United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 14-1486**
	)	**Issued: November 18, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Clarksville, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2014 appellant filed a timely appeal from a March 21, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) pertaining to her schedule award and a May 21, 2014 nonmerit decision denying her request for a review of the written record before the Branch of Hearings and Review. 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 and the nonmerit issue.

ISSUES

The issues are: (1) whether appellant has established that she sustained more than two percent impairment to her right arm, for which she received a schedule award; and (2) whether OWCP properly denied her request for a review of the written record before an OWCP hearing representative.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 19, 2011 appellant, then a 52-year-old distribution clerk, filed an occupational disease claim alleging that the repetitive movement of her hands during the performance of her federal duties resulted in bilateral carpal tunnel syndrome. By decision dated November 29, 2012, OWCP accepted the claim for bilateral carpal tunnel syndrome and paid all appropriate benefits.[2] Appellant underwent right carpal tunnel release and flexor tenosynovectomy on March 1, 2013.

On October 17, 2013 appellant filed a Form CA-7 claim for a schedule award. In an August 28, 2013 report, Dr. Charles R. Kaelin, a Board-certified orthopedic surgeon, noted that she was 24 weeks status post right wrist carpal tunnel release and that she has gained full motion and was working regular duty. Examination of the right upper extremity revealed essentially normal right wrist with no numbness but with pain. Strength of 4.5/5 and normal range of motion. Jamar readings were also provided. Dr. Kaelin released appellant from care of the right carpal tunnel release and noted that she did not wish to proceed with carpal tunnel surgery on the left wrist. In a September 4, 2013 report, he stated that she reached maximum medical improvement on August 28, 2013 and returned to regular duty on that date. Dr. Kaelin opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[3] (hereinafter A.M.A., *Guides*), appellant had eight percent impairment for her bilateral carpal tunnel syndrome. He advised that, under Table 15-23, page 449 of the A.M.A., *Guides*, she had a diagnosed condition grade modifier of 3, a functional history grade modifier of 3, a physical examination grade modifier of 3 and a clinical studies grade modifier of 0.

On October 29, 2013 OWCP medical adviser reviewed Dr. Kaelin's September 4, 2013 report. He determined that maximum medical improvement occurred on September 4, 2013, the date of Dr. Kaelin's report. The medical adviser determined that further evaluation through a second opinion examination was necessary because of the complexity of the right carpal tunnel release on March 1, 2013. Specifically, he found a thorough, detailed examination of the sensory and motor residual innervation of the right hand was necessary.

OWCP referred appellant, a list of questions and the medical records to Dr. David A. West, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a January 30, 2014 report, Dr. West noted the history of injury and presented examination findings. He found that appellant had loss of grip strength in both hands rated at 4/5 with diminished flexion and extension of both wrists by approximately 20 degrees in each plane. Appellant also had decreased sensation in the distribution of the median nerve in both hands with decreased sensation to the tips of the thumbs and index finger. Otherwise, she was neurovascularly intact for her radial nerve and ulnar nerve without any other complications. An assessment of bilateral carpal tunnel with surgical releases on both wrists with residual objective findings of retained carpal tunnel syndrome was provided. Dr. West opined that appellant reached maximum medical improvement in terms of surgery of both wrists and could return to

[2] OWCP has not yet issued a schedule award determination regarding appellant's accepted left hand condition.

[3] A.M.A., *Guides* (6th ed. 2008).

full duty. However, appellant has residual objective findings of numbness and tingling in a distribution of the median nerve to both thumb and index fingers on both wrists and may benefit from new EMG/nerve conduction study.

On February 7, 2014 OWCP medical adviser reviewed the medical record and opined appellant reached maximum medical improvement on August 28, 2013, the date of Dr. Kaelin's report. He noted that she had right carpal tunnel release on March 1, 2013 which included a release of the thenar branch of the median nerve and had severe atrophy. The medical adviser noted that Dr. West found objective numbness in the median nerve distribution from the index finger to the right thumb, decreased grip strength (4/5) and thenar atrophy. He noted that Dr. Kaelin had reported on August 28, 2013 that appellant had full range of motion, strength 4/5 and no numbness. The medical adviser stated that Dr. Kaelin incorrectly assigned eight percent upper extremity impairment because he did not use the entrapment neuropathy method under the A.M.A., *Guides*. He opined that appellant had two percent right upper extremity impairment under the A.M.A., *Guides*. Under Table 15-23, the medical adviser found grade modifier functional history 1, grade modifier physical findings 2 and grade modifier clinical testing 1. He found the average value for those 3 modifiers was 1 or 1 + 2 + 1 = 4 divided by 3 = 1.33, which rounds to 1, for a grade 1 final rating category. The medical adviser found the default value for grade modifier 1 was two percent default impairment. He then opined appellant had functional scale grade of 1, which equaled the average grade modifier of 1, so no modification of the default value was necessary. Accordingly, the medical adviser provided a final rating of two percent right upper extremity impairment.

By decision dated March 21, 2014, OWCP granted appellant a schedule award for two percent right arm impairment. The award ran for 6.24 weeks from August 28 to October 10, 2013.

On an appeal request form dated April 22, 2014 and postmarked April 23, 2014, appellant requested a review of the written record by the Branch of Hearings and Review. She submitted an April 24, 2014 work capacity evaluation, a March 31, 2014 report from Dr. Kaelin opining she had eight percent upper extremity impairment because of marked thenar atrophy and residual numbness and a November 12, 2013 report from Dr. John Stanton, a Board-certified orthopedic surgeon, opining appellant had a seven percent upper extremity impairment based on Table 15-23 of the A.M.A., *Guides.*

By decision dated May 21, 2014, OWCP denied appellant's April 23, 2014 request for a review of the written record. It found that her request was not timely filed within 30 days of the March 21, 2014 decision. OWCP exercised its discretion by performing a limited review of the evidence and further denied appellant's request as the issue in the case could be addressed equally well pursuant to a valid request for reconsideration.

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 of or loss of use of scheduled members or functions of the body.[4] 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.[5]

The A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).

For upper and lower extremity impairments, the evaluator identifies the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[6] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[7]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[8] In Table 15-23, grade modifiers levels (ranging from zero to four) 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.[9]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.[10]

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[4] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[5] *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).

[6] *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

[7] *J.W.*, Docket No. 11-289 (issued September 12, 2011).

[8] A.M.A., *Guides* 449.

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

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). *See C.K*., Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to prove that she has more than a two percent impairment of the right arm. The accepted condition is bilateral carpal tunnel syndrome. OWCP has still not issued a schedule award for permanent impairment of appellant accepted left wrist condition. On March 21, 2014 it granted her schedule award for two percent impairment of the right upper extremity, adopting the two percent rating of the medical adviser over ratings of seven percent and eight percent by evaluating physicians, Drs. Kaelin and Stanton.

An OWCP medical adviser provided a February 7, 2014 report in which he reviewed Dr. Kaelin's August 28, 2013 report and Dr. West's January 30, 2014 report. He found that maximum medical improvement was reached on August 28, 2013 the date of Dr. Kaelin's report. The medical adviser noted that appellant had right carpal tunnel release on March 1, 2013 which included a release of the thenar branch of the median nerve and had severe atrophy. He also noted that the most recent examination of record from Dr. West revealed objective numbness in the median nerve distribution from the index finger to the right thumb, decreased grip strength (4/5) and thenar atrophy while Dr. Kaelin had reported on August 28, 2013 that appellant had no numbness, full range of motion and strength 4/5. The medical adviser stated that Dr. Kaelin incorrectly assigned eight percent upper extremity impairment because he did not use the entrapment neuropathy method under the A.M.A., *Guides*. While the medical adviser provided no explanation as to why Dr. Kaelin incorrectly used the entrapment neuropathy method and Table 15-23 of the A.M.A., *Guides*, the Board notes that Dr. Kaelin's examination findings of August 28, 2013 do not correlate to grade 3 modifier levels for history, physical findings and functional scale as defined in Table 15-23. Further, Dr. Kaelin offered no rationale as to why grade 3 modifiers were chosen for those modifiers. Although he found no numbness on examination, he appeared to rate for it. The medical adviser utilized Dr. West's examination findings, which included numbness, decreased grip strength (4/5) and thenar atrophy. He advised that, under Table 15-23 of the sixth edition, appellant had a functional history grade modifier of 1, a physical examination grade modifier of 2 and a clinical studies grade modifier of 1. The medical adviser totaled these values and arrived at an average grade modifier of 1, which represented two percent default impairment rating. He then found that appellant had functional scale grade of 1, which equaled the average grade modifier of 1, so no modification of the default value was necessary. This yielded a grade 1 modifier representing an impairment rating under Table 15-23 of two percent for the right upper extremity.

The Board finds that the medical evidence of record supports that appellant has a two percent right upper extremity due to bilateral carpal tunnel syndrome. There is no medical evidence in accordance with the A.M.A., *Guides* to support greater permanent impairment.

On appeal, appellant argues that OWCP should have based her schedule award determination on Dr. Kaelin's eight percent impairment rating, as he used Table 15-23 of the A.M.A., *Guides*. As noted, OWCP properly relied upon the rating of its medical adviser as it was based on the recent examination of Dr. West, which found increased symptomology. Furthermore, Dr. Kaelin's impairment rating provided no explanation as to how he utilized Table 15-23 and his objective findings did not comport to the chosen grade modifier values. Thus, his impairment rating was of diminished probative value.

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

Section 8124(b)(1) of FECA provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issue of an OWCP final decision.[11] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[12] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[13] In such a case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[14]

ANALYSIS -- ISSUE 2

A request for a hearing or review of the written record before the Branch of Hearings and Review must be made within 30 days after issuance of an OWCP final decision. Appellant's request review of the written record before the Branch of Hearings and Review was postmarked April 23, 2014. As her request was submitted more than 30 days following issuance of the March 21, 2014 decision, it was untimely filed.

OWCP also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right. The Board finds that OWCP, in its May 21, 2014 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that his claim could be addressed through a reconsideration application. The Board has held that as the only limitation on OWCP's authority is reasonableness, 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.[15] In the present case, the evidence of record does not indicate that OWCP committed any abuse of discretion in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion.

[11] 5 U.S.C. § 8124(b)(1). *See A.B.*, 58 ECAB 546 (2007); *Gerard F. Workinger*, 56 ECAB 259 (2005).

[12] 20 C.F.R. § 10.616(b).

[13] *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

[14] *Teresa M. Valle*, 57 ECAB 542 (2006).

[15] *Id.*; *Daniel J. Perea*, 42 ECAB 214 (1990).

CONCLUSION

The Board finds that appellant did not sustain greater than two percent impairment to her right arm, for which she received a schedule award. The Board further finds that OWCP properly denied appellant's request for a review of the written record as it was untimely.

ORDER

IT IS HEREBY ORDERED THAT the May 21 and March 21, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 18, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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