United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 14-1934**
	)	**Issued: January 15, 2015**
U.S. POSTAL SERVICE, PROCESSING & DISTRUBUTION CENTER, Capitol Heights, MD, Employer	)	

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 31, 2014 appellant, through her representative, filed a timely appeal from a March 31, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 two percent permanent impairment of each arm, for which she received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated June 16, 2011, the Board reversed a February 23, 2010 decision terminating appellant's compensation for refusing

[1] 5 U.S.C. § 8101 *et seq.*

suitable work.[2] The Board determined that the medical evidence was insufficient to establish that appellant met the physical requirements of the offered position. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference. The facts relevant to the present appeal are set forth below.

OWCP accepted that appellant, a contract technician, sustained bilateral carpal tunnel syndrome and bilateral wrist tendinitis causally related to factors of her federal employment. Electrodiagnostic testing performed in October 1999 revealed moderate carpal tunnel syndrome of the right wrist and mild carpal tunnel syndrome of the left wrist. Appellant underwent a right carpal tunnel release on October 29, 1999. She returned to part-time work on March 27, 2000. OWCP accepted that appellant experienced a recurrence of disability beginning March 6, 2001. In September 2009, appellant retired from the employing establishment and began receiving retirement benefits from the Office of Personnel Management.

On December 6, 2012 appellant filed a claim for a schedule award. In an impairment evaluation dated October 26, 2012, Dr. David Weiss, an osteopath Board-certified in family practice, reviewed the medical records, including the results of electrodiagnostic testing. He noted that nerve conduction studies (NCS) performed on July 30, 1999 revealed moderate right carpal tunnel syndrome and mild left carpal tunnel syndrome. A December 6, 2006 NCS was normal and a March 10, 2010 NCS showed mild carpal tunnel syndrome bilaterally. Dr. Weiss diagnosed bilateral carpal tunnel syndrome post releases. Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), he identified the diagnosis as entrapment neuropathy of the wrists under Table 15-23 on page 449. Dr. Weiss applied grade modifiers bilaterally of one for test findings, three for history, and one for physical examination, which yielded an average modifier of two and an upper extremity impairment of five percent. He advised that the *Quick*DASH (Disabilities of the Arm, Shoulder and Hand) score of 93 on the right and 95 on the left moved the impairment finding over one place to the left. Dr. Weiss concluded that appellant had a six percent permanent impairment of each upper extremity.

On January 29, 2013 an OWCP medical adviser reviewed the evidence of record. He determined that Dr. Weiss' findings in his October 26, 2012 report were sufficient to reach a schedule award rating. The medical adviser concurred with Dr. Weiss' determination that appellant had a five percent upper extremity impairment using Table 15-23. He found, however, that it was unclear how Dr. Weiss found a *Quick*DASH score given that he did not perform an examination. The medical adviser thus concluded that appellant had a five percent rather than a six percent impairment of each upper extremity.

On April 15, 2013 OWCP referred appellant to Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon, for an impairment evaluation. In a report dated April 30, 2013, Dr. Gordon discussed her complaints of hand pain worse on the right and difficulty performing activities such as brushing her hair, using dinner ware, and bathing. On examination he found full range of motion, mild thenar atrophy, and intact flexor and extensor function. Dr. Gordon noted that x-rays showed bilateral ulnar variance and mild arthritis of the carpometacarpal (CMC) joint. He

[2] Docket No. 10-2142 (issued June 16, 2011).

diagnosed bilateral carpal tunnel syndrome and "unrelated carpometacarpal arthritis." Using Table 15-23 of the A.M.A., *Guides*, Dr. Gordon applied grade modifiers of one for test findings based on the results of electrodiagnostic testing of mild to normal findings, two for history based on subjective complaints and one for physical findings of mild thenar atrophy with normal sensation. He rounded the modifiers to find a grade modifier of one and a two percent impairment of each upper extremity.

On May 13, 2013 an OWCP medical adviser concurred with Dr. Gordon's findings of a two percent permanent impairment of each upper extremity. Dr. Gordon opined that his opinion was entitled to more weight than Dr. Weiss as he was a Board-certified orthopedic surgeon and had performed a physical examination.

By decision dated July 25, 2013, OWCP granted appellant a schedule award for a two percent permanent impairment of each upper extremity. The period of the award ran for 12.48 weeks from April 30 to July 26, 2013.

On November 13, 2013 appellant, through her representative, requested reconsideration. In support of the request, she submitted a September 17, 2013 report from Dr. Weiss, who reviewed her complaints of stiffness, pain, numbness, tingling, and weakness in her hands and difficulty performing activities of daily living. Appellant had a *Quick*DASH score of 90 on the left side and 95 on the right side. On examination of the right hand and wrist, Dr. Weiss found no thenar or hypothenar atrophy and a positive Tinel's sign and Phalen's test. For the left wrist he found thenar flattening and atrophy and a positive Tinel's sign, Phalen's test, and carpal compression test. Dr. Weiss measured range of motion of the wrists bilaterally, grip and pinch strength, and two-point discrimination. He diagnosed repetitive trauma disorder and bilateral carpal tunnel syndrome. Using Table 15-23 on page 449, Dr. Weiss found grade modifiers of one for test findings, three for history, and three for physical examination due to loss of pinch strength, which yielded a five percent permanent impairment of each upper extremity. He increased the rating to six percent for each upper extremity based on the *Quick*DASH scores.

On March 23, 2014 an OWCP medical adviser noted that Dr. Weiss' findings on physical examination differed substantially from Dr. Gordon even though his examination was only five months later. He indicated that the most recent electromyogram showed "mild abnormalities with no documentation of motor conduction block." The medical adviser found that Dr. Gordon's opinion was entitled to the most weight as he was a Board-certified orthopedic surgeon. He concurred with Dr. Gordon's finding of a grade modifier of one for test results based on the lack of a motor conduction block, a grade modifier of two for history, and a grade modifier of one for physical findings of normal sensation. The medical adviser opined that Dr. Weiss' *Quick*DASH recommendation was "totally inconsistent with Dr. Gordon's examination and, therefore, it is negated."

By decision dated March 31, 2014, OWCP denied modification of its July 25, 2013 decision.

On appeal, appellant's representative argues that the medical adviser erred in finding that Dr. Weiss' opinion was entitled to less weight than that of Dr. Gordon. He advises that

Dr. Weiss is qualified as an orthopedic surgeon. The representative argues that a conflict in medical opinion exists between Dr. Weiss and Dr. Gordon.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations[4] 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.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments.[7] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[8] The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[9]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

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

[7] Federal (FECA) Procedure Manual, *id*. at Chapter 3.700, Exhibit 4 (January 2010); *see R.M.*, Docket No. 12-1811 (issued March 14, 2013).

[8] *Id*.

[9] *Id*.

[10] 5 U.S.C. § 8123(a).

[11] 20 C.F.R. § 10.321.

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and bilateral wrist tendinitis due to factors of her federal employment. On December 6, 2012 appellant filed a claim for a schedule award and, in support of her claim, submitted an October 26, 2012 impairment evaluation from Dr. Weiss based on his review of the medical evidence. Dr. Weiss diagnosed bilateral carpal tunnel syndrome post releases. He noted that the most recent NCS revealed bilateral mild carpal tunnel syndrome. Dr. Weiss applied Table 15-23 on page 449, relevant to determining impairments due to entrapment neuropathy under the sixth edition of the A.M.A., *Guides*. He found that appellant had a grade modifier of one for test findings or clinical studies, a grade modifier of three for functional history, and a grade modifier of one for physical examination, which yielded an average grade modifier for the identified condition of entrapment neuropathy of two and a default impairment value of five percent. Dr. Weiss applied the *Quick*DASH score of 93 on the right and 95 on the left to move the default impairment over one place and concluded that appellant had a six percent permanent impairment of each upper extremity.[12]

OWCP referred appellant to Dr. Gordon for a referral examination. In a report dated April 30, 2013, Dr. Gordon diagnosed bilateral carpal tunnel syndrome and arthritis of the CMC joint. On examination he found full range of motion and mild thenar atrophy. Dr. Gordon utilized Table 15-23 of the A.M.A., *Guides* and found that appellant had grade modifiers of one for test findings, two for history based on subjective complaints, and one for physical findings of mild thenar atrophy with normal sensation, which yielded a two percent permanent impairment of each upper extremity.

On September 17, 2013 Dr. Weiss examined appellant and found a positive Tinel's sign and Phalen's test bilaterally and a thenar flattening, atrophy and a positive carpal compression test on the left. He applied grade modifiers for test findings or clinical studies of one, functional history of three, and physical examination of three to find a five percent permanent impairment of each upper extremity, which he increased to six percent due to the *Quick*DASH scores of 90 on the left side and 95 on the right side.

On March 23, 2014 an OWCP medical adviser indicated that the findings of Dr. Weiss and Dr. Gordon on physical examination differed significantly. He determined that Dr. Gordon's opinion constituted the weight of the evidence as he was a Board-certified orthopedic surgeon and as electrodiagnostic testing did not reveal a motor conduction block.

The Board finds that the case is not in posture for decision due to a conflict in medical opinion. Dr. Weiss provided an impairment rating in conformance with the protocols under the sixth edition of the A.M.A., *Guides* and found six percent permanent impairment of each upper extremity. Dr. Gordon, an OWCP referral physician, also properly applied the A.M.A., *Guides* to his clinical findings and determined that appellant had two percent permanent impairment.

[12] On January 29, 29013 an OWCP medical adviser indicated that Dr. Weiss properly found that appellant had a five percent upper extremity impairment using Table 15-23. He indicated, however, that it was not clear how Dr. Weiss arrived at a *Quick*DASH score and opined that appellant had a five rather than a six percent impairment of each upper extremity.

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[13] On remand, OWCP should refer appellant to an appropriate physician for an impartial medical examination. Following this and any further development deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 15, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

[13] 5 U.S.C. § 8123(a).