United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 14-853**
	)	**Issued: December 1, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, 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:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2014 appellant, through her attorney, filed a timely appeal of an October 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant sustained ratable permanent impairment of her upper extremities warranting a schedule award.

On appeal, counsel argues that there is an unresolved conflict of medical opinion evidence.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. Appellant, a 35-year-old letter carrier, developed carpal tunnel syndrome due to factors of her federal employment.[2] She underwent electromyogram (EMG) and nerve conduction velocity (NCV) studies on April 13, 1998. OWCP accepted appellant's claim for bilateral tenosynovitis of the wrists on April 22, 1998. On November 16, 1999 appellant's attending physician, Dr. Scott M. Fried, an osteopath, performed an anterior sub muscular transposition of the ulnar nerve in appellant's right elbow. OWCP accepted appellant's periods of intermittent total disability as work related and authorized compensation. OWCP terminated her compensation and medical benefits due to bilateral tenosynovitis of the wrists effective July 31, 2001. The Board affirmed this decision on June 5, 2003.[3]

In a report dated June 10, 2004, Dr. Nicholas Diamond, an osteopath, evaluated appellant's permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] He found 41 percent impairment of the right upper extremity and 35 percent impairment of the left upper extremity. Appellant requested a schedule award on September 30, 2004. The medical adviser reviewed appellant's claim for schedule award on June 9, 2005 and found that she had no impairment of her left upper extremity and seven percent impairment of her right upper extremity due to loss of range of motion. He again reviewed appellant's medical evidence on November 6, 2008 and noted that carpal tunnel syndrome was never accepted. The medical adviser recommended further medical examination.

In a letter dated May 22, 2009, OWCP requested that appellant submit medical evidence regarding her impairment under the sixth edition of the A.M.A., *Guides*.[5] Dr. Diamond resubmitted his June 10, 2004 report and noted that his impairment rating was revised to the sixth edition of the A.M.A., *Guides*. He diagnosed entrapment neuropathy right median nerve at the wrist and determined that appellant had clinical studies grade modifier 1, physical examination grade modifier 2 or functional history grade modifier 2 or five percent impairment of the right upper extremity. Dr. Diamond found entrapment neuropathy right ulnar nerve at the elbow, clinical studies grade modifier 1, functional history grade modifier 2 or physical examination grade modifier 1 for 13 percent impairment of the right upper extremity. He also found a moderate motor deficit of the right supraspinatus at C5-6 with functional history grade modifier 2 and clinical studies grade modifier 2 and eight percent impairment of the right upper

[2] Appellant had a previous claim for sprain of the talofibular ligament and requested a schedule award for the left lower extremity. OWCP found that she had nine percent impairment of her left lower extremity. The Board reviewed this claim and found that it was not in posture for a decision and remanded the case to OWCP on December 24, 1998. Docket No. 97-1177 (issued December 24, 1998).

[3] Docket No. 03-545 (issued June 5, 2003).

[4] A.M.A., *Guides*, 5th ed. (2001).

[5] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

extremity. Dr. Diamond diagnosed a mild motor deficit of the right biceps with a functional history grade modifier 2 and clinical studies grade modifier 2 and net adjustment of 2 for right upper extremity impairment rating of six percent. He also found a motor deficit of the right triceps with functional history grade modifier 2 and clinical studies grade modifier 2 and a net adjustment of 2 for a right upper extremity impairment of 12. Dr. Diamond concluded that appellant had 38 percent impairment of the right upper extremity.

As to appellant's left upper extremity, Dr. Diamond found entrapment neuropathy of the left medical nerve at the wrist with clinical studies grade modifier 1, functional history grade modifier 3 and physical examination grade modifier 2 for five percent impairment of the left upper extremity. He diagnosed class 1 mild motor deficit of the left supraspinatus and deltoid, C5-6 of the brachial plexus, nine percent impairment. With adjustments from functional history of 2 and clinical studies of 2 resulting in a net adjustment of 13 percent Dr. Diamond found that appellant had a combined left upper extremity impairment of 17 percent.

OWCP referred the medical evidence to an OWCP medical adviser on March 11, 2010. In a report dated March 17, 2010, Dr. Henry J. Magliato, the medical adviser, found that appellant had five percent impairment due to entrapment neuropathies of the right median nerve at the wrist in accordance with Table 15-23 of the A.M.A., *Guides*.[6] He found that her grade modifiers were 3 for functional history, 2 for physical examination and 1 for clinical studies. Dr. Magliato agreed that appellant had entrapment neuropathy of the ulnar nerve at the elbow based on Table 15-23 of the A.M.A., *Guides*.[7] He listed her functional history grade modifier 2, clinical studies grade modifier 1 and physical examination grade modifier 4 and found that appellant had two percent impairment of the right elbow. He determined that Dr. Diamond had used other diagnoses in the right upper extremity, which were neither accepted or preexisting conditions and were based on shoulder and cervical spine impairments. Dr. Magliato recommended additional development of the medical evidence.

OWCP stated that it referred appellant for an impartial medical examination on November 5, 2010 to resolve a conflict of medical opinion between Dr. Diamond and Dr. Magliato regarding the extent of permanent impairment. In a report dated December 22, 2010, Dr. Mark K. Levistsky, a Board-certified orthopedic surgeon, designated as the impartial medical examiner, listed findings on physical examination, including normal range of motion of the cervical spine; right trapezius pain; and intact reflexes. Appellant reported right shoulder pain with motion, but no impingement and normal strength or atrophy. Dr. Levistsky found normal range of motion of the right elbow with no atrophy in either hand. He reported normal grasp and intrinsic strength in both hands. Dr. Levistsky found positive Tinel's sign and Phalen's test in the right median nerve. He reviewed the medical reports of record and diagnostic studies. Dr. Levistsky found that she had bilateral tenosynovitis of her arms. He found that appellant's tenosynovitis had resolved and that she had completely recovered from her injuries to her right upper extremity. Dr. Levistsky stated, "I find no evidence of any permanent functional impairment to her right upper extremity."

[6] A.M.A., *Guides* 449, Table 15-23.

[7] *Id.*

OWCP again referred appellant to Dr. Levistsky and he examined her on August 23, 2011. Dr. Levistsky again found no evidence of any permanent functional impairment of either of her upper extremities. He stated that tests for carpal tunnel syndrome were normal with no evidence of atrophy in either of appellant's hands. Dr. Levistsky stated that she had no evidence of any neurological deficits in either of her upper extremities. He stated that tests for carpal tunnel syndrome were normal and that there was no evidence of any neurological deficits in either of her upper extremities.

Dr. Andrew Merola, a medical adviser and Board-certified orthopedic surgeon, reviewed the evidence on February 29, 2012. He agreed with Dr. Levistsky finding a normal examination without objective evidence of deficiencies. Dr. Merola reported the findings of no thenar atrophy and normal grip strength.

By decision dated March 7, 2012, OWCP denied appellant's claim for a schedule award based on Dr. Levistsky's reports.

Counsel requested an oral hearing before an OWCP hearing representative on March 12, 2012. He submitted a report from Dr. Diamond dated June 8, 2012. Dr. Diamond reviewed his June 10, 2004 report and the reports of Drs. Levistsky and Merola. He noted the diagnosis of entrapment neuropathy of the right median nerve at the wrist and provided grade modifiers for clinical studies 1, functional history 3 and physical examination 2 due to decreased sensation. He averaged the grade modifiers and reached two[8] finding a right upper extremity impairment of five percent. Dr. Diamond also found entrapment neuropathy of the right ulnar nerve at the elbow. He reported functional history grade modifier 2, clinical studies grade modifier 1 and physical examination grade modifier 1 for two percent impairment of the right upper extremity. Dr. Diamond stated that appellant's average modifier was two and stated that her impairment range was increased to three. He also noted that since this was her second entrapment, the lesser impairment was reduced by 50 percent[9] to reach an impairment rating of five percent of the right upper extremity.

Dr. Diamond also provided impairment ratings for moderate motor deficits at C5 and 6. He stated that a class 2 rating was 25 percent and provided grade modifiers including functional history 2 and clinical studies 2, for a net adjustment of 0. Dr. Diamond found that appellant had 25 percent impairment of the right upper extremity due to this condition.[10]

Appellant testified at the oral hearing on June 13, 2012. She stated that she had retired from the employing establishment in 2004 and that she received disability retirement and social security benefits. Appellant described her right hand and right elbow symptoms. She continued to experience pain in both wrists and hands with numbness and tingling. Appellant reported dropping items and losing strength in her arms. She could not drive more than five minutes because her hands became numb. Appellant's children helped her to shop to avoid dropping

[8] *Id*. at 448-49, Table 15-23.

[9] *Id.*

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

items, reaching and bending. She contended that Dr. Levistsky failed to provide a complete examination. Counsel argued that there was no conflict in the medical evidence at the time of Dr. Levistsky's reports.

By decision dated August 16, 2012, the hearing representative set aside the March 7, 2012 decision and remanded the case for further development of the medical evidence. He found that OWCP incorrectly determined that there was a conflict of medical opinion between Dr. Diamond and Dr. Magliato. Therefore, Dr. Levistsky was not an impartial medical examiner. The hearing representative found that Dr. Levistsky's reports were of diminished probative value as he was provided with a deficient statement of accepted facts which did not mention an accepted right elbow surgery in 1999.

OWCP amended the statement of accepted facts on September 26, 2012, which included the acceptance of bilateral tenosynovitis and the authorized November 16, 1999 right ulnar nerve transposition surgery. Dr. Magliato reviewed the medical records on behalf of OWCP on September 29, 2012 and noted that Dr. Diamond's reports were based on an old examination of June 10, 2004 and then applying the sixth edition of the A.M.A., *Guides*. He stated that Dr. Levistsky's report was more recent and should be accepted as representing appellant's current physical condition.

By decision dated October 23, 2012, OWCP denied appellant's claim finding that Dr. Levistsky's reports were entitled to the weight of the medical evidence. It found that she did not establish any permanent impairment of her upper extremities.

Counsel requested an oral hearing on October 31, 2012. In a decision dated December 17, 2012, the Branch of Hearings and Review vacated the October 23, 2012 decision and remanded the case for referral to a second opinion examiner.

OWCP referred appellant for a second opinion to Dr. Stanley Askin, a Board-certified orthopedic surgeon. In a report dated February 1, 2013, Dr. Askin reviewed the statement of accepted facts and the medical evidence of record. He listed appellant's symptoms of numbness in both hands, pain from her neck to right fingertips and pain from her left elbow to her hand. Dr. Askin examined appellant and found a scar on her right arm, but no other objective findings. He noted that appellant demonstrated no neck flexion, 30 degrees of extension, 30 degrees of right rotation and 20 degrees of left rotation. Dr. Askin further found that appellant's shoulder motion was limited to 80 degrees of abduction on the right and 70 degrees on the left. He reported 70 degrees of forward flexion in both shoulders and essentially full range of motion of her left elbow. Appellant's right elbow demonstrated 40 to 110 degrees of motion with no crepitus. Dr. Askin found that appellant's forearm circumferences were equal. Appellant's muscle function was intact in her upper extremities bilaterally with intact thenar function. There were no atrophic or dystrophic changes in either hand and that two-point discrimination was preserved in all digits. Dr. Askin stated, "[Appellant] did have a positive Phalen's [test] and Tinel's [sign] of both hands, suggesting that the real explanation for her complaints has been carpal tunnel syndrome."

In response to the questions posed by OWCP, Dr. Askin stated that appellant had zero percent impairment of her upper extremities due to the accepted condition of bilateral

tenosynovitis. He stated that she did not cooperate with the examination as she had no objective limitation and no imperfection that was not under her voluntary control. Dr. Askin found that carpal tunnel syndrome might be the true explanation for her complaints. He stated, "If so [appellant's] complaints do have a physical basis, but such was not an accepted condition and is not being addressed or treated in the present time. The bottom line is that she offers no acceptable basis upon which to make a calculation as her presentation appears to be one of fabrication."

Dr. Magliato reviewed Dr. Askin's report on March 13, 2013. He found a conflict between Dr. Diamond and Dr. Levistsky. He further stated that, based on Dr. Askin's findings, appellant had no impairment of the right upper extremity.

By decision dated April 17, 2013, OWCP denied appellant's claim for a schedule award relying on Dr. Askin's report as it was more recent than Dr. Diamond's examination of 2004.

Counsel requested an oral hearing on April 22, 2013. He argued that there was a conflict of medical opinion on the issue of permanent impairment.

The hearing representative issued an October 28, 2013 decision. She found that appellant did not establish any permanent impairment warranting a schedule award. The hearing representative found that Dr. Diamond's findings were significantly different and inconsistent with prior and subsequent medical evaluations. The hearing representative noted that Dr. Diamond did not explain how the degree of impairment for the bilateral medial nerves, the deltoid muscle deficit, C5-6 motor deficit, and bilateral brachial plexopathy were related to appellant's accepted employment injury or her surgery in 1999. She concluded that Dr. Diamond's ratings of impairment was of diminished probative value.

LEGAL PRECEDENT

The schedule award provision of FECA[11] and its implementing regulations[12] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[13]

[11] *See supra* note 1.

[12] 20 C.F.R. § 10.404.

[13] For decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); *see supra* note 5; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to her employment.[14] The Board has held that medical opinion based upon stale clinical or physical examination evidence is unpersuasive.[15] The Board has evaluated the probative value of medical opinion evidence by looking to the quality of the information cited in the report rather than limiting its review to the putative date of the report.[16] Where a physician prepares a report without a contemporaneous clinical examination and record review, the physician should explain why new information was unnecessary to reach the medical opinion expressed in the report.[17]

ANALYSIS

OWCP accepted appellant's claim for bilateral tenosynovitis of the wrists on April 22, 1998. On November 16, 1999 she underwent an authorized anterior submuscular transposition of the ulnar nerve in her right elbow.

Appellant filed a claim for a schedule award on September 30, 2004 and submitted a report from Dr. Diamond dated June 10, 2004. Dr. Diamond applied the fifth edition of the A.M.A., *Guides* to find that she had 41 percent impairment of the right upper extremity and 35 percent impairment of the left upper extremity.

On May 22, 2009 OWCP requested that appellant submit medical evidence regarding any impairment under the sixth edition of the A.M.A., *Guides.*[18] Dr. Diamond resubmitted his June 10, 2004 report, stating he revised the impairment rating under the sixth edition of the A.M.A., *Guides*. He found 38 percent impairment of her right upper extremity and 17 percent of

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

[15] *L.T.*, Docket No. 13-997 (issued June 10, 2014); *E.W.*, Docket No. 13-506 (issued May 13, 2013) (the Board held that a medical report dated May 16, 2011, which contained only clinical examination results from October 2004 and where the author of the report failed to respond, within the allotted time, to an OWCP request for a supplemental report did not support appellant's claim for a schedule award. The Board affirmed OWCP's order denying a schedule award). *B.M.*, Docket No. 13-691 (issued September 12, 2013) (the Board found that a medical report dated April 22, 2010 and based on physical examination findings from July 2004 rested on stale evidence and did not create a conflict with a second opinion report based on an examination made almost seven years later. The Board affirmed OWCP's schedule award).

[16] *D.S.*, Docket No. 13-20 (issued April 3, 2013) (the Board found a report dated November 5, 2010, which provided an impairment rating was of limited probative value because, in part, it was based on physical examination findings from 2003).

[17] *B.N.*, Docket No. 12-1394 (issued August 5, 2013) (the Board found a report dated November 28, 2011, by an attending osteopath, to be stale because the physician used his examination findings from July 2004 and applied the criteria of the sixth edition of the A.M.A., *Guides* to the results of 2004. He failed to explain why a current examination was not necessary to support the opinion offered). *R.C.*, Docket No. 12-437 (issued October 23, 2012) (the Board found that a report dated September 27, 2010, by an attending orthopedic surgeon, did not create a conflict of medical evidence, in part, because the physician relied on examination findings from October 2, 2007. The physician did not explain why a new examination was not necessary).

[18] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. *See supra* note 5.

the left upper extremity. Dr. Diamond relied on the physical findings from his June 10, 2004 report. The Board finds that his impairment ratings are of reduced probative value as he relied on physical findings some five and seven years after his examination of appellant. These physical examination findings constitute stale medical evidence.[19]

The Board finds that there was no conflict of medical opinion between Dr. Diamond and Dr. Magliato. As noted, Dr. Diamond's findings were based on a stale examination. The medical adviser reviewed the findings and recommended a second opinion evaluation. Given the reduced probative value of Dr. Diamond's impairment rating findings, there was no conflict of medical opinion evidence. Dr. Levistsky was improperly designated as an impartial medical adviser and his reports are not entitled to special weight.

In his reports dated December 22, 2010 and August 23, 2011, Dr. Levistsky found that appellant's accepted tenosynovitis had resolved and that she had recovered from the injuries to her right upper extremity. He stated that tests for carpal tunnel syndrome were normal and that there was no evidence of any neurological deficits in either of her upper extremities. However, Dr. Levistsky's opinion was not based on an accurate statement of accepted facts, which excluded the November 16, 1999 right ulnar nerve transposition surgery authorized by OWCP in 1999. Due to this deficiency, his opinion is also of reduced probative value.

Dr. Askin reported findings on examination of appellant on February 1, 2013. He reviewed an accurate statement of accepted facts and the medical evidence in the record. Dr. Askin stated that appellant had no impairment of her upper extremities due to the accepted condition of bilateral tenosynovitis. He stated that carpal tunnel syndrome might be the true explanation for her complaints and stated, "If so [appellant's] complaints do have a physical basis, but such was not an accepted condition and is not being addressed or treated in the present time. The bottom line is that she offers no acceptable basis upon which to make a calculation as her presentation appears to be one of fabrication."

The Board finds that the most recent medical evidence based on an accurate factual background is the February 1, 2013 report of Dr. Askin, who provided findings on physical examination and concluded that appellant's accepted employment injury did not result in any permanent impairment.

Appellant has the burden of proving that the condition for which a schedule award is sought is causally related to her employment.[20] She has not submitted sufficient medical opinion evidence to establish that she sustained a permanent impairment to her upper extremities causally related to her accepted employment injury of bilateral tenosynovitis of the wrists.

[19] *K.P.*, Docket No. 13-2079 (issued February 18, 2014); *see H.C.*, Docket No. 11-1407 (issued May 11, 2012) (finding that an attending osteopath did not reexamine appellant and based his physical findings on a 2004 examination such that his report constituted stale medical evidence and did not create a conflict of medical opinion evidence).

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

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.

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish a permanent impairment of a scheduled member due to her accepted employment-related condition of bilateral tenosynovitis of the wrists.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 2014
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