United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 14-470**
	)	**Issued: July 14, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Kearny, 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:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2013 appellant, through her attorney, filed a timely appeal from a September 27, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) granting her a 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.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of each upper extremity.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 15, 2010, the Board set aside the September 5, 2008 and January 21, 2009 OWCP decisions denying

[1] 5 U.S.C. § 8101 *et seq.*

appellant's claim for compensation for disability from March 15 to September 28, 2007.[2] OWCP found that appellant had submitted sufficient evidence to warrant further development regarding whether she was disabled due to her bilateral carpal tunnel syndrome. In a decision dated December 2, 2011, the Board set aside a December 20, 2010 OWCP decision finding that appellant had not established employment-related disability from March 15 to September 28, 2007.[3] The Board determined that OWCP had not obtained a report that would resolve the relevant issue of whether she was disabled from March 15 to September 28, 2007 due to her accepted work injury. The Board remanded the case for further development of the medical evidence. The facts from the prior decisions are hereby incorporated by reference.

On September 2, 2010 appellant underwent a right carpal tunnel release and on November 10, 2010 underwent a left carpal tunnel release.[4] On October 17, 2011 she filed a claim for a schedule award. In support of her request, appellant submitted a June 24, 2011 impairment evaluation from Dr. Arthur Becan, an orthopedic surgeon, who noted that electromyograms (EMG) dated April 23 and September 28, 2007 and March 23, 2009 showed bilateral carpal tunnel syndrome. Dr. Becan diagnosed right and left carpal tunnel syndrome and repetitive trauma disorder. On examination, he found continued wrist pain and weakness with reduced range of motion and grip strength. Applying Table 15-23 on page 449 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), (6th ed. 2009), Dr. Becan identified the diagnosis as entrapment neuropathy of the median nerve bilaterally. He applied a grade modifier of three based on positive electrodiagnostic studies, a grade modifier of two for history and a grade modifier of three for decreased grip strength to find a total impairment of eight percent. Dr. Becan determined that the *Quick*DASH (Disabilities of the Arm, Shoulder and Hand) score of 34 percent reduced the impairment percentage to 7 percent for each upper extremity.

On December 23, 2011 OWCP referred appellant to Dr. Kenneth P. Heist, an osteopath, to determine whether she was disabled from March 15 through September 28, 2007 due to her accepted work injury. In a report dated January 5, 2012, Dr. Heist found that she had full grip strength with no pain on range of motion, sensory loss or atrophy of the hands and wrists. He determined that appellant had a negative Tinel's sign of the ulnar and median nerve bilaterally and no Phalen's sign. Dr. Heist diagnosed status post bilateral carpal tunnel releases with residuals of her accepted carpal tunnel syndrome.[5]

[2] Docket No. 09-1503 (issued April 15, 2010). On December 19, 2007 appellant, then a 53-year-old distribution clerk, filed an occupational disease claim alleging that she sustained bilateral carpal tunnel syndrome causally related to factors of her federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome.

[3] Docket No. 11-1146 (issued December 2, 2011).

[4] In a decision dated February 29, 2012, OWCP denied appellant's claim for compensation from March 15 through September 28, 2007; however, following a preliminary review on May 10, 2012 a hearing representative vacated the February 29, 2012 decision and remanded the case for further development of the medical evidence. In decisions dated September 18, 2012 and April 22, 2013, it again denied her claim for disability compensation from March 15 through September 28, 2007.

[5] In an addendum dated February 10, 2012, Dr. Heist advised that appellant was not disabled from March 15 through September 28, 2007 due to her accepted work injury.

On March 1, 2012 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and OWCP medical adviser, noted that the physical findings of Dr. Becan differed significantly from those set forth by Dr. Heist. He noted that Dr. Heist found no loss of sensation, power or atrophy and a negative Tinel's sign and Phalen's test, which would yield no impairment of the upper extremities. Dr. Magliato opined that a conflict in medical opinion existed and recommended that OWCP refer appellant for an impartial medical examination.

OWCP determined that a conflict in medical opinion arose between Dr. Becan and Dr. Magliato. On April 17, 2012 it referred appellant to Dr. Dean Carlson, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated May 10, 2012, Dr. Carlson discussed appellant's history of bilateral carpal tunnel releases in 2010 and continued complaints of occasional numbness of the hands. He measured range of motion for both upper extremities and found full strength of the wrists bilaterally and intact sensation "to light touch and pinprick." Dr. Carlson measured pinch strength of seven pounds on the right and three pounds on the left. He found no Tinel's sign and a negative Phalen's sign bilaterally. Dr. Carlson related that x-rays obtained on that date revealed "advanced osteoarthritis of the first metacarpal trapezial joint, left hand." He diagnosed status post bilateral carpal tunnel releases, a postoperative incisional inclusion cyst of the left hand and nonemployment-related advanced first metacarpal trapezial osteoarthritis of the left hand. Dr. Carlson advised that electrodiagnostic studies verified carpal tunnel syndrome. He rated appellant's impairment due to entrapment neuropathy using Table 15-23 on page 449 of the A.M.A., *Guides*. For both the right and left upper extremity, Dr. Carlson applied a grade modifier of three for test findings, a grade modifier of one for a history of mild symptoms and a grade modifier of zero for physical findings of normal strength and sensation, which he found yielded an average modifier 1 and impairment value of two percent. He determined that the *Quick*DASH score of 34 substantiated the grade modifier 1. Dr. Carlson concluded that appellant had a two percent permanent impairment of each upper extremity.

On February 8, 2013 Dr. Andrew A. Merola, a Board-certified orthopedic surgeon and OWCP medical adviser, concurred with Dr. Carlson's findings. He opined that appellant reached maximum medical improvement on May 10, 2012.

By decision dated March 14, 2013, OWCP granted appellant schedule awards for a two percent permanent impairment of each upper extremity. The period of the awards ran for 12.48 weeks from May 10 to August 5, 2012.

On March 19, 2013 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

In a report dated July 9, 2013, Dr. Becan noted that Dr. Carlson found seven pounds of pinch strength on the right and three pounds on the left. He disagreed with Dr. Carlson's finding of a grade modifier of one rather than two for history. Dr. Becan stated, "In conclusion, I stand by my impairment rating as outlined in my report that [appellant] does indeed have an impairment rating of [seven percent] to the right upper extremity and [seven percent] to the left upper extremity."

At the hearing, held on July 15, 2013, counsel argued that the medical adviser should not have used Dr. Heist's findings in determining that a conflict arose as the physician was asked for an opinion on disability. The medical adviser contended that the record contained no conflict. Appellant's attorney further maintained that Dr. Carlson found no grade modifier for physical examination even though he found a loss of pinch strength and did not provide a proper modifier for history because he did not rate her physical complaints of pain and numbness.

By decision dated September 27, 2013, an OWCP hearing representative affirmed the March 14, 2013 decision. She found that Dr. Carlson's opinion represented the weight of the evidence and established that appellant had no more than a two percent permanent impairment of each upper extremity.

On appeal, appellant's attorney contends that the medical adviser improperly used the findings of Dr. Heist to find a conflict in opinion as he addressed disability rather than the extent of any impairment. He argues that there was thus no conflict in medical opinion at the time of OWCP's referral of appellant to Dr. Carlson. Counsel maintains that Dr. Carlson inaccurately provided a zero grade modifier for physical examination as he found a loss of motion and strength and failed to provide a grade modifier for appellant's complaints of hand and wrist pain. Appellant's attorney further asserts that he did not rate appellant's impairment due to preexisting osteoarthritis of the left hand.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing federal regulations,[7] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[10] In Table 15-23, grade modifier levels (ranging from zero to four) are described for the categories of test findings, history and physical findings. The grade modifiers are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome causally related to factors of her federal employment. In 2010, appellant underwent bilateral carpal tunnel releases and, in 2011, filed a claim for a schedule award. OWCP determined that a conflict in medical opinion arose between the medical adviser and Dr. Becan regarding the extent of her permanent impairment. It referred appellant to Dr. Carlson for an impartial medical examination. Based on his opinion, OWCP granted her schedule awards for a two percent permanent impairment of each upper extremity.

On appeal, appellant's attorney argues that there was no conflict at the time of the referral of appellant to Dr. Carlson. The Board finds, however, that a conflict existed between the medical adviser, who reviewed the clinical findings of Dr. Heist, to find that appellant had no impairment of the upper extremities, and Dr. Becan, who determined that she had a seven percent permanent impairment of each upper extremity based on his clinical findings.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[12] In a report dated May 10, 2012, Dr. Carlson discussed appellant's complaints of occasional hand numbness following bilateral carpal tunnel releases. On examination, he found no Tinel's sign and a negative Phalen's test bilaterally. Dr. Carlson measured full wrist strength and intact sensation bilaterally and pinch strength of seven pounds on the right and three pounds on the left. He diagnosed bilateral carpal tunnel syndrome confirmed by electrodiagnostic studies and advanced osteoarthritis of the first metacarpal trapezial joint of the left hand. Dr. Carlson utilized Table 15-23 on page 449 of the A.M.A., *Guides* to rate appellant's impairment due to bilateral entrapment neuropathy. He applied a grade modifier 3 for test findings, 1 for a history of mild symptoms and 0 for physical findings of normal strength and sensation, which he averaged to find a grade modifier 1. Dr. Carlson found that the grade modifier 1 was supported by the *Quick*DASH score of 34 and yielded a two percent permanent impairment of each upper extremity due to entrapment neuropathy. On February 8, 2013 Dr. Merola, the medical adviser, reviewed and concurred with Dr. Carlson's findings.

Regarding the extent of appellant's right upper extremity impairment, the Board finds that Dr. Carlson's opinion, which is detailed, well rationalized and supported by findings on examination, is entitled to special weight and establishes that she has no more than a two percent permanent impairment. In a report dated July 9, 2013, Dr. Becan again advised that she had a seven percent permanent impairment. He challenged Dr. Carlson's finding of a grade modifier 0

[11] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[12] *See R.C.*, 58 ECAB 238 (2006); *Kathryn Haggerty*, 45 ECAB 383 (1994).

for physical examination findings, noting that he measured reduced pinch strength. A medical report, however, from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.[13] The Board, consequently, finds that Dr. Carlson's opinion represents the special weight of the evidence afforded an impartial medical examiner with regards to appellant's right upper extremity impairment.[14]

On appeal, counsel contends that Dr. Carlson should have applied a higher grade modifier for physical findings. Dr. Carlson, however, explained the basis for his grade modifier for physical findings and, as discussed, his report represents the weight of the evidence. Appellant has not submitted evidence sufficient to overcome the weight of the impartial medical examiner in regards to the extent of her right upper extremity impairment.

Appellant may request a schedule award or increased schedule award for the right upper extremity based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

Regarding the extent of appellant's left upper extremity impairment, the Board finds that the case is not in posture for decision. On appeal, her attorney contends that Dr. Carlson should have considered the preexisting osteoarthritis in reaching his impairment rating. It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.[15] OWCP's procedures provide that, in evaluating the loss of use of a scheduled member due to an employment injury, the percentage includes both employment-related impairments and "any preexisting permanent impairment of the same member or function."[16] Dr. Carlson found that appellant had nonemployment-related advanced osteoarthritis of the metacarpal trapezial joint of the left hand, but did not specifically address whether it preexisted her employment-related carpal tunnel syndrome. The case, therefore, will be remanded for OWCP to obtain a supplemental opinion from Dr. Carlson regarding whether the osteoarthritis is preexisting and, if so, whether it resulted in a greater permanent impairment of the left upper extremity under the A.M.A., *Guides*. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has no more than a two percent permanent impairment of the right upper extremity. The Board further finds that the case is not in posture for decision regarding the extent of any left upper extremity impairment.

[13] *See Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

[14] *See H.S.*, Docket No. 13-365 (issued January 8, 2014).

[15] *See Clary J. Cleary*, 57 ECAB 563 (2006); *Mike E. Reid*, 51 ECAB 543 (2000).

[16] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 14, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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