United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 13-1675**
	)	**Issued: January 13, 2014**
U.S. POSTAL SERVICE, INTERBAY ANNEX, Seattle, WA, 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
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 3, 2013 appellant filed a timely appeal from the May 8, 2013 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. The Board also has jurisdiction to review OWCP's June 17, 2013 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether appellant has more than a 19 percent impairment of her left arm, for which she received a schedule award; and (2) whether OWCP properly denied her reconsideration request under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 12, 2004 appellant, a 49-year-old letter carrier, filed an occupational disease claim alleging right carpal tunnel syndrome and left thumb joint pain was a result of letter casing and repetitive hand motion in the performance of her duties. OWCP accepted her claim for bilateral carpal tunnel syndrome, bilateral carpometacarpal (CMC) arthritis and bilateral enthesopathy of the wrist and carpus.

Appellant underwent a left CMC arthroplasty in 2006. In 2008 OWCP issued a schedule award for a 19 percent impairment of her left arm.

Appellant underwent left revision CMC arthroplasty in 2012. She filed a claim for an additional schedule award and submitted the December 21, 2012 report of Dr. Thomas E. Trumble, a Board-certified orthopedic surgeon specializing in hand surgery. Dr. Trumble compared appellant's October 18, 2012 physical findings to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). He found that appellant had a class 3 impairment for left thumb CMC arthroplasty with a default digital impairment of 30 percent.[2] Dr. Trumble reduced this to 26 percent based on her mild functional history, physical examination and clinical studies.[3] He then converted this to a nine percent impairment of the upper extremity.[4]

Dr. L.J. Weaver, an OWCP medical adviser, reviewed the physical findings from Dr. Trumble's evaluation. He agreed with the default digit impairment of 30 percent, as well as the grade modification to 26 percent and the conversion to a 9 percent impairment of the left upper extremity. The medical adviser combined this with a 2 percent impairment due to motion loss for a final impairment rating of 11 percent.[5]

OWCP scheduled a second opinion to address appellant's complaint of left thumb numbness, sensitivity and atrophy/deformity, as well as any residuals due to carpal tunnel syndrome and left thumb surgeries. It referred her to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for an impairment evaluation. Dr. Dinenberg examined appellant on April 23, 2013. He related her history, reviewed her records and described his findings on physical examination. As had Dr. Trumble and Dr.Weaver, Dr. Dinenberg found that appellant had a default digit impairment of 30 percent for thumb CMC arthroplasty, which he modified to 26 percent due to her functional history and physical examination.

Dr. Dinenberg noted a two-point discrimination of seven millimeters on the radial and ulnar aspect of the left thumb. This represented a partial sensory loss[6] and a 25 percent digit

[2] A.M.A., *Guides* 394 (6th ed. 2009) (Table 15-2).

[3] *Id*. at 406 (Table 15-7), 408 (Table 15-8), 410 (Table 15-9).

[4] *Id*. at 421 (Table 15-12).

[5] OWCP's medical adviser found no ratable impairment due to carpal tunnel syndrome.

[6] *Id*. at 426 (Table 15-15)

impairment.[7] Dr. Dinenberg added the 26 and 25 percent ratings for a total thumb impairment of 51 percent, which converted to an 18 percent impairment of the left upper extremity.[8]

Dr. Weaver reviewed Dr. Dinenberg's impairment evaluation and advised that the 26 percent diagnosis-based estimate for thumb CMC arthroplasty should be combined with, not added to, the 25 percent impairment due to partial sensory loss. Using the Combined Values Chart,[9] he determined that appellant had a total digit impairment of 46 percent, which converted to a 17 percent upper extremity impairment.

In a decision dated May 8, 2013, OWCP denied appellant's claim for an additional schedule award. It found that the medical evidence did not support that she had more than the 19 percent left upper extremity impairment for which she was previously awarded compensation.

Appellant requested reconsideration, which OWCP received on May 28, 2013. She stated that she was submitting a statement from her doctors explaining that the first surgery (rating) was done to the fifth edition of the A.M.A., *Guides* and the second surgery (rating) was done to the sixth edition, "which they find discrepancies with."

In a decision dated June 17, 2013, OWCP denied appellant's reconsideration request. It noted that it received no statement from appellant's doctors, and that the treatment notes of record were not relevant to the schedule award issue. As her argument was not supported by pertinent new and relevant evidence, OWCP found appellant's request insufficient to warrant a reopening of her case.

On appeal, appellant argues that she submitted a letter from Dr. Trumble and a physician's assistant, a copy of which she submitted to the Board. She argued that her impairment rating should be performed under the previous edition of the A.M.A., *Guides*. Appellant has also submitted a September 9, 2013 report from Dr. Richard R. Wagoner, a Board-certified internist.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[10] and the implementing regulations[11] 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 shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[12]

[7] *Id*. at 427 (Table 15-16).

[8] *Id*. at 422 (Table 15-12).

[9] *Id*. at 604.

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[13] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[14]

ANALYSIS -- ISSUE 1

Diagnosis-based impairment is the primary method of evaluation for the upper extremities. The first step is to choose the diagnosis that is most applicable for the region being assessed. Selection of the optimal diagnosis requires judgment and experience. If more than one diagnosis can be used, the highest causally related impairment rating should be used; this will generally be the more specific diagnosis. Typically, one diagnosis will adequately characterize the impairment and its impact on activities of daily living.[15]

Specific criteria for that diagnosis determine which class is appropriate: no objective problem, mild problem, moderate problem, severe problem, very severe problem approaching total function loss. The A.M.A., *Guides* assigns a default impairment rating for each diagnosis by class, which may be slightly adjusted using such grade modifiers as functional history, physical examination and clinical studies.[16]

Table 15-2, page 391 of the A.M.A., *Guides* sets forth the digit impairment values for specific diagnoses. All of the evaluating physicians in this case -- Dr. Trumble, the attending physician, Dr. Dinenberg, the second opinion physician, and OWCP's medical adviser -- agree that appellant has a default digit impairment of 30 percent for left thumb CMC arthroplasty. A mild or moderate functional history and physical examination work modify the default value to 26 percent. The Board has confirmed that this is consistent with the procedure set forth in the A.M.A., *Guides*.[17]

Dr. Dinenberg also found a peripheral nerve impairment in the left thumb. His physical examination revealed a seven-millimeter two-point discrimination. According to Table 15-15, page 426 of the A.M.A., *Guides*, this represents a partial sensory loss. According to Table 15-16, page 427, such a loss over the entire length of the thumb represents a 25 percent digit impairment.

Dr. Dinenberg added appellant's 26 and 25 percent impairments for a total thumb impairment of 51 percent. Dr. Weaver, a medical adviser, correctly noted that the values should

[13] 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

[15] A.M.A., *Guides* 387, 389 (6th ed. 2009).

[16] *Id*. at 497.

[17] *See generally id*. at 405 (Chapter 5.13).

be combined, not added. As the A.M.A., *Guides* states: "Peripheral nerve impairment may be combined with DBIs [diagnosis-based impairments] at the upper extremity level so long as the DBI does not encompass the nerve impairment."[18] Using the Combined Values Chart on page 604, the Board finds that a 26 percent diagnosis-based impairment (for left thumb CMC arthroplasty) combines with a 25 percent impairment (for partial transverse sensory loss over the entire length of the thumb) for a total digit impairment of 45 percent. According to Table 15-12, a 45 percent impairment of the thumb converts to a 16 percent impairment of the upper extremity. This is appellant's final rating under the sixth edition of the A.M.A., *Guides*.

OWCP previously paid appellant a schedule award for a 19 percent impairment of her left upper extremity. In order for her to receive an additional schedule award, she must establish more than a 19 percent impairment of her left upper extremity under the current edition of the A.M.A., *Guides*. The Board notes that her physician, Dr. Trumble, rated only a nine percent diagnosis-based impairment. An OWCP medical adviser increased this to 11 percent with the addition of motion loss.[19] Dr. Dinenberg calculated an 18 percent impairment by adding diagnosis-based and peripheral nerve impairments. Dr. Weaver corrected this to 17 percent. None of the physicians of record find that appellant had more than 19 percent impairment of her left arm under the sixth edition of the A.M.A., *Guides*.

As the medical evidence does not support that appellant has more than a 19 percent impairment of her left upper extremity, the Board finds that she is not entitled to an additional award. Accordingly, the Board will affirm OWCP's May 8, 2013 decision.

Appellant argues that her impairment rating should be performed under the fifth edition of the A.M.A., *Guides*, as it was before. However, it is well settled that as of May 1, 2009 all impairment ratings are to be calculated under the current sixth edition,[20] which improves accuracy over the previous edition.[21] Any rating not based on the current edition of the A.M.A., *Guides* is of little probative or evidentiary value.[22]

Appellant disagreed with Dr. Dinenberg's impairment evaluation, as he did not record the correct ratings from his findings. His finding on physical examination of a seven-millimeter two-point discrimination supports a partial sensory loss along the length of the thumb and a 25 percent impairment due to sensory loss. The only mistake he made was to add the 26 and 25 percent digit impairments. The A.M.A., *Guides* requires they be combined. The Board has confirmed that these impairments, when combined, represent a 45 percent total thumb

[18] *Id*. at 419.

[19] Motion loss is an alternative stand-alone method that cannot be combined with a diagnosis-based estimate. *Id*. at 394 (see note).

[20] *Supra* note 14.

[21] A.M.A., *Guides*.

[22] *James Kennedy, Jr*., 40 ECAB 620, 627 (1989) (an opinion that is not based upon standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment).

impairment and a 16 percent left upper extremity impairment, which is insufficient to warrant an additional schedule award.

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

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.[23] An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[24]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[25] A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[26]

ANALYSIS -- ISSUE 2

OWCP received appellant's reconsideration request within one year of its May 8, 2013 merit decision denying an additional schedule award. Her request is therefore timely. The issue is whether appellant's request met any of the standards that would require OWCP to reopen her case.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by OWCP. A claimant may be entitled to a merit review by submitting evidence that constitutes relevant and pertinent new evidence not previously considered by OWCP, but appellant submitted no evidence. She indicated that she was submitting a report from her doctors, but OWCP received no such report.

[23] 5 U.S.C. § 8128(a).

[24] 20 C.F.R. § 10.606.

[25] *Id*. at § 10.607(a).

[26] *Id*. at § 10.608.

Accordingly, the Board finds that appellant's reconsideration request did not meet any of the standards for obtaining a merit review of her case. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request. The Board will therefore affirm OWCP's June 17, 2013 decision.

Appellant has submitted to the Board a report from a physician assistant, the report she intended to submit with her reconsideration request. She has also submitted a report from Dr. Wagoner. The Board's review of a case, however, is limited to the evidence that was in the case record at the time of OWCP's final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.[27] Because the evidence appellant has submitted to the Board was not before OWCP at the time of its June 17, 2013 decision, the Board may not consider it.

CONCLUSION

The Board finds that appellant is not entitled to an additional schedule award. The Board also finds that OWCP properly denied her reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the June 17 and May 8, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 13, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[27] 20 C.F.R. § 501.2(c)(1).