, regardless of whether the schedule award began on April 18 or July 23, 2011.[25]

The Board finds that OWCP properly determined the period of the award for 18.72 weeks from July 3 to November 11, 2011. Based on the evidence of record, the period of the award does not represent an adverse finding to appellant.

LEGAL PRECEDENT -- ISSUE 3

Section 8126 of FECA provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[26] The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[27] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[28] Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark,

[23] *Mark Holloway*, 55 ECAB 321, 325 (2004).

[24] *See Marie J. Born*, 27 ECAB 623 (1976).

[25] *T.K.*, Docket No. 12-271 (issued June 21, 2012).

[26] 5 U.S.C. § 8126(1).

[27] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[28] *Id.*

electronic marker or other objective date mark) after the date of the original hearing request.[29] OWCP's hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[30] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[31]

ANALYSIS -- ISSUE 3

On September 9, 2011 appellant requested a hearing and, by letter dated November 6, 2011, requested subpoenas to compel the attendance and testimony of his wife and OWCP nurse who had been present during his physician's appointments. On November 21, 2011 an OWCP hearing representative denied his request for subpoenas stating that he was appealing a schedule award determination which primarily involved a medical issue for permanent partial impairment ratings. By decision dated February 14, 2012, the hearing representative affirmed its November 21, 2011 decision denying appellant's request to subpoena such witnesses, finding that the schedule award determination was based on medical evidence and that this testimony could not provide relevant information that could not be obtained by any other means to ascertain facts which needed to be considered.

The Board finds that the hearing representative properly denied appellant's subpoena requests because he did not establish why a subpoena was the best method to obtain the evidence in question and why there was no other means by which the testimony could be obtained. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[32] The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion. The Board finds that the hearing representative did not abuse her discretion in denying appellant's request for subpoenas.

CONCLUSION

The Board finds that appellant does not have more than a six percent employment-related permanent impairment to his upper right extremity. In addition, the Board finds that OWCP properly determined the period of the schedule award. The Board further finds that OWCP properly denied appellant's request for a subpoena.

[29] 20 C.F.R. § 10.619(a)(1).

[30] *See Gregorio E. Conde*, *supra* note 27.

[31] *Claudio Vazquez*, 52 ECAB 496 (2001).

[32] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated February 14, 2012 is affirmed.

Issued: January 15, 2013
Washington, DC

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

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

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